Chapter IX

PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

A. Introduction

164. At its sixty-fifth session (2013), the Commission decided to include the topic "Protection of the environment in relation to armed conflicts" in its programme of work, and appointed Ms. Marie G. Jacobsson as Special Rapporteur for the topic.[1042]

165. The Commission received and considered three reports from its sixty-sixth session (2014) to its sixty-eighth session (2016).[1043] At its sixty-sixth session (2014), the Commission considered the preliminary report of the Special Rapporteur.[1044] At its sixty-seventh session (2015), the Commission considered the second report of the Special Rapporteur[1045] and took note of the draft introductory provisions and draft principles provisionally adopted by the Drafting Committee, which were subsequently renumbered and revised for technical reasons by the Drafting Committee at the sixty-eighth session.[1046] Accordingly, the Commission provisionally adopted draft principles 1, 2, 5 and 9 to 13, and commentaries thereto, at that session.[1047] At the same session, the Commission also considered the third report of the Special Rapporteur,[1048] and took note of draft principles 4, 6 to 8, and 14 to 18 provisionally adopted by the Drafting Committee,[1049] without provisionally adopting any commentaries.

166. At its sixty-ninth session (2017), the Commission established a Working Group to consider the way forward in relation to the topic, as Ms. Jacobsson was no longer with the Commission.[1050] The Working Group, chaired by Mr. Vázquez-Bermúdez, had before it the draft commentaries prepared by the Special Rapporteur, even though she was no longer with the Commission, on draft principles 4, 6 to 8, and 14 to 18 provisionally adopted by the Drafting Committee at the sixty-eighth session, and taken note of by the Commission at the same session. The Working Group recommended to the Commission the appointment of a new Special Rapporteur for the topic to assist with the successful completion of its work on the topic.[1051] Following an oral report by the Chair of the Working Group, the Commission decided to appoint Ms. Marja Lehto as Special Rapporteur.[1052]

B. Consideration of the topic at the present session

167. At the present session, the Commission established, at its 3390th meeting, on 30 April 2018, a Working Group, chaired by Mr. Vázquez-Bermúdez, to assist the Special Rapporteur in the preparation of the draft commentaries to draft principles 4, 6 to 8, and 14 to 18. The Working Group held two meetings, on 3 and 4 May 2018.

168. At its 3426th meeting, on 10 July 2018, the Commission provisionally adopted draft principles 4, 6 to 8, and 14 to 18, which had been provisionally adopted by the Drafting Committee at the sixty-eighth session (see section C.1 below).

169. At the same meeting, the Commission began its consideration of the first report of Special Rapporteur Ms. Marja Lehto (A/CN.4/720). The Commission continued its consideration of the first report at its 3427th to 3431st meetings, from 11 to 17 July 2018.

170. In her first report, the Special Rapporteur addressed the protection of the environment in situations of occupation. The report offered a general introduction to the protection of the environment under the law of occupation and addressed the complementarity between the law of occupation, international human rights law and international environmental law. The Special Rapporteur proposed three draft principles relating to the protection of the environment in situations of occupation, to be included in a separate part (Part Four). She also made some suggestions for the future programme of work on the topic.

171. At its 3431st meeting, on 17 July 2018, the Commission referred draft principles 19 to 21, as contained in the first report of the Special Rapporteur, to the Drafting Committee.[1053]

[1042] The decision was made at the 3171st meeting of the Commission, on 28 May 2013 (see *Yearbook ... 2013*, vol. II (Part Two), para. 167). For the syllabus of the topic, see *Yearbook … 2011*, vol. II (Part Two), annex V.

[1043] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674 (preliminary report); *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685 (second report); and *Yearbook … 2016*, vol. II (Part One), document A/CN.4/700 (third report).

[1044] *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, paras. 187–222.

[1045] *Yearbook … 2015*, vol. II (Part Two), paras. 132–170.

[1046] A/CN.4/L.870 and Rev.1 (available from the Commission's website, documents of the sixty-seventh and sixty-eighth sessions).

[1047] *Yearbook … 2016*, vol. II (Part Two), para. 189.

[1048] *Ibid*., paras. 141–189.

[1049] A/CN.4/L.876 (available from the Commission's website, documents of the sixty-eighth session).

[1050] *Yearbook … 2017*, vol. II (Part Two), para. 255.

[1051] *Ibid.*, para. 260.

[1052] *Ibid.*, para. 262.

[1053] The draft principles proposed by the Special Rapporteur in her first report read as follows:

"Part Four

"*Draft principle 19*

"1. Environmental considerations shall be taken into account by the occupying State in the administration of the occupied territory, including in any adjacent maritime areas over which the territorial State is entitled to exercise sovereign rights.

(*Continued on next page.*)

172. At its 3436th meeting, on 26 July 2018, the Chair of the Drafting Committee presented the report of the Drafting Committee on protection of the environment in relation to armed conflicts, containing draft principles 19, 20 and 21 provisionally adopted by the Drafting Committee at the seventieth session (A/CN.4/L.911),[1054] which can be found on the website of the Commission.[1055] The Commission took note of the draft principles as presented by the Drafting Committee. It is anticipated that the Commission will take action on the draft principles and commentaries thereto at the next session.

173. At its 3451st meeting, on 9 August 2018, the Commission adopted the commentaries to the draft principles provisionally adopted at the present session (see section C.2 below).

1. Introduction by the Special Rapporteur of her first report

174. The Special Rapporteur recalled the background of the topic, noting that it had been under active consideration by the Commission based on three reports submitted by her predecessor. She also emphasized the continued interest of States in the topic as well as the importance of consultations with the United Nations Environment Programme (UNEP) and the International Committee of the Red Cross (ICRC). Her first report, which built on previous reports, did not set forth a new methodology and sought to ensure coherence with the work completed thus far. The report proposed three new draft principles on an issue that the Commission had identified for further consideration, namely the protection of the environment in situations of occupation. The Special Rapporteur reiterated the temporal scope of the topic, which covered the whole conflict cycle and allowed the review of the law of armed conflict, international human rights law and international environmental law.

175. The law of occupation constituted a distinct legal regime, primarily based on the 1907 Regulations respecting the Laws and Customs of War on Land (Hague Regulations) and the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). While these instruments provided only indirect protection to the environment, relevant concepts such as the notions of "civil life" and "usufruct" lend themselves to evolutive interpretation. Furthermore, the law of occupation had to be interpreted in the light of circumstances of the occupation, in particular its stability and duration. The Special Rapporteur recalled that, generally, an occupied territory is expected to be administered for the benefit of the occupied population, not the occupying State.

176. The report addressed the relationship between international human rights law, international environmental law and the law of occupation as *lex specialis*. International jurisprudence confirmed that human rights law applied alongside the law of occupation, while the exact content of the obligations depended on the nature and duration of the occupation. The report focused on the right to health as an example of how human rights law may contribute to environmental protection in the case of occupation. Customary and conventional environmental law also played a role in situations of occupation, particularly in relation to transboundary or global issues. The Special Rapporteur emphasized that such environmental obligations protected a collective interest and were owed to a wider group of States than those involved in an armed conflict or occupation.

177. The report contained proposals for three new draft principles. The Special Rapporteur proposed to place those in a new Part Four, as they could be relevant to armed conflicts as well as the post-conflict phase, depending on the nature of the occupation.

178. Draft principle 19 embedded the obligation of the occupying State to protect the environment in the general obligation to take care of the welfare of the occupied territories. The text of paragraph 1, for which the Special Rapporteur had proposed a reformulation during her introduction, found support in international human rights law and in the jurisprudence of international courts and tribunals. The relevant obligations covered land territory as well as adjacent maritime areas and superjacent airspace. Paragraph 2 reiterated the obligation of the occupying State to respect, unless absolutely prevented, the legislation of the occupied territory pertaining to the protection of the environment.

(*Footnote 1053 continued.*)

"2. An occupying State shall, unless absolutely prevented, respect the legislation of the occupied territory pertaining to the protection of the environment.

"*Draft principle 20*

"An occupying State shall administer natural resources in an occupied territory in a way that ensures their sustainable use and minimizes environmental harm.

"*Draft principle 21*

"An occupying State shall use all the means at its disposal to ensure that activities in the occupied territory do not cause significant damage to the environment of another State or to areas beyond national jurisdiction."

[1054] The text provisionally adopted by the Drafting Committee reads as follows:

"Part Four

"Principles applicable in situations of occupation

"*Draft principle 19. General obligations of an Occupying Power*

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

"2. An Occupying Power shall take appropriate measures to prevent significant harm to the environment of the occupied territory that is likely to prejudice the health and well-being of the population of the occupied territory.

"3. An Occupying Power shall respect the law and institutions of the occupied territory concerning the protection of the environment and may only introduce changes within the limits provided by the law of armed conflict.

"*Draft principle 20. Sustainable use of natural resources*

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

"*Draft principle 21. Due diligence*

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

[1055] The report and the corresponding statement of the Chair of the Drafting Committee are available in the Analytical Guide to the Work of the International Law Commission: https://legal.un.org/ilc/guide/8_7.shtml.

179. Draft principle 20 was based on the principle of usufruct as found in article 55 of the 1907 Hague Regulations while it also drew on the principle of sustainable use as its modern equivalent. It provided that the occupying State should exercise caution in the exploitation of non-renewable resources and exploit renewable resources in a way that ensured their long-term use and capacity for regeneration. The practical application of the principle would depend on the nature and duration of the occupation. The wording of draft principle 20 was based on article 54, paragraph 1, of the Berlin Rules on Water Resources as adopted by the International Law Association.[1056]

180. Draft principle 21 incorporated the principle not to cause harm to the environment of another State. A central principle in international environmental law, the "no harm" principle applied to situations of occupation, as confirmed in international jurisprudence and Commission's earlier work. The wording was derived from the judgment of the International Court of Justice in *Pulp Mills on the River Uruguay*.[1057] The words "at its disposal" notably allow for flexibility depending on the prevailing circumstances.

181. The Special Rapporteur further explained that the principles in Part One and Part Two applied to situations of occupation, and proposed to clarify in the commentary to draft principles 15 to 18, contained in Part Three, that they were also relevant to situations of occupation.

182. As to future work, the Special Rapporteur expressed the intention to address in her next report certain questions relating to the protection of the environment in non-international armed conflicts, questions relating to responsibility and liability for environmental harm in relation to armed conflicts, and issues related to the consolidation of a complete set of draft principles.

2. Summary of the debate

(a) *General comments*

183. Members supported the continuation of the methodology adopted by the previous Special Rapporteur, in particular the temporal approach to the topic. At the same time, it was reiterated that a strict temporal division might not always be feasible. A number of members agreed with the Special Rapporteur that the Commission should not seek to change international humanitarian law relating to occupation, but rather to fill gaps relating to environmental protection.

184. Some members supported the addition of a separate Part Four, dealing specifically with occupation. Some others insisted that occupation fell exclusively within the armed conflict phase (Part Two), while yet others maintained it related to the post-armed-conflict phase (Part Three). Several members supported the proposal of the Special Rapporteur to extend the application of certain draft principles already provisionally adopted by the Commission to the situation of occupation and noted that this should be indicated in the commentaries. It was proposed by some members to indicate in a separate draft principle that the draft principles in Parts One, Two and Three applied *mutatis mutandis* to situations of occupation.

185. Some members held that the report presented little State practice to bolster its findings, while others called for the inclusion of State practice from a wider variety of regions. Some members called for a definition of the concept of occupation, either in the commentary or in the text of the draft principles. Others maintained that providing a definition would not be necessary, while recognizing that situations of occupation may vary in nature and duration. It was also suggested by some members to take into consideration the legality or illegality of the occupation and to exclude the applicability of occupation law to situations resulting from unlawful use of force.

186. Several members suggested addressing the issue of the applicability of the law of occupation to international organizations in the draft principles or in the commentaries. While some members suggested that international organizations could exercise functions similar to those of an Occupying Power, other members questioned this proposition. It was noted by some members that the international administration of a territory by an international organization was very different in nature from a belligerent occupation.

187. Several members suggested replacing the term "occupying State" with a more general reference to "Occupying Power", which was the term used in the relevant treaties.

188. Several members noted that, while the law of armed conflict predated international environmental law, the former had to be interpreted so as to incorporate elements of the latter. Others did not favour an evolutionary interpretation of the law of armed conflict.

189. Members noted that the law of occupation was a subset of the law of armed conflict, which only offered "indirect" protection to the environment. Members generally agreed that international human rights law and international environmental law continued to apply in situations of occupation, while the specificities of the law of armed conflict were to be taken into account. According to some members, international humanitarian law, as *lex specialis*, could set aside those bodies of law if the situation of occupation so required. Other members maintained that, in situations of occupation, military necessity did not override—but had to be balanced against—international human rights law and international environmental law obligations.

190. Several members emphasized that the application of international human rights law and international environmental law depended on the type of occupation, its nature and its duration. In this regard, some members proposed drawing a distinction between different forms of occupation, such as "belligerent" or "military" occupation and "pacific" or "prolonged" occupation, or "colonial" occupation. Other members pointed out that the focus of the report was on belligerent occupation and that such a distinction was therefore not necessary in this context.

[1056] International Law Association, *Report of the Seventy-first Conference held in Berlin, 16–21 August 2004*, pp. 334 *et seq.*, at p. 397.

[1057] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010*, p. 14.

191. Some members questioned the link drawn by the Special Rapporteur between the protection of property rights in situations of occupation and the protection of the environment. It was pointed out that harm to public or private property could not necessarily be equated to damage to the environment. Others maintained that the protection of the environment had become a core task of the modern State, and that the concept of "usufruct" could be interpreted in the current legal context to accommodate environmental considerations.

192. A number of members also noted that, while a significant part of the report dealt with international human rights law, the Special Rapporteur had not proposed a draft principle on that basis. Several members suggested the addition of a new draft principle, or a new paragraph, addressing the relevance of international human rights law, while some members were doubtful about the proposal and saw it as beyond the scope of the topic.

193. While agreeing that the right to health was relevant to the protection of the environment, several members encouraged the Special Rapporteur to extend her analysis to include other human rights, such as the right to life, the right to water and the right to food. A suggestion was made to focus on particularly vulnerable populations.

(b) *Comments on draft principle 19*

194. Members generally expressed support for the oral revision of paragraph 1 of draft principle 19 made by the Special Rapporteur during her introduction of the report, while some members asked for further clarification of the proposed formulation. In particular, several members called for clarification of certain terms, including "general obligation", "environmental considerations" and "administration", or for reconsideration of the use of the words "territorial State" and "sovereign rights".

195. Some members questioned the reference to the maritime areas and airspace of the occupied territory. Other members maintained that the authority was limited to the areas over which the occupying State had established its authority and exercised effective control.

196. With regard to paragraph 2, members supported the position of the Special Rapporteur that an occupying State had a general obligation to respect the legislation of the occupied territory with regard to environmental protection. A number of members suggested that the Occupying Power enjoyed greater latitude to alter environmental legislation than the wording of paragraph 2 permitted, particularly to enhance the protection of the population. The view was expressed that in such cases the local population had to be consulted.

197. It was suggested that, apart from domestic legislation, occupying States should respect the international obligations pertaining to the protection of the environment that were incumbent on the occupied territory. It was also suggested that an occupying State was bound by its own obligations under international law.

198. Several drafting suggestions were made with regard to draft principle 19, including the addition of a further paragraph to the draft principle to reflect the role of international human rights law.

(c) *Comments on draft principle 20*

199. With regard to draft principle 20, some members supported the term "sustainable use", while a view was expressed that the term should be clarified. Other members expressed the view that the principle of sustainable use constituted a policy objective, rather than a legal obligation, and questioned its application to situations of occupation. Some members also questioned the link with the concept of usufruct, and how this concept applied to different categories of property, including private property, public goods and natural resources. Other members stressed that occupying States ought to consider sustainability in the administration and exploitation of natural resources.

200. In this regard, a number of members emphasized the importance of the principles of permanent sovereignty over natural resources and of the self-determination of peoples for the draft principles, while other members questioned the relevance of these principles.

201. Members emphasized that the Occupying Power should act for the benefit of the people under occupation, not for its own benefit. A suggestion was made to broaden the principle to apply to economic and social development of the occupied State more generally.

202. Some members also questioned the term "minimize" environmental harm, while a view was expressed that "prevent" would be more appropriate. The view was expressed that in situations of occupation, the focus was on eliminating and repairing environmental damage, in light of the draft principles contained in Part Three, rather than on the administration of natural resources.

203. Several drafting proposals were made with regard to draft principle 20.

(d) *Comments on draft principle 21*

204. Members generally expressed support for the inclusion of the no-harm or due diligence principle in draft principle 21, although a view was expressed that the principle had no place in the project. A suggestion was made to include therein the obligation to cooperate to prevent, reduce and control transboundary environmental pollution.

205. Certain drafting suggestions or clarifications were proposed, including with regard to the phrases "all the means at its disposal", "significant damage" and "areas beyond national jurisdiction". It was also suggested that the no-harm principle be extended to situations of armed conflict beyond occupation.

(e) *Future work*

206. Support was expressed for the proposals by the Special Rapporteur regarding future work on the topic. It was suggested that, in her next report, the Special Rapporteur address the extent to which the draft principles apply to non-international armed conflicts; enforcement

measures; compensation for environmental damage; and questions of responsibility and liability. The Special Rapporteur was also encouraged to clarify the role and obligations of non-State actors. A suggestion was made to elaborate on the relevance of the precautionary and "polluter pays" principles with regard to the topic, although opposition to this proposal was expressed.

207. Support was also expressed for completing the first reading on the topic in 2019, although it was noted that this was an ambitious goal.

3. Concluding remarks of the Special Rapporteur

208. Regarding the applicability of the law of occupation to international organizations, the Special Rapporteur noted that such law may have relevance to the administration of a territory, in particular to United Nations missions, provided that they entail the exercise of functions and powers over a territory that are comparable to those of an occupying State under the law of armed conflict. The Special Rapporteur pointed out that, even considering that the law of occupation could complement the mandate laid down in the relevant Security Council resolutions, there was very little actual practice of having recourse to the law of occupation for such purpose. This remained a theoretical possibility, and the issue was not mature enough to be addressed in the draft principles. The Special Rapporteur proposed to replace the term "occupying State" in the draft principles with the expression "Occupying Power", which could leave the door open for further developments in this regard.

209. The Special Rapporteur stressed that the distinction between belligerent occupation and pacific occupation had lost much significance, and that the presence of armed forces based on an agreement was already largely covered by draft principles 7 and 8. She reiterated that the focus of the report and of the draft principles was on belligerent—or military—occupation. In addition, the Special Rapporteur considered that no distinction between different forms of occupation was needed, since the law of armed conflict did not distinguish between different types of occupation. At the same time, the Special Rapporteur pointed out that the obligations of the occupying State under the law of occupation were to a certain extent dependent on the prevailing situation, and that a certain flexibility was thus recognized in its implementation.

210. With respect to the interplay of different areas of international law, the Special Rapporteur indicated that the requirements of the law of occupation as *lex specialis*, as well as the concrete realities of the situation, affected the extent to which other areas of international law, such as international human rights law and international environmental law, may complement the law of armed conflict. This did not mean that humanitarian principles, human rights and environmental considerations could be ignored, as the jurisprudence of the International Court of Justice made clear. The question therefore was not whether certain peacetime rules applied in situations of armed conflict or occupation, but how they applied.

211. On the general issue of the legality or illegality of occupation, the Special Rapporteur noted that the law of armed conflict applied whenever the criteria of armed conflict were fulfilled, regardless of the reasons for the conflict. She stressed that occupation law, from the perspective of international humanitarian law, applied equally to all occupations, whether or not they were the result of force used lawfully within the *jus ad bellum*.

212. The Special Rapporteur indicated that, although the first report focused on the right to health, other human rights were relevant from the point of view of environmental protection. She concluded that such rights could usefully be addressed in the commentary. The Special Rapporteur suggested that the relationship between the draft principles proposed in the first report and the draft principles already adopted by the Commission be clarified in the commentary.

213. The Special Rapporteur noted that the reformulation proposed in her introduction was generally supported. She added that the term "general obligation" was used in reference to article 43 of the Hague Regulations, which set forth the obligation of the occupying State to restore and maintain public order and civil life. Such an obligation must be interpreted in light of current circumstances, including the importance of environmental concerns as an essential interest of all States and taking into account the development of international human rights law. She also indicated that the term "environmental considerations" was context-dependent and evolving, as indicated in the commentary to draft principle 11. The Special Rapporteur also indicated that the latter part of paragraph 1, concerning the territorial scope of draft principle 19, could be addressed in the commentary. Regarding the second paragraph of draft principle 19, the Special Rapporteur acknowledged the usefulness of making reference to the international obligations of the occupied State, in addition to its legislation. Finally, the Special Rapporteur expressed her agreement with the proposal made by several members to include a provision related to the human rights obligations of the occupying State.

214. As regards draft principle 20, the Special Rapporteur noted that the first issue concerned the limits of the Occupying Power's right to administer and use the resources of the occupied territory. In that respect, she indicated that the proposal to add wording, in either the draft principle or the commentary, along the lines of the Institute of International Law's Bruges Declaration on the Use of Force,[1058] could be useful. She added that the principle of permanent sovereignty over natural resources was also to be taken into account. Regarding the mention of "minimizing environmental harm", the Special Rapporteur stressed that the purpose of the draft principles, as indicated in draft principle 2, was to enhance "the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict". Further, the Special Rapporteur recalled that draft principle 20 was grounded on article 55 of the Hague Regulations, which is binding as customary international law and should be interpreted to involve environmental aspects. In addition, the concept of sustainability, in particular in the context of sustainable use of natural resources, was well

[1058] *Yearbook of the Institute of International Law*, vol. 70-II (Session of Bruges, Belgium, 2003), pp. 285 *et seq*.; available from the Institute's website at www.idi-iil.org, *Declarations*.

established, as reflected in the adoption by the General Assembly of the 2030 Agenda for Sustainable Development and the 17 Sustainable Development Goals.[1059]

215. The Special Rapporteur indicated that draft principle 21 had met with broad agreement. In addition to the current language, two alternatives were supported deriving either from the advisory opinion of the International Court of Justice concerning the *Legality of the Threat or Use of Nuclear Weapons*[1060] or from the Commission's articles on prevention of transboundary harm from hazardous activities.[1061]

216. Regarding future work on the topic, the Special Rapporteur clarified that her intention was to address non-international armed conflicts, as well as the questions of responsibility and liability, in the context of the topic and not to give a comprehensive presentation of these two areas. She noted that it would not be advisable to expressly limit the draft principles to one type of armed conflict given that the development of customary international law had a tendency to progressively reduce the importance of the distinction between international and non-international armed conflicts. This was also in line with the approach taken by the Commission on the topic so far.

C. Text of the draft principles on protection of the environment in relation to armed conflicts provisionally adopted so far by the Commission

1. Text of the draft principles

217. The text of the draft principles provisionally adopted so far by the Commission is reproduced below.

PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

Principle 1. Scope

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

Principle 2. Purpose

The present draft principles are aimed at enhancing the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures.

[…]

Part One

GENERAL PRINCIPLES

Principle 4. Measures to enhance the protection of the environment

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

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

Principle 5 [I-(x)].[**] Designation of protected zones

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

Principle 6. Protection of the environment of indigenous peoples

1. States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit.

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

Principle 7. Agreements concerning the presence of military forces in relation to armed conflict

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

Principle 8. Peace operations

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

Part Two

PRINCIPLES APPLICABLE DURING ARMED CONFLICT

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

1. The natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.

2. Care shall be taken to protect the natural environment against widespread, long-term and severe damage.

3. No part of the natural environment may be attacked, unless it has become a military objective.

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

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

Principle 11 [II-3]. Environmental considerations

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

Principle 12 [II-4]. Prohibition of reprisals

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

Principle 13 [II-5]. Protected zones

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

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[*] Whether the term "environment" or "natural environment" is preferable for all or some of these draft principles will be revisited at a later stage.

[1059] General Assembly resolution 70/1 of 25 September 2015.

[1060] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 226.

[1061] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq*. The articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session are reproduced in the annex to General Assembly resolution 62/68 of 6 December 2007.

[**] The draft principles provisionally adopted by the Drafting Committee at the sixty-seventh session, and which the Commission took note of at that session, are in brackets.

PART THREE

PRINCIPLES APPLICABLE AFTER AN ARMED CONFLICT

Principle 14. Peace processes

1. Parties to an armed conflict should, as part of the peace process, including where appropriate in peace agreements, address matters relating to the restoration and protection of the environment damaged by the conflict.

2. Relevant international organizations should, where appropriate, play a facilitating role in this regard.

Principle 15. Post-armed conflict environmental assessments and remedial measures

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

Principle 16. Remnants of war

1. After an armed conflict, parties to the conflict shall seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment. Such measures shall be taken subject to the applicable rules of international law.

2. The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic and hazardous remnants of war.

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

Principle 17. Remnants of war at sea

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

Principle 18. Sharing and granting access to information

1. To facilitate remedial measures after an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under international law.

2. Nothing in the present draft principle obliges a State or international organization to share or grant access to information vital to its national defence or security. Nevertheless, that State or international organization shall cooperate in good faith with a view to providing as much information as possible under the circumstances.

2. TEXT OF THE DRAFT PRINCIPLES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SEVENTIETH SESSION

218. The text of the draft principles and commentaries thereto provisionally adopted by the Commission at its seventieth session is reproduced below.

PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

Principle 4. Measures to enhance the protection of the environment

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

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

Commentary

(1) Draft principle 4 recognizes that States are required to take effective measures to enhance the protection of the environment in relation to armed conflict. Paragraph 1 recalls obligations under international law and paragraph 2 encourages States voluntarily to take further measures. The phrase "to enhance the protection of the environment", included in both paragraphs, corresponds to the purpose of the set of draft principles. Similarly, the phrase "in relation to armed conflict", also inserted in both paragraphs, is intended to underline the connection of environmental protection to armed conflict.

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

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

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

(5) As far as the law of armed conflict is concerned, the obligation to disseminate the law of armed conflict to armed forces and, to the extent possible, also to the civilian population contributes to the protection of the environment.[1062] A relevant provision to this end is article 83

[1062] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), art. 47; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), art. 48; Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 127; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 144; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 83; Protocol Additional to the Geneva

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of Protocol I, which provides that the High Contracting Parties are under the obligation to disseminate information on, among other provisions, articles 35 and 55[1063] to their forces. This obligation can also be linked to common article 1 of the Geneva Conventions of 1949, in which States parties undertake to respect and to ensure respect for the Conventions in all circumstances.[1064] Such dissemination can take place for instance through the inclusion of relevant information in military manuals,[1065] as encouraged by the ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict.[1066]

(6) Common article 1 is also interpreted to require that States, when they are in a position to do so, exert their influence to prevent and stop violations of the Geneva Conventions by parties to an armed conflict.[1067] As far as the protection of the environment is concerned, this could entail, for instance, sharing of scientific expertise as to the nature of the damage caused to the natural environment by certain types of weapons, or making available technical advice as to how to protect areas of particular ecological importance or fragility.

(7) A further obligation to conduct a "weapons review" is found in article 36 of Protocol I. According to this provision, a High Contracting Party is under an obligation to determine whether the employment of a new weapon would, in some or all circumstances, be prohibited by Protocol I or by any other applicable rule of international law. It is notable that the obligation covers the study, development, acquisition or adoption of all means or methods of warfare: both weapons and the way in which they can be used.[1068] According to the ICRC commentary on the Additional Protocols, article 36 "implies the obligation to establish internal procedures for the purpose of elucidating the issue of legality".[1069] A number of States, including States not party to Protocol I, are known to have established such procedures.[1070]

(8) The obligation to institute a "weapons review" binds all High Contracting Parties to Protocol I. The reference to "any other rule of international law" makes it clear that the obligation goes beyond merely studying whether the employment of a certain weapon would be contrary to the law of armed conflict. This means, first, an examination of whether the employment of a new weapon, means or method of warfare would, in some or all circumstances, be prohibited by Protocol I, including articles 35 and 55, which are of direct relevance to the protection of the environment. Second, there is a need to go beyond Protocol I and analyse whether any other rules of the law of armed conflict, treaty or customary, or any other areas of international law might prohibit the employment of a new weapon, means or method of warfare. Such examination will include taking into account any applicable international environmental law and human rights obligations.[1071]

(9) While Protocol I applies only to international armed conflict, the weapons review provided for in article 36 also

(*Continued on next page.*)

Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 19; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), art. 7; and Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, art. 6. See also J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules*, Cambridge, ICRC and Cambridge University Press, 2005, pp. 505–508, rule 143.

[1063] Article 35 of Protocol I reads:

"1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.

"2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

"3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."

Article 55 reads:

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

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

[1064] First Geneva Convention, art. 1; Second Geneva Convention, art. 1; Third Geneva Convention, art. 1; Fourth Geneva Convention, art. 1.

[1065] Examples of States that have introduced such provisions in their military manuals include Argentina, Australia, Belgium, Benin, Burundi, Canada, the Central African Republic, Chad, Colombia, Côte d'Ivoire, France, Germany, Italy, Kenya, the Netherlands, New Zealand, Peru, the Russian Federation, South Africa, Spain, Sweden, Switzerland, Togo, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the United States of America. Information available from https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule45.

[1066] The Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (A/49/323, annex) states, in guideline 17, that: "States shall disseminate these rules and make them known as widely as possible in their respective countries and include them in their programmes of military and civil instruction."

[1067] See the 2016 ICRC commentary on article 1 of the First Geneva Convention (ICRC, *Commentary on the First Geneva Convention*, 2016, p. 35; available from https://ihl-databases.icrc.org/ihl/full/GCI-commentary). The ICRC study on customary international law provides a broader interpretation, according to which the obligation to respect and to ensure respect is not limited to the Geneva Conventions of 1949 but refers to the entire body of international humanitarian law binding upon a particular State (Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules* (see footnote 1062 above), p. 495, rule 139.

[1068] J. de Preux, "Article 35: Basic rules", in 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*, Geneva, ICRC and Martinus Nijhoff, 1987, p. 390, at p. 398, para. 1402. The commentary on article 36, "New weapons", refers to this section for an explanation of means and methods on page 425, paragraph 1472.

[1069] *Ibid*., p. 424, para. 1470.

[1070] States that are known to have in place national mechanisms to review the legality of weapons and that have made the instruments setting up these mechanisms available to ICRC include Australia, Belgium, Canada, Denmark, Germany, the Netherlands, Norway, Sweden, the United Kingdom and the United States. Other States have indicated to ICRC that they carry out reviews pursuant to Ministry of Defence instructions, but these have not been made available. Information received from ICRC on 31 December 2017.

[1071] Some States, such as Sweden, Switzerland and the United Kingdom, see a value in considering international human rights law in the review of military weapons because military personnel may in some situations (e.g. peacekeeping missions) use the weapon to conduct law enforcement missions. For further commentary, see S. Casey-Maslen, N. Corney and A. Dymond-Bass, "The review of weapons under international humanitarian law and human rights law", in S. Casey-Maslen (ed.), *Weapons under International Human Rights Law*, Cambridge, Cambridge University Press, 2014, pp. 411–447.

promotes respect for the law in non-international armed conflicts. Furthermore, the use of weapons that are inherently indiscriminate and the use of means or methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering are prohibited under customary international law.[1072] These rules are not limited to international armed conflict.[1073] It follows that new weapons as well as methods of warfare are to be reviewed against all applicable international law, including the law governing non-international armed conflicts, in particular as far as the protection of civilians and the principle of distinction are concerned. The obligation not to use inherently indiscriminate weapons, means or methods of warfare has the indirect effect of protecting the environment in a non-international armed conflict. Furthermore, the special treaty-based prohibitions of certain weapons (such as biological and chemical weapons) that may cause serious environmental harm must be observed.

(10) States also have the obligation to effectively exercise jurisdiction and prosecute persons suspected of certain war crimes that have a bearing on the protection of the environment in relation to armed conflict, to the extent that such crimes fall within the category of grave breaches of the Geneva Conventions of 1949.[1074] Examples of grave breaches, the suppression of which provides indirect protection to certain components of the natural environment, include wilfully causing great suffering or serious injury to body or health and extensive destruction and appropriation of property, not justified by military necessity and carried out wantonly and unlawfully.

(11) Yet another treaty-based obligation is for States to record the laying of mines in order to facilitate future clearing of landmines.[1075]

(12) Paragraph 2 of the draft principle addresses voluntary measures that would further enhance the protection of the environment in relation to armed conflict. This paragraph is therefore less prescriptive than paragraph 1 and the word "should" is used to reflect this difference. The phrases "[i]n addition" and "further measures" both serve to indicate that this provision goes beyond the measures that States shall take pursuant to their obligations under international law, which are addressed in paragraph 1. Like the measures referred to in paragraph 1, the measures taken by States may be of a legislative, judicial, administrative or other nature. Furthermore, they could include special agreements providing additional protection to the natural environment in situations of armed conflict.[1076]

(13) In addition to encouraging States to take voluntary measures to enhance the protection of the environment in relation to armed conflict beyond their current obligations under international law, the paragraph captures the recent developments in the practice of States to this end.[1077] One example of how States can continue this development is through providing more explicit guidelines on environmental protection in their military manuals.[1078] Such guidelines may, for instance, aim to ensure training of military personnel involved in peace operations on the environmental aspects of the operation, as well as the conduct of environmental assessments.[1079] Other measures that should be taken by States can aim at enhancing cooperation, as appropriate, with other States, as well as with relevant international organizations.

(14) The overall development that paragraph 2 aims to capture and encourage has its basis also in the practice of international organizations. One example of such practice is the United Nations initiative "Greening the Blue Helmets", which aims to function as a sustainable environmental management programme.[1080] A further example of this development is the joint environmental policy developed by the United Nations Department of Peacekeeping Operations and Department of Field Support. The policy includes obligations to develop environmental baseline studies and adhere to a number of multilateral environmental agreements. References are made to treaties and instruments, including the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),[1081] the World Charter for Nature,[1082] the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Convention on Biological Diversity and the Convention on Wetlands of International Importance especially as Waterfowl Habitat, as standards

[1072] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules* (see footnote 1062 above), rules 70 and 71, pp. 237–250.

[1073] By virtue of the customary rule that civilians must not be made the object of attack, weapons that are by nature indiscriminate are also prohibited in non-international armed conflicts. The prohibition of weapons that are by nature indiscriminate is also set forth in several military manuals applicable in non-international armed conflicts, for instance those of Australia, Colombia, Ecuador, Germany, Nigeria and the Republic of Korea. Information available from https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule71#Fn_1_19.

[1074] First Geneva Convention, art. 49; Second Geneva Convention, art. 50; Third Geneva Convention, art. 129; Fourth Geneva Convention, art. 146.

[1075] See, for example, the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.

[1076] For special agreements, see First Geneva Convention, art. 6; Second Geneva Convention, art 6; Third Geneva Convention, art. 6; and Fourth Geneva Convention, art. 7. See also common article 3 of the Geneva Conventions of 1949.

[1077] See, e.g., Slovenia, Rules of Service in the Slovenian Armed Forces, item 210; Paraguay, National Defence Council, *Política de Defensa Nacional 1999–2020* [National Defence Policy 1999–2020], para. I (A); and Netherlands, note verbale dated 20 April 2016 from the Permanent Mission of the Netherlands to the United Nations addressed to the Secretariat, para. 5. See also contributions in the Sixth Committee from Croatia (A/C.6/70/SR.24, para. 89), Cuba (*ibid.*, para. 10), the Czech Republic (*ibid.*, para. 45), New Zealand (A/C.6/70/SR.25, para. 102) and Palau (*ibid.*, para. 27).

[1078] Examples of States that have done so include Australia, Burundi, Cameroon, Côte d'Ivoire, the Netherlands, the Republic of Korea, Switzerland, Ukraine, the United Kingdom and the United States. Information available from https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule44. For further examples, see the second and third reports of the previous Special Rapporteur, *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685, paras. 69–76, and *Yearbook … 2016*, vol. II (Part One), document A/CN.4/700, para. 52, respectively.

[1079] See the information on the UNEP website regarding post-crisis environmental recovery, available from www.unep.org/explore-topics/disasters-conflicts/what-we-do/response-and-recovery.

[1080] UNEP, *Greening the Blue Helmets: Environment, Natural Resources and UN Peacekeeping Operations*, Nairobi, 2012.

[1081] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 (A/CONF.48/14/Rev.1)), part one, chap. I.

[1082] General Assembly resolution 37/7 of 28 October 1982, annex.

to be considered when a mission establishes its environmental objectives and procedures.[1083]

Principle 6. Protection of the environment of indigenous peoples

1. States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit.

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

Commentary

(1) Draft principle 6 recognizes that States should, due to the special relationship between indigenous peoples and their environment, take appropriate measures to protect such an environment in relation to an armed conflict. It further recognizes that where armed conflict has adversely affected the environment of indigenous peoples' territories, States should attempt to undertake remedial measures. In light of the special relationship between indigenous peoples and their environment, these steps should be taken in consultation and cooperation with such peoples, respecting their relationship and through their own leadership and representative structures.

(2) The special relationship between indigenous peoples and their environment has been recognized, protected and upheld by international instruments such as the International Labour Organization (ILO) Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries and the United Nations Declaration on the Rights of Indigenous Peoples,[1084] as well as in the practice of States and in the jurisprudence of international courts and tribunals. To this end, the land of indigenous peoples has been recognized as having a "fundamental importance for their collective physical and cultural survival as peoples".[1085]

(3) Paragraph 1 is based, in particular, on article 29, paragraph 1, of the United Nations Declaration on the Rights of Indigenous Peoples, which expresses the right of indigenous peoples to "the conservation and protection of the environment and the productive capacity of their lands or territories and resources",[1086] and article 7, paragraph 4, of the ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, which recognizes that "Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit".

(4) The specific rights of indigenous peoples over certain lands or territories may be the subject of different legal regimes in different States. Further, in international instruments concerning the rights of indigenous peoples, various formulations are used to refer to the lands or territories connected to indigenous peoples, and over which they have various rights and protective status.[1087]

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

(6) For example, the concerned State should take steps to ensure that military activities do not take place in the lands or territories of indigenous peoples unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.[1088]

[1083] United Nations, Department of Peacekeeping Operations and Department of Field Support, "Environmental Guidelines for UN Field Missions", 24 July 2009. See also the Department of Field Support website, available from https://fieldsupport.un.org/en/environment.

[1084] ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, 1989, which revised the ILO Convention (No. 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957; United Nations Declaration on the Rights of Indigenous Peoples, General Assembly resolution 61/295 of 13 September 2007, annex, art. 26. The reports of the Special Rapporteur on the rights of indigenous peoples and the Special Rapporteur on human rights and the environment provide an overview of the application of the rights of indigenous peoples in connection with the environment and natural resources (see, for example, A/HRC/15/37 and A/HRC/4/32, respectively).

[1085] Report of the Working Group of Experts on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights, adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session, p. 93. See also, for example, *Río Negro Massacres v. Guatemala*, in which the Inter-American Court of Human Rights recognized that "the culture of the members of the indigenous communities corresponds to a specific way of being, seeing and acting in the world, constituted on the basis of their close relationship with their traditional lands and natural resources, not only because these are their main means of subsistence, but also because they constitute an integral component of their cosmovision, religious beliefs and, consequently, their cultural identity" (*Río Negro Massacres v. Guatemala*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 4 September 2012, Inter-American Court of Human Rights, Series C, No. 250, para. 177, footnote 266, which cites the judgment in *Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), 17 June 2005, Series C, No. 125, para. 135); see also *Chitay Nech et al. v. Guatemala*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 25 May 2010, Series C, No. 212, para. 147, footnote 160.

[1086] United Nations Declaration on the Rights of Indigenous Peoples (see footnote 1084 above). See also American Declaration on the Rights of Indigenous Peoples, adopted on 15 June 2016, Organization of American States (OAS), General Assembly, forty-sixth regular session, Santo Domingo, 13–15 June 2016, *Proceedings*, vol. I, OEA/Ser.P/XLVI-O.2, resolution AG/RES. 2888 (XLVI-O/16), art. XIX, para. 4.

[1087] See, for example, the phrase "lands or territories, or both as applicable, which they occupy or otherwise use" in article 13, paragraph 1, of the ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, or the expression "lands, territories and resources" in the preamble of the United Nations Declaration on the Rights of Indigenous Peoples.

[1088] See United Nations Declaration on the Rights of Indigenous Peoples, art. 30:

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

This could be achieved through avoiding placing military installations in indigenous peoples' lands or territories, and by designating their territories as protected areas, as set out in draft principle 5. In general, the concerned State should consult effectively with the indigenous peoples concerned prior to using their lands or territories for military activities.[1089] During an armed conflict, the rights, lands and territories of indigenous peoples also enjoy the protections provided by the law of armed conflict and applicable human rights law.[1090]

(7) Paragraph 2 focuses on the phase after an armed conflict has ended. The purpose of this provision is to facilitate the taking of remedial measures in the event that an armed conflict has adversely affected the environment of the territories that indigenous peoples inhabit.[1091] In doing so, it seeks to ensure the participatory rights of indigenous peoples in issues relating to their territories in a post-conflict context, while focusing on States as the subjects of the paragraph.

(8) In such instance, the concerned States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and, in particular, through their own representative institutions. In doing so, States should consider the special nature of the relationship between indigenous peoples and their territories—in its social, political, spiritual, cultural and other aspects. Further, States should consider that this relationship is often of a "collective" nature.[1092]

(9) The need to proceed through appropriate procedures and representative institutions of indigenous peoples has been included to acknowledge the diversity of the existing procedures within different States that allow for effective consultation and cooperation with indigenous peoples, and the diversity of their modes of representation, in order to obtain their free, prior and informed consent before adopting measures that may affect them.[1093]

Principle 7. Agreements concerning the presence of military forces in relation to armed conflict

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

Commentary

(1) Draft principle 7 addresses agreements concluded by States among themselves and between States and international organizations, concerning the presence of military forces in relation to armed conflict. The phrase "in relation to armed conflict" underlines the purpose of the draft principles: to enhance the protection of the environment in relation to armed conflict. Consequently, the provision does not refer to situations in which military forces are being deployed without any relation to an armed conflict, since such situations are outside the scope of the topic.

(2) The draft principle is cast in general terms to refer to "agreements concerning the presence of military forces in relation to armed conflict". The specific designation and purpose of such agreements can vary, and may, depending on the particular circumstances, include status of forces and status of mission agreements. The purpose of the draft principle is to reflect recent developments whereby States and international organizations have begun addressing matters relating to environmental protection in agreements concerning the presence of military forces concluded with host States.[1094] The word "should" indicates that this provision is not mandatory in nature, but rather aims at acknowledging and encouraging this development.

(3) Examples of environmental provisions in agreements concerning the presence of military forces in relation to armed conflict include the United States–Iraq agreement on the withdrawal of the United States from Iraq, which contains an explicit provision on the protection of the

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

[1089] *Ibid.*

[1090] See the American Declaration on the Rights of Indigenous Peoples (footnote 1086 above), art. XXX, paras. 3 and 4, which read:

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

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

[1091] According to the United Nations Declaration on the Rights of Indigenous Peoples, "[i]ndigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent" (art. 28, para. 1). Similarly, the American Declaration on the Rights of Indigenous Peoples states: "Indigenous peoples and individuals have the right to effective and suitable remedies, including prompt judicial remedies, for the reparation of any violation of their collective and individual rights. States, with the full and effective participation of indigenous peoples, shall provide the necessary mechanisms for the exercise of this right" (art. XXXIII).

[1092] For example, see article 13, paragraph 1, of the ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, which states that: "In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship." Though specific to that Convention's application, it explicitly notes the collective aspects of the relationship that indigenous peoples have with their lands or territories.

[1093] See for instance, United Nations Declaration on the Rights of Indigenous Peoples, art. 19. The Inter-American Court of Human Rights has established safeguards requiring States to obtain the "free, prior, and informed consent [of indigenous peoples], according to their customs and traditions" (*Saramaka People v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 28 November 2007, Series C, No. 172, para. 134).

[1094] The Agreement between the European Union and the former Yugoslav Republic of Macedonia on the status of the European Union-led forces in the former Yugoslav Republic of Macedonia of 21 March 2003 (*Official Journal of the European Union*, L 82, 29 March 2003, pp. 46–51, annex, article 9, provided for a duty to respect international norms regarding, *inter alia*, the sustainable use of natural resources.

environment.[1095] Another example is the status of forces agreement between the North Atlantic Treaty Organization (NATO) and Afghanistan, in which the parties agree to pursue a preventative approach to environmental protection.[1096] The status of mission agreement under the European Security and Defence Policy also makes several references to environmental obligations.[1097] Relevant treaty practice includes also the agreement between Germany and other NATO States, which states that potential environmental effects shall be identified, analysed and evaluated, in order to avoid environmental burdens.[1098] Moreover, the memorandum of special understandings between the United States and the Republic of Korea contains several provisions on environmental protection.[1099] Reference can further be made to arrangements applicable to the short-term presence of foreign armed forces in a country for the purpose of exercises, transit by land or training.[1100]

(4) Reference can also be made to other agreements, including those concerning the presence of military forces with a less clear relation to armed conflict, such as the status of forces agreement between the United States and Australia, which contains a relevant provision on damage claims,[1101] and the Enhanced Defence Cooperation Agreement between the United States and the Philippines, which contains provisions seeking to prevent environmental damage and provides for a review process.[1102]

(5) The draft principle also provides a non-exhaustive list of provisions on environmental protection that may be included in agreements concerning the presence of military forces in relation to armed conflict. Thus the second sentence of the draft principle mentions "preventive measures, impact assessments, restoration and clean-up measures" as examples of what provisions on environmental protection may address. The presence of military forces may risk having an adverse impact on the environment.[1103] In order to avoid such adverse impact to the extent possible, measures of a preventive nature are of great importance. Impact assessments are necessary to determine the kind of restoration and clean-up measures that may be needed at the conclusion of the presence of military forces.

(6) The measures referred to in the draft principle may address a variety of relevant aspects. Some precise examples that deserve specific mention as reflected in treaty practice are: the recognition of the importance of environmental protection, including the prevention of pollution in facilities and areas granted to the deploying State;[1104] an understanding that the agreement will be implemented in a manner consistent with protecting the environment;[1105] cooperation and sharing of information between the host State and the sending State regarding issues that could affect the health and environment of citizens;[1106] measures to prevent environmental damage;[1107] periodic environmental performance assessments;[1108] review processes;[1109] application of the environmental laws of the host State[1110] or, similarly, a commitment by the deploying State to respect the host State's environmental laws, regulations and standards;[1111] a duty to respect international norms regarding the sustainable use of natural resources;[1112] the taking of restorative measures where detrimental effects are unavoidable;[1113] and the regulation of environmental damage claims.[1114]

[1095] Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during their Temporary Presence in Iraq (Baghdad, 17 November 2008), art. 8 (hereinafter, "United States–Iraq Agreement").

[1096] Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO Personnel Conducting Mutually Agreed NATO-led Activities in Afghanistan (Kabul, 30 September 2014), ILM, vol. 54, No. 2 (2015), pp. 272–305, art. 5, para. 6, art. 6, para. 1, and art. 7, para. 2.

[1097] Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA) (Brussels, 17 November 2003).

[1098] Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (Bonn, 3 August 1959), amended by the Agreements of 21 October 1971 and 18 March 1993 (hereinafter, "NATO–Germany Agreement"), art. 54A. See also Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces of 19 June 1951, art. XV.

[1099] Memorandum of Special Understandings on Environmental Protection, concluded between the United States and the Republic of Korea (Seoul, 18 January 2001) (hereinafter, "United States–Republic of Korea Memorandum"). Available from www.usfk.mil/Portals/105/Documents/SOFA/A12_MOSU.Environmental.Protection.pdf.

[1100] See, e.g., Memorandum of Understanding between Finland and NATO regarding the provision of host nation support for the execution of NATO operations/exercises/similar military activity (4 September 2014), available from www.defmin.fi/files/2898/HNS_MOU_FINLAND.pdf. According to article 5.3 (*g*), sending nations must follow host nation environmental regulations as well as any host nation regulations for the storage, movement, or disposal of hazardous materials.

[1101] Agreement concerning the Status of United States Forces in Australia (Canberra, 9 May 1963), United Nations, *Treaty Series*, vol. 469, No. 6784, p. 55 (hereinafter, "United States–Australia Agreement"), art. 12, para. 7 (*e*) (i).

[1102] Agreement between the Government of the Republic of the Philippines and the Government of the United States of America on enhanced defense cooperation (Quezon City, 28 April 2014) (hereinafter, "United States–Philippines Agreement"). Available from www.officialgazette.gov.ph/downloads/2014/04apr/20140428-EDCA.pdf.

[1103] See e.g. D. Shelton and I. Cutting, "If you break it, do you own it?", *Journal of International Humanitarian Legal Studies*, vol. 6 (2015), pp. 201–246, at pp. 210–211; and J. Taylor, "Environment and security conflicts: the U.S. military in Okinawa", *The Geographical Bulletin*, vol. 48 (2007), pp. 3–13, at pp. 6–7.

[1104] See United States–Republic of Korea Memorandum (footnote 1099 above).

[1105] See United States–Iraq Agreement (footnote 1095 above), art. 8.

[1106] See United States–Republic of Korea Memorandum (footnote 1099 above).

[1107] See United States–Philippines Agreement (footnote 1102 above), art. IX, para. 3, and NATO–Germany Agreement, art. 54A.

[1108] These assessments could identify and evaluate the environmental aspects of the operation and can be accompanied by a commitment to plan, programme and budget for these requirements accordingly, as in the United States–Republic of Korea Memorandum (footnote 1099 above).

[1109] See United States–Philippines Agreement (footnote 1102 above), art. IX, para. 2.

[1110] See NATO–Germany Agreement, art. 54A, and United States–Australia Agreement (footnote 1101 above), art. 12, para. 7 (*e*) (i).

[1111] See United States–Iraq Agreement (footnote 1095 above), art. 8.

[1112] As is done in article 9 of the Agreement between the European Union and the former Yugoslav Republic of Macedonia on the status of the European Union-led forces in the former Yugoslav Republic of Macedonia (see footnote 1094 above).

[1113] See NATO–Germany Agreement, art. 54A.

[1114] *Ibid.*, art. 41, and United States–Australia Agreement (footnote 1101 above), art. 12, para. 7 (*e*) (i).

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

Principle 8. Peace operations

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

Commentary

(1) Peace operations can relate to armed conflict in multiple ways. Previously, many peace operations were deployed following the end of hostilities and the signing of a peace agreement.[1115] As the High-level Independent Panel on Peace Operations noted, today many missions operate in environments where no such political agreements exist, or where efforts to establish one have failed.[1116] Moreover, modern United Nations peacekeeping missions are multi-dimensional and address a range of peacebuilding activities, from providing secure environments to monitoring human rights, or rebuilding the capacity of a State.[1117] Mandates also include the protection of civilians.[1118] Draft principle 8 is intended to cover all such peace operations that may relate to multifarious parts or aspects of an armed conflict, and may vary in temporal nature.

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

(3) The present draft principle covers operations where States and international organizations are involved in peace operations related to armed conflict and where groups of multiple actors may be present. All these actors will have some effect on the environment. For example, the Department of Peacekeeping Operations and the Department of Field Support recognize the potential damage by peacekeeping operations to the local environment.[1119]

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

(5) The draft principle reflects the growing recognition on the part of States and international organizations such as the United Nations, the European Union[1120] and NATO[1121] of the need to consider the environmental impact of peace operations and to take necessary measures to prevent, mitigate and remediate negative impacts. For example, some United Nations field missions have dedicated environmental units to develop and implement mission-specific environmental policies and oversee environmental compliance.[1122]

(6) There is no clear or definitive definition for "peace operation" or "peacekeeping" in existing international law, and the current draft principle is intended to cover broadly all such peace operations that relate to armed conflict. The Agenda for Peace highlighted that "peacemaking" was action to bring hostile parties to agreement, especially through peaceful means;[1123] "peacekeeping"

[1115] Report of the High-level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people (A/70/95–S/2015/446), para. 23.

[1116] *Ibid*.

[1117] V. Holt and G. Taylor, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges*, independent study jointly commissioned by the Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs (United Nations publication, Sales No. E.10.III.M.1), pp. 2–3.

[1118] See, for example, the following mandates of United Nations-led missions found in Security Council resolutions: United Nations Mission in Sierra Leone (UNAMSIL) (1289 (2000)); United Nations Observer Mission in the Democratic Republic of the Congo (MONUC) (1291 (2000)); United Nations Mission in Liberia (UNMIL) (1509 (2003) and 2215 (2015)); United Nations Operation in Burundi (ONUB) (1545 (2004)); United Nations Stabilization Mission in Haiti (MINUSTAH) (1542 (2004)); United Nations Operation in Côte d'Ivoire (UNOCI) (1528 (2004) and 2226 (2015)); United Nations Mission in the Sudan (UNMIS) (1590 (2005)); African Union–United Nations Hybrid Operation in Darfur (UNAMID) (1769 (2007)); and United Nations Mission in the Central African Republic and Chad (MINURCAT) (1861 (2009)).

[1119] See United Nations, Department of Peacekeeping Operations and Department of Field Support, "DFS Environment Strategy" (2017). Available from https://peacekeeping.un.org/sites/default/files/171116_dfs_exec_summary_environment_0.pdf. The strategy is complemented by an environmental policy and environmental guidelines for United Nations field missions (see footnote 1083 above).

[1120] See, e.g., European Union, "Military Concept on Environmental Protection and Energy Efficiency for EU-led military operations", 14 September 2012, European External Action Service document EEAS 01574/12.

[1121] See, e.g., NATO, "Joint NATO doctrine for environmental protection during NATO-led military activities", 8 March 2018, document NSO(Joint)0335(2018)EP/7141.

[1122] "The future of United Nations peace operations: implementation of the recommendations of the High-level Independent Panel on Peace Operations", report of the Secretary-General (A/70/357–S/2015/682), para. 129.

[1123] "An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping", report of the Secretary-General (A/47/277–S/24111), para. 20. See also the supplement thereto, a position paper of the Secretary-General on the occasion of the fiftieth anniversary of the United Nations (A/50/60–S/1995/1).

was the deployment of a United Nations presence in the field, involving military and/or police personnel, and frequently civilians as well;[1124] while "peacebuilding" was to take the form of cooperative projects in a mutually beneficial undertaking to enhance the confidence fundamental to peace.[1125] The report of the High-level Independent Panel on Peace Operations includes, for its purposes, "a broad suite of tools … from special envoys and mediators; political missions, including peacebuilding missions; regional preventive diplomacy offices; observation missions, including both ceasefire and electoral missions; to small, technical-specialist missions such as electoral support missions; multidisciplinary operations …".[1126] The term "peace operations" is thus aimed to cover all these types of operations, and operations broader than United Nations peacekeeping operations, including peace enforcement operations and operations by regional organizations. There is no reference in the text to "multilateral" peace operations, as it was considered unnecessary to address this expressly in the draft principle. The general understanding of the term "peace operations" is nevertheless that it concerns multilateral operations.

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

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

(9) It is understood that the draft principle also encompasses reviews of concluded operations that would identify, analyse and evaluate any detrimental effects of those operations on the environment. This would be a "lessons learned" type of exercise to seek to avoid or minimize the negative effects of future peace operations on the environment and ensure that mistakes are not repeated.

Principle 14. Peace processes

1. Parties to an armed conflict should, as part of the peace process, including where appropriate in peace agreements, address matters relating to the restoration and protection of the environment damaged by the conflict.

2. Relevant international organizations should, where appropriate, play a facilitating role in this regard.

Commentary

(1) Draft principle 14 aims to reflect the fact that environmental considerations are, to a greater extent than before, being taken into consideration in the context of contemporary peace processes, including through the regulation of environmental matters in peace agreements.

(2) Including the term "peace process" in the draft principle is intended to broaden its scope to cover the entire peace process, as well as any formal peace agreements concluded.[1127] Modern armed conflicts have a variety of outcomes that do not necessarily take the form of formal agreements. For example, at the end of an armed conflict, a ceasefire agreement, an armistice or a situation of *de facto* peace with no agreement could be reached. A peace process may also begin well before the actual end of an armed conflict. The conclusion of a peace agreement thus represents only one aspect, which, if at all, may take place several years after the cessation of hostilities. For this reason, and also to avoid any temporal *lacuna*, the words "as part of the peace process" have been employed. The outcome of a peace process often involves different steps and the adoption of a variety of instruments.

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

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

(5) The draft principle is cast in general terms to accommodate the wide variety of situations that may exist after an armed conflict. The condition of the environment after an armed conflict can vary greatly depending on a number of factors.[1128] In some instances, the environment may have suffered serious and severe damage which is immediately apparent and which may need to be addressed as a matter of urgency, whereas in others, the damage the environment has suffered may not be so significant as to warrant urgent restoration.[1129] Some environmental

[1124] A/47/277–S/24111, para. 20.

[1125] *Ibid*., para. 56.

[1126] A/70/95–S/2015/446 (see footnote 1115 above), para. 18.

[1127] The United Nations peace agreements database, a "reference tool providing peacemaking professionals with close to 800 documents that can be understood broadly as peace agreements and related material", contains a huge variety of documents, such as "formal peace agreements and sub-agreements, as well as more informal agreements and documents such as declarations, communiqués, joint public statements resulting from informal talks, agreed accounts of meetings between parties, exchanges of letters and key outcome documents of some international or regional conferences … The database also contains selected legislation, acts and decrees that constitute an agreement between parties and/or were the outcome of peace negotiations". Selected resolutions of the Security Council are also included. The database is available from https://peacemaker.un.org/document-search.

[1128] For example, the intensity and duration of the conflict as well as the weapons used can all influence how much environmental damage is caused in a particular armed conflict.

[1129] Well-known examples of environmental damage caused in armed conflict include the damage caused by the United States Armed Forces'

damage may only become apparent months or even years after the armed conflict has ended.

(6) The draft principle aims to cover all formal peace agreements, as well as other instruments or agreements concluded or adopted at any point during the peace process, whether concluded between two or more States, between State(s) and non-State armed group(s), or between two or more non-State armed groups. Such agreements and instruments may take different forms, such as sub-agreements to formal peace agreements, informal agreements, declarations, communiqués, joint public statements resulting from informal talks and agreed accounts of meetings between parties, as well as relevant legislation, acts and decrees that constitute an agreement between parties and/or were the outcome of peace negotiations.[1130]

(7) Some modern peace agreements contain environmental provisions.[1131] The types of environmental matters that have been addressed in the instruments concluded during peace processes or in peace agreements include, for example, obligations for or encouragement to parties to cooperate regarding environmental issues, and provisions that set out in detail the authority that will be responsible for matters relating to the environment, such as preventing environmental crimes and enforcing national laws and regulations on natural resources and the sharing of communal resources.[1132] The present draft principle aims to encourage parties to consider including such provisions in the agreements.

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

(9) Paragraph 2 refers to "relevant international organizations" to signal that not all organizations are suited to address this particular issue. The organizations that are envisioned as being relevant in the context of this draft principle include those that have been recognized as playing an important role in the peace processes of various armed conflicts in the past, *inter alia*, the United Nations and its organs in particular, as well as the African Union, the European Union and the Organization of American States.[1133] The draft principle also includes the words

use of Agent Orange in the Viet Nam War and the burning of Kuwaiti oil wells by Iraqi troops in the Gulf War, which are well documented. Instances of environmental damage, which vary in severity, have also been documented in relation to other armed conflicts, such as the conflicts in Colombia, the Democratic Republic of the Congo, Iraq and the Syrian Arab Republic. See UNEP, "UN Environment will support environmental recovery and peacebuilding for post-conflict development in Colombia", available from www.unenvironment.org/news-and-stories/story/un-environment-will-support-environmental-recovery-and-peacebuilding-post; UNEP, *The Democratic Republic of the Congo: Post-Conflict Environmental Assessment—Synthesis for Policy Makers*, 2011, available from https://wedocs.unep.org/20.500.11822/22069; UNEP, *UNEP in Iraq: Post-Conflict Assessment, Clean-up and Reconstruction*, 2007, available from https://wedocs.unep.org/20.500.11822/17462 and "Lebanon Environmental Assessment of the Syrian Conflict and Priority Interventions" (MOE/EU/UNDP, 2014) (Lebanon, supported by UNDP and the European Union), available from www.undp.org/lebanon/publications/lebanon-environmental-assessment-syrian-conflict. See also International Law and Policy Institute, "Protection of the natural environment in armed conflict: an empirical study", Oslo, 2014, pp. 34–40.

[1130] See C. Bell, "Women and peace processes, negotiations, and agreements: operational opportunities and challenges", Norwegian Peacebuilding Resource Centre, Policy Brief, March 2013, p. 1; available from http://noref.no, *Publications*.

[1131] Such instruments are predominantly concluded in non-international armed conflicts, between a State and a non-State actor, and include the following: Peace Agreement between the Government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional (Chapultepec Agreement) (Mexico City, 16 January 1992), A/46/864–S/23501, annex, chap. II; Interim Agreement for Peace and Self-Government in Kosovo (Rambouillet Accords) (Paris, 18 March 1999), S/1999/648, annex; Arusha Peace and Reconciliation Agreement for Burundi (Arusha, 28 August 2000), available from http://peacemaker.un.org/node/1207, Protocol III, art. 12, para. 3 (*e*), and Protocol IV, art. 8 (*h*); Final Act of the Inter-Congolese Political Negotiations (Sun City, 2 April 2003), available from http://peacemaker.un.org/drc-suncity-agreement2003, resolution No. DIC/CEF/03 and resolution No. DIC/CHSC/03; Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army, available from http://peacemaker.un.org/node/1369, chap. V and chap. III, which set out as guiding principles that "the best known practices in the sustainable utilization and control of natural resources shall be followed" (para. 1.10)—further regulations on oil resources are found in paras. 3.1.1 and 4; Darfur Peace Agreement (Abuja, 5 May 2006), available from http://peacemaker.un.org/node/535, chap. 2, art. 17, para. 107 (*g*) and (*h*), and art. 20; Agreement on Comprehensive Solutions between Uganda and Lord's Resistance Army/Movement (Juba, 2 May 2007), available from https://peacemaker.un.org/sites/peacemaker.un.org/files/UG_070502_AgreementComprehensiveSolutions.pdf, para. 14.6; and Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé, 7 July 1999), S/1999/777, annex, art. VII.

[1132] Chapultepec Agreement, chap. II. Further regulations are found in article 13 contained in annex II to the Agreement; they prescribe that it is the role of the Environment Division of the National Civil Police to "be responsible for preventing and combating crimes and misdemeanours against the environment". The Arusha Peace and Reconciliation Agreement for Burundi, Protocol III, art. 12, para. 3 (*e*), and Protocol IV, art. 8 (*h*), contains several references to the protection of the environment, one of which prescribes that one of the missions of the intelligence services is "[t]o detect as early as possible any threat to the country's ecological environment". Furthermore, it states that "[t]he policy of distribution or allocation of new lands shall take account of the need for environmental protection and management of the country's water system through protection of forests".

[1133] The United Nations has acted as a facilitator in numerous armed conflicts, *inter alia* the armed conflicts in Angola, the Democratic Republic of the Congo, Libya and Mozambique. Regional organizations have also played a facilitating role in peace processes across the world. For example, the African Union has been involved in aspects of the peace processes in, *inter alia*, the Comoros, Côte d'Ivoire, Guinea-Bissau, Liberia and Somalia. See Chatham House, Africa Programme, "The African Union's role in promoting peace, security and stability: from reaction to prevention?", meeting summary (15 October 2014), p. 3, available from www.chathamhouse.org/sites/default/files/field/field_document/20141015AfricanUnion.pdf. OAS was involved in the peace processes in, *inter alia*, the Plurinational State of Bolivia and Colombia. See P. J. Meyer, "Organization of American States: background and issues for Congress" (Congressional Research Service, 2014), p. 8, available from https://fas.org/sgp/crs/row/R42639.pdf. See also T. Whitfield, "External actors in mediation", in African Union and Centre for Humanitarian Dialogue, *Managing Peace Processes: A Handbook for AU Practitioners*, vol. 3: *Towards More Inclusive Processes*, 2013, pp. 95–111, at p. 106. The European Union has been involved in the peace processes in armed conflicts in, *inter alia*, the Middle East and Northern Ireland. See also Switzerland, Federal Department of International Affairs, "Mediation and facilitation in today's peace processes: centrality of commitment, coordination and context", presentation by Thomas Greminger at a retreat of the International Organization of la Francophonie, 15–17 February 2007, available from www.swisspeace.ch, *Publications*.

"where appropriate" to reflect the fact that the involvement of international organizations for this purpose is not always required, or wanted by the parties.

Principle 15. Post-armed conflict environmental assessments and remedial measures

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

Commentary

(1) The purpose of draft principle 15 is to encourage relevant actors to cooperate in order to ensure that environmental assessments and remedial measures can be carried out in post-conflict situations. The draft principle is closely linked to draft principle 8.

(2) The reference to "relevant actors" includes both State and non-State actors. Not only States, but also a wide range of actors, including international organizations and non-State actors, have a role to play in relation to environmental assessments and remedial measures. The phrase "is encouraged" is hortatory in nature and is to be seen as an acknowledgement of the scarcity of practice in this field.

(3) The term "environmental assessment" is distinct from an "environmental impact assessment", which is typically undertaken *ex ante* as a preventive measure.[1134] Such assessments play an important role in the preparation and adoption of plans, programmes, and policies and legislation, as appropriate. This may involve the evaluation of the likely environmental, including health, effects of a plan or programme.[1135]

(4) It is in this context that a post-conflict environmental assessment has emerged as a tool to mainstream environmental considerations in the development plans in the post-conflict phase. Such assessments are typically intended to identify major environmental risks to health, livelihoods and security and to provide recommendations to national authorities on how to address them.[1136] A post-conflict environmental assessment is intended to meet various needs and policy processes, which, depending on the requirements, are distinct in scope, objective and approach.[1137] Such post-conflict environmental assessment, undertaken at the request of a State, may take the form of: (*a*) a needs assessment;[1138] (*b*) a quantitative risk assessment;[1139] (*c*) a strategic assessment;[1140] or (*d*) a comprehensive assessment.[1141] The comprehensive assessment of Rwanda, for example, involved a scientific expert evaluation and assessment, covering a range of activities, including scoping, desk study, fieldwork, environmental sampling, geographic information system modelling, analysis and reporting and national consultations. It is readily acknowledged that "conflicts often have environmental impacts, direct or indirect, that affect human health and livelihoods as well as ecosystem services".[1142]

(5) Such assessments are encouraged because, if the environmental impacts of armed conflict are left unattended, there is strong likelihood that they may lead to "further population displacement and socio-economic instability", thereby "undermining recovery and reconstruction in post-conflict" zones and "triggering a vicious cycle".[1143]

(6) In order to align the text with other draft principles, in particular draft principle 2, the term "remedial" is used in the present principle even though "recovery" has a more prominent usage in the practice. Once an assessment is completed, the challenge is to ensure that environmental recovery programmes are in place that aim at strengthening the national and local environmental authorities, rehabilitate ecosystems, mitigate risks and ensure sustainable utilization of resources in the context of the concerned State's development plans.[1144] The term "remedial measures" has a more limited remit than "recovery".

Principle 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.

[1134] See, for instance, Convention on Environmental Impact Assessment in a Transboundary Context.

[1135] See Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context.

[1136] See UNEP, "Post-crisis environmental assessment", available from www.unep.org/explore-topics/disasters-conflicts/what-we-do/preparedness-and-response/post-crisis-environmental.

[1137] D. Jensen, "Evaluating the impact of UNEP's post-conflict environmental assessments", in D. Jensen and S. Lonergan (eds.), *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding*, London, Earthscan, 2012, p. 18; available from https://environmentalpeacebuilding.org/assets/Documents/LibraryItem_000_Doc_061.pdf.

[1138] A needs assessment and desk study can be done during or after a conflict, based on a collection of pre-existing secondary information on environmental trends and natural resource management challenges from international and national sources. Such information, with limited verification field visits, is then compiled into a desk study report that attempts to identify and prioritize environmental needs; *ibid.*, pp. 18–19.

[1139] A quantitative risk assessment, involving field visits, laboratory analysis and satellite imagery, focuses on the direct environmental impact of conflicts caused by bombing and destruction of buildings, industrial sites, and public infrastructure; *ibid.*, pp. 19–20.

[1140] A strategic assessment evaluates the indirect impact of the survival and coping strategies of local people and the institutional problems caused by the breakdown of governance and capacity. These tend to be longer in duration; *ibid.*, p. 20.

[1141] A comprehensive assessment seeks to provide a detailed picture of each natural resource sector and the environmental trends, governance challenges, and capacity needs. Based on national consultations with stakeholders, comprehensive assessments attempt to identify priorities and cost the required interventions over the short, medium and long terms; *ibid.*, p. 20.

[1142] DAC Network on Environment and Development Co-operation (ENVIRONET) of the Development Assistance Committee of the Organisation for Economic Co-operation and Development, "Strategic environmental assessment and post-conflict development—SEA toolkit" (2010), p. 4, available from http://content-ext.undp.org/aplaws_publications/2078176/Strategic%20Environment%20Assessment%20and%20Post%20Conflict%20Development%20full%20version.pdf.

[1143] *Ibid.*

[1144] See UNEP, "Disasters and Conflicts"; available from www.unep.org/explore-topics/disasters-conflicts.

2. The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic and hazardous remnants of war.

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

Commentary

(1) Draft principle 16 aims to strengthen the protection of the environment in a post-conflict situation. It seeks to ensure that toxic and hazardous remnants of war that are causing or that may cause damage to the environment are removed or rendered harmless after an armed conflict. This draft principle covers toxic and hazardous remnants of war on land, as well as those which have been placed or dumped at sea, as long as they fall under the jurisdiction or control of a former party to the armed conflict. The measures taken shall be subject to the applicable rules of international law.

(2) Paragraph 1 is cast in general terms. Remnants of war take various forms. They consist of not only explosive remnants of war but also other hazardous material and objects. Some remnants of war are not dangerous to the environment at all or may be less dangerous if they remain where they are after the conflict is over.[1145] In other words, removing the remnants of war may in some situations pose a higher environmental risk than leaving them where they are. It is for this reason that the draft principle contains the words "or render harmless", to illustrate that in some circumstances it may be appropriate to do nothing, or to take measures other than removal.

(3) The obligation to "seek to" is one of conduct and relates to "toxic and hazardous remnants of war" that "are causing or risk causing damage to the environment". The terms "toxic" and "hazardous" are often used when referring to remnants of war which pose a danger to humans or the environment, and it was considered appropriate to use the terms here.[1146] The term "hazardous" is somewhat wider than the term "toxic", in that all remnants of war that pose a threat to humans or the environment may be considered hazardous, but not all are toxic. The term "toxic remnants of war" does not have a definition under international law, but has been used to describe "any toxic or radiological substance resulting from military activities that forms a hazard to humans and ecosystems".[1147]

(4) The reference to "jurisdiction or control" is intended to cover areas within *de jure* and *de facto* control even beyond that established by a territorial link. The term "jurisdiction" is intended to cover, in addition to the territory of a State, activities over which, under international law, a State is authorized to exercise its competence and authority extraterritorially.[1148] The term "control" is intended to cover situations in which a State (or party to an armed conflict) is exercising *de facto* control, even though it may lack *de jure* jurisdiction.[1149] It therefore "refers to the factual capacity of effective control over activities outside the jurisdiction of a State".[1150]

(5) The present draft principle is intended to apply to international as well as non-international armed conflicts. For this reason, paragraph 1 addresses "parties to the conflict". The phrase "party to a conflict" has been used in various provisions of law of armed conflict treaties in the context of remnants of war.[1151] It was considered appropriate to use the term in the present draft principle as it is foreseeable that there may be situations where there are toxic or hazardous remnants of war in an area where a State does not have full control. For example, a non-State actor may have control over territory where toxic and hazardous remnants of war are present.

[1145] For example, this is often the case with chemical weapons that have been dumped at sea. See T. A. Mensah, "Environmental damages under the Law of the Sea Convention", in J. E. Austin and C. E. Bruch (eds.), *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, Cambridge, Cambridge University Press, 2000, pp. 226–249. The Chemical Munitions Search and Assessment (CHEMSEA) project is an example of cooperation among the Baltic States, which is partly financed by the European Union. Information on the CHEMSEA project can be found at https://ec.europa.eu/regional_policy/en/projects/finland/chemsea-tackles-problem-of-chemical-munitions-in-the-baltic-sea. See also the Baltic Marine Environment Protection Commission (Helsinki Commission) website at https://helcom.fi/baltic-sea-trends/hazardous-subtances/sea-dumped-chemical-munitions.

[1146] See, for more information, ICRC, "Strengthening legal protection for victims of armed conflicts", report prepared for the thirty-first International Conference of the Red Cross and Red Crescent in 2011 (31IC/11/5.1.1), chap. 3, p. 18.

[1147] See M. Ghalaieny, "Toxic harm: humanitarian and environmental concerns from military-origin contamination", discussion paper (Toxic Remnants of War project, 2013), p. 2. Available from https://paxforpeace.nl/media/download/987_icbuw-toxicharmtrwproject.pdf. For more information on toxic remnants of war, see also Geneva Academy, *Weapons Law Encyclopedia*, available from www.weaponslaw.org, *Glossary*, which cites the ICRC report "Strengthening legal protection for victims of armed conflicts" (see footnote 1146 above), p. 18. See the statements delivered by Austria, Costa Rica, Ireland and South Africa to the First Committee of the General Assembly at its sixty-eighth session, which are available from www.un.org/disarmament/meetings/firstcommittee-68.

[1148] See para. (9) of the commentary to draft article 1 of the draft articles on prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 151.

[1149] Para. (12) of the commentary to draft article 1, *ibid*.

[1150] Third report on the protection of the atmosphere, prepared by Mr. Shinya Murase, Special Rapporteur, *Yearbook … 2016*, vol. II (Part One), document A/CN.4/692, para. 33. Concerning the concept of "control", see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, p. 16, at p. 54, para. 118, where it states that: "The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States."

[1151] See, for example, amended Protocol II to the Convention on Certain Conventional Weapons, as well as the Protocol on Explosive Remnants of War, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Protocol V) (Protocol V to the Convention on Certain Conventional Weapons).

(6) Paragraph 2 should be read together with paragraph 1. It aims to encourage cooperation and technical assistance among parties to render harmless the remnants of war referred to in paragraph 1. It should be noted that paragraph 2 does not aim to place any new international law obligations on parties to cooperate. However, it is foreseeable that there may be situations where an armed conflict has taken place and a party is not in a position to ensure that toxic and hazardous remnants of war are rendered harmless. It was thus considered valuable to encourage parties to cooperate in this regard.

(7) Paragraph 3 contains a "without prejudice" clause that aims to ensure that there would be no uncertainty that existing treaty or customary international law obligations prevail. There are various law of armed conflict treaties that regulate remnants of war, and different States thus have varying obligations relating to remnants of war.[1152]

(8) The words "clear, remove, destroy or maintain", as well as the specific remnants of war listed, namely "minefields, mined areas, mines, booby-traps, explosive ordnance and other devices", were specifically chosen and are derived from existing law of armed conflict treaties to ensure that the paragraph is based on the law of armed conflict as it exists at present.[1153]

(9) It should be noted that the draft principle does not directly deal with the issue of responsibility or reparation for victims on purpose. This is because responsibility to clear, remove, destroy or maintain remnants of war is already regulated to some extent under the existing law of armed conflict, at least in the sense that certain treaties identify who should take action.[1154] The draft principle is without prejudice to the allocation of responsibility and questions of compensation.

[1152] See, for example, amended Protocol II to the Convention on Certain Conventional Weapons; Protocol V to the Convention on Certain Conventional Weapons; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction; Convention on Cluster Munitions; and Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.

[1153] See the wording of amended Protocol II to the Convention on Certain Conventional Weapons; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction; and Convention on Cluster Munitions.

[1154] See, e.g., article 3, paragraph 2, of amended Protocol II to the Convention on Certain Conventional Weapons: "Each High Contracting Party or party to a conflict is, in accordance with the provisions of this Protocol, responsible for all mines, booby-traps, and other devices employed by it and undertakes to clear, remove, destroy or maintain them as specified in Article 10 of this Protocol." Article 10, paragraph 2, in turn, provides that: "High Contracting Parties and parties to a conflict bear such responsibility with respect to minefields, mined areas, mines, booby-traps and other devices in areas under their control." In addition, article 3, paragraph 2, of Protocol V to the Convention on Certain Conventional Weapons provides that: "After the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall mark and clear, remove or destroy explosive remnants of war in affected territories under its control." See also Convention on Cluster Munitions, art. 4, para. 1: "Each State Party undertakes to clear and destroy, or ensure the clearance and destruction of, cluster munition remnants located in cluster munition contaminated areas under its jurisdiction or control"; and Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, art. 5, para. 1: "Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control".

Principle 17. Remnants of war at sea

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

Commentary

(1) Unlike the broader draft principle 16, which deals with remnants of war more generally, draft principle 17 deals with the specific situation of remnants of war at sea, including the long-lasting effects on the marine environment. Draft principle 17 has added value, as draft principle 16 only covers remnants of war under the jurisdiction or control of a former party to an armed conflict, which means that it is not wide enough to cover all remnants of war at sea. This draft principle expressly encourages international cooperation to ensure that remnants of war at sea do not constitute a danger to the environment.[1155]

(2) Owing to the multifaceted nature of the law of the sea, a particular State could have sovereignty, jurisdiction, both sovereignty and jurisdiction, or neither sovereignty nor jurisdiction, depending on where the remnants are located.[1156] It is therefore not surprising that remnants of war at sea pose significant legal challenges.[1157] For example, the parties to the armed conflict may have ceased to exist, the coastal State may not have the resources to ensure that the remnants of war at sea do not constitute a danger to the environment, or the coastal State may not have been a party to the conflict, but the cooperation of that State may still be needed in efforts to get rid of remnants. Another foreseeable challenge is that the party that left the remnants may not have been in violation of its international law obligations at the time when that happened, but these remnants now pose environmental risks.

(3) Accordingly, draft principle 17 addresses States generally, not only those which have been involved in an armed conflict. It aims to encourage all States, as well as relevant international organizations,[1158] to cooperate to ensure that

[1155] The need to take cooperative measures to assess and increase awareness of environmental effects related to waste originating from chemical munitions dumped at sea has been explicitly recognized by the General Assembly since 2010, including in General Assembly resolution 71/220 of 21 December 2016. The resolution reaffirms the 2030 Agenda for Sustainable Development and recalls a number of relevant international and regional instruments. It furthermore notes the importance of raising awareness of the environmental effects related to waste originating from chemical munitions dumped at sea and invites the Secretary-General to seek the views of Member States and relevant regional and international organizations on the cooperative measures envisaged in the resolution with a view to identifying the appropriate intergovernmental bodies within the United Nations for further consideration and implementation, as appropriate, of those measures.

[1156] See United Nations Convention on the Law of the Sea. The remnants of war could be located in the territorial waters, the continental shelf, the exclusive economic zone or on the high seas, and this will have an impact on the rights and obligations of States.

[1157] See A. Lott, "Pollution of the marine environment by dumping: legal framework applicable to dumped chemical weapons and nuclear waste in the Arctic Ocean", *Nordic Environmental Law Journal* (2015:1), pp. 57–69; and W. F. Searle and D. H. Moody, "Explosive remnants of war at sea: technical aspects of disposal", in A. H. Westing (ed.), *Explosive Remnants of War: Mitigating the Environmental Effects*, London and Philadelphia, Taylor and Francis, 1985, pp. 61–69.

[1158] For example, the CHEMSEA project, which was initiated in 2011 as a project of cooperation among the Baltic States and partly financed by the European Union (see footnote 1145 above).

remnants of war at sea do not constitute a danger to the environment. The reference to "international organizations" is qualified with the word "relevant", in the light of the fact that the issues involved tend to be specialized.

(4) The words "should cooperate" rather than the more prescriptive "shall cooperate" were considered appropriate, given that this is an area where practice is still developing. Cooperation is an important element concerning remnants of war at sea, as the coastal States negatively affected by remnants of war at sea may not have the resources and thus not be capable of ensuring that remnants of war at sea do not pose environmental risks.

(5) There are various ways in which States and relevant international organizations can cooperate to ensure that remnants of war at sea do not pose environmental risks. For example, they could survey maritime areas and make the information freely available to the affected States, they could provide maps with markers, and they could provide technological and scientific information and information concerning whether the remnants pose risks or may pose risks in the future.

(6) There is increasing awareness concerning the environmental effects of remnants of war at sea.[1159] Dangers posed to the environment by remnants of war at sea could entail significant collateral damage to human health and safety, especially of seafarers and fishermen.[1160] The clear link between danger to the environment and public health and safety has been recognized in several international law instruments, and it was thus considered particularly important to encourage cooperation among States and international organizations to ensure that remnants of war at sea do not pose a danger.[1161]

(7) Draft principle 17 intentionally does not deal with any issues concerning the allocation of responsibility or compensation for damage regarding remnants of war at sea. Determining which party has the primary obligation to ensure that remnants of war at sea do not pose environmental risks is a very complex and delicate issue to define, especially considering the varied legal nature of the law of the sea, ranging from internal waters to the high seas.

Principle 18. Sharing and granting access to information

1. To facilitate remedial measures after an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under international law.

2. Nothing in the present draft principle obliges a State or international organization to share or grant access to information vital to its national defence or security. Nevertheless, that State or international organization shall cooperate in good faith with a view to providing as much information as possible under the circumstances.

Commentary

(1) Draft principle 18 refers generally to "States", as this term is broader than "parties to an armed conflict". States not parties to an armed conflict may be affected as third States, and may have relevant information useful for the taking of remedial measures that could usefully be provided to other States or international organizations. This obligation applies to States, even though non-State actors are addressed in other draft principles, and the set of draft principles covers both international and non-international armed conflicts.

(2) While States are typically the most relevant subjects, the draft principle also refers to international organizations, with the addition of the qualifier "relevant". The specific term "national defence" applies only to States. For some international organizations, confidentiality requirements may also affect the extent of information that they can share or grant access to in good faith.[1162]

(3) Draft principle 18 consists of two paragraphs. Paragraph 1 refers to the obligations States and international organizations may have under international law to share and grant access to information with a view to facilitating remedial measures after an armed conflict. Paragraph 2 refers to security considerations to which such access may be subject.

(4) The expression "in accordance with their obligations under international law" reflects the fact that treaties contain obligations relevant in the context of the protection of the environment in relation to armed conflicts, which may be instrumental for the purpose of the taking of remedial measures after an armed conflict,[1163] such as, for instance, keeping a record of the placement of landmines.

[1159] See General Assembly resolutions 65/149 of 20 December 2010 and 68/208 of 20 December 2013, and the report of the Secretary-General on cooperative measures to assess and increase awareness of environmental effects related to waste originating from chemical munitions dumped at sea (A/68/258). See also Mensah, "Environmental damages under the Law of the Sea Convention" (footnote 1145 above), p. 233.

[1160] The Baltic Marine Environment Protection Commission (Helsinki Commission), governing body of the Convention on the Protection of the Marine Environment of the Baltic Sea Area, issued guidelines for fishermen that encounter sea-dumped chemical munitions at an early stage. For an easily accessible overview, see the work done by the James Martin Center for Nonproliferation Studies at www.nonproliferation.org/chemical-weapon-munitions-dumped-at-sea/.

[1161] There is a clear link between danger to the environment and public health and safety. See, for example, article 55, paragraph 1, of Protocol I Additional to the Geneva Conventions of 12 August 1949, which provides for the protection of the natural environment in international armed conflicts and prohibits the use of means and methods of warfare which are intended or may be expected to cause environmental damage and thereby prejudice the health of the population; article 1, paragraph 2, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes stipulates that adverse effects on the environment include "effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors".

[1162] *Cf.* e.g. Office of the United Nations High Commissioner for Refugees (UNHCR), Policy on the Protection of Personal Data of Persons of Concern to UNHCR (2015), available from www.refworld.org/pdfid/55643c1d4.pdf.

[1163] Protocol I, art. 33; First Geneva Convention, art. 16; Second Geneva Convention, arts. 19 and 42; Third Geneva Convention, art. 23; and Fourth Geneva Convention, art. 137.

Obligations to grant access to and/or share information which provide protection for the environment in relation to armed conflicts have been listed above. Also relevant is paragraph 2 of article 9 on "Recording and use of information on minefields, mined areas, mines, booby-traps and other devices" of amended Protocol II to the Convention on Certain Conventional Weapons, as well as paragraph 2 of article 4 on "Recording, retaining and transmission of information" of Protocol V to the Convention on Certain Conventional Weapons.

(5) Furthermore, this expression reflects the fact that the obligations to grant access to and/or share information as contained in the relevant treaties are commonly accompanied by exceptions or limitations regarding grounds on which the disclosure of information may be refused. Such grounds relate, *inter alia*, to "national defence or public security" or situations in which the disclosure would make it more likely that the environment to which such information related would be damaged.[1164]

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

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

(8) The origins of the right of access to information in modern international human rights law can be found in article 19 of the Universal Declaration of Human Rights,[1165] as well as in article 19 of the International Covenant on Civil and Political Rights. General comment No. 34 on article 19 of the International Covenant on Civil and Political Rights provides that article 19, paragraph 2, should be read as including a right of access to information held by public bodies.[1166]

(9) A right to environmental information has also developed within the context of the European Convention on Human Rights, as exemplified in the case of *Guerra and Others v. Italy*,[1167] in which the European Court of Human Rights decided that the applicants had a right to environmental information on the basis of article 8 of the Convention (the right to family life and privacy). Reference can also be made to the European Union directive on public access to environmental information and to a related judgment of the European Court of Justice of 2011.[1168] In addition to the right to privacy, a right to environmental information has also been based on the right to freedom of expression (as in e.g. *Claude-Reyes et al. v. Chile* before the Inter-American Court of Human Rights).[1169]

(10) Principle 10 of the 1992 Rio Declaration on Environment and Development[1170] also provides that individuals shall have appropriate access to information, including on hazardous materials. The recently adopted Sustainable Development Goal 16 on peaceful and inclusive societies calls upon States to ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements.[1171]

(11) Article 2 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters defines "environmental information" as any information pertaining to the state of elements of the environment, factors affecting or likely to affect elements of the environment, and the state of human health and safety insofar as they may be affected by these elements. Article 4 of the Convention stipulates that States parties must "make such [environmental] information available to the public, within the framework of national legislation". Such a right necessarily entails a duty for States to collect such environmental information for the purposes of making it available to the public if and when requested to do so.

(12) The United Nations Framework Convention on Climate Change addresses access to information in its article 6, noting that the parties shall "[p]romote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities: … public access to information on climate change and its effects". In addition, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity stipulates that parties shall promote and facilitate access to information on living modified organisms.[1172] Both the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade[1173] and the Stockholm Convention on Persistent Organic Pollutants[1174] contain provisions on access to information. Similarly, article 18 of the 2013 Minamata Convention on Mercury stipulates that parties

[1164] See Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art. 4, para. 4 (*b*); and Convention for the Protection of the Marine Environment of the North-East Atlantic, art. 9, para. 3 (*g*). See also the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, art. 5, para. 6 (*b*).

[1165] General Assembly resolution 217 A (III) of 10 December 1948.

[1166] Human Rights Committee, general comment No. 34 (2011) on article 19 (freedoms of opinion and expression), *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40* (A/66/40), vol. I, annex V, para. 18.

[1167] *Guerra and Others v. Italy*, 19 February 1998, *Reports of Judgments and Decisions* 1998-I.

[1168] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, *Official Journal of the European Union*, L 41, 14 February 2003, p. 26; *Office of Communications v. Information Commissioner*, case C-71/10, judgment of 28 July 2011, *ibid.*, C 298, 8 October 2011, p. 6.

[1169] *Claude-Reyes et al. v. Chile*, Judgment (Merits, Reparations and Costs) of 19 September 2006, Inter-American Court of Human Rights, Series C, No. 151.

[1170] Adopted at Rio de Janeiro on 14 June 1992; see *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I: *Resolutions adopted by the Conference* (A/CONF.151/26/Rev.1 (Vol. I) and Corr.1, United Nations publication, Sales No. E.93.I.8 and corrigenda), resolution 1, annex I, p. 3.

[1171] General Assembly resolution 70/1.

[1172] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, art. 23.

[1173] Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, art. 15.

[1174] Stockholm Convention on Persistent Organic Pollutants, art. 10.

shall "promote and facilitate" access to such information. The recently concluded Paris Agreement adopted under the United Nations Framework Convention on Climate Change similarly addresses access to information in numerous paragraphs and articles, e.g. as part of the responsibility of States to provide intended nationally determined contributions, referred to in article 4, paragraph 8, of the Paris Agreement, and more generally regarding climate change education and public access to information, referred to in article 12.

(13) In accordance with the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, parties thereto shall make information on desertification "fully, openly and promptly available".[1175] Similarly, the Bali Guidelines provide that "affordable, effective and timely access to environmental information held by public authorities upon request" should be ensured.[1176]

(14) Within the particular regime of humanitarian demining and remnants of war, a number of instruments contain requirements on providing environmental information. For instance, a request to extend the deadline for completing the clearance and destruction of cluster munition remnants under the Convention on Cluster Munitions must outline any potential environmental and humanitarian impacts of such an extension.[1177] Similarly, in connection with the destruction of cluster munitions, the "location of all destruction sites and the applicable safety and environmental standards" must be outlined.[1178] Similar obligations are contained in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.[1179] Reference can also be made to International Mine Action Standard 10.70, which states, *inter alia*, that national mine action authorities should "promulgate information about significant environmental incidents to other demining organisations within the programme".[1180]

(15) Regarding the practice of international organizations, the Environmental Policy for United Nations Field Missions of 2009 stipulates that peacekeeping missions shall assign an Environmental Officer with the duty to "[p]rovide environmental information relevant to the operations of the mission and take actions to promote awareness on environmental issues".[1181] The policy also contains a requirement to disseminate and study information on the environment, which would presuppose access to information that can in fact be disseminated and that thus is not classified.

(16) Moreover, the ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict contain a provision on protection of organizations,[1182] which could include environmental organizations gathering environmental data as a means of "contributing to prevent or repair damage to the environment".[1183]

(17) In connection with post-armed conflict environmental assessments, it is worth recalling that the UNEP guidelines on integrating environment in post-conflict assessments include a reference to the importance of public participation and access to information, as "natural resource allocation and management is done in an ad-hoc, decentralized, or informal manner" in post-conflict contexts.[1184]

(18) The obligation to *share information* and to cooperate in this context is reflected in the Convention on the Law of the Non-navigational Uses of International Watercourses.[1185] Moreover, the Convention on Biological Diversity contains a provision on exchange of information in its article 14, requiring that each Contracting Party shall, as far as possible and as appropriate, promote "notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate".[1186] In addition, article 17 of the Convention calls upon the Parties to facilitate the exchange of information relevant to the conservation and sustainable use of biological diversity.

(19) Previous work of the Commission of relevance to this aspect of the draft principle includes the articles on nationality of natural persons in relation to the succession of States (1999),[1187] articles on prevention of transboundary harm from hazardous activities (2001),[1188] principles on the allocation of loss in the case of transboundary harm

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[1175] United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, art. 16 (*f*), and also art. 19.

[1176] UNEP, Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters, adopted by the Governing Council of UNEP in decision SS.XI/5 A, annex, of 26 February 2010, guideline 1 (A/65/25, annex I). Available from www.unep.org, *Resources*.

[1177] Convention on Cluster Munitions, art. 4, para. 6 (*h*).

[1178] *Ibid.*, art. 7 (Transparency measures), para. 1 (*e*).

[1179] Article 5.

[1180] IMAS 10.70, 1 September 2007, "Safety and occupational health—Protection of the environment", para. 12.1 (*f*), available from www.mineactionstandards.org.

[1181] United Nations, Department of Peacekeeping Operations and Department of Field Support, "Environmental Policy for UN Field Missions", 2009, para. 23.5.

[1182] Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (see footnote 1066 above), guideline 19, referring to the Fourth Geneva Convention, art. 63, para. 2, and Protocol I, arts. 61–67.

[1183] It should be noted that guideline 19 refers to special agreements between the parties or permission granted by one of them.

[1184] UNEP, Guidance Note, *Integrating Environment in Post-Conflict Needs Assessments*, Geneva, 2009, p. 7; available from www.unep.org/resources/report/integrating-environment-post-conflict-needs-assessments-unep-guidance-note (as referenced in paragraph 144 and footnote 264 of the third report of the previous Special Rapporteur, *Yearbook … 2016*, vol. II (Part One), document A/CN.4/700).

[1185] Convention on the Law of the Non-navigational Uses of International Watercourses, arts. 9, 11, 12, 14–16, 19, 30, 31 and 33, para. 7.

[1186] Article 14, para. 1 (*c*).

[1187] General Assembly resolution 55/153 of 12 December 2000, annex, art. 18. The draft articles and the commentaries thereto are reproduced in *Yearbook … 1999*, vol. II (Part Two), paras. 47–48.

[1188] General Assembly resolution 62/68 of 6 December 2007, annex, arts. 8, 12–14 and 17. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 97–98.

arising out of hazardous activities (2006)[1189] and articles on the law of transboundary aquifers (2008).[1190]

(20) Paragraph 2 serves a similar purpose in the context of draft principle 18. The exception to the obligation set out under paragraph 1 concerns information vital to the national defence of a State or the security of a State or an international organization. This exception is not absolute. The second sentence of the paragraph provides that States and international organizations shall provide as much information as possible under the circumstances, through cooperation in good faith. Paragraph 2 is based on provisions contained in the Convention on the Law of the Non-navigational Uses of International Watercourses. Article 31 of the Convention provides that a watercourse State is not obliged to provide data or information vital to its national defence or security, while noting that the obligation to cooperate in good faith is still applicable. The articles on prevention of transboundary harm from hazardous activities[1191] and the articles on the law of transboundary aquifers[1192] contain a similar exception.

(21) Draft principle 18 is closely linked to the duty to cooperate, as well as draft principle 15 on post-armed conflict environmental assessments and remedial measures.

[1189] General Assembly resolution 61/36 of 4 December 2006, annex, principle 5. The draft principles and the commentaries thereto are reproduced in *Yearbook … 2006*, vol. II (Part Two), paras. 66–67.

[1190] General Assembly resolution 63/124 of 11 December 2008, annex, arts. 8, 13, 15, 17 and 19. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2008*, vol. II (Part Two), paras. 53–54.

[1191] Article 14.

[1192] Article 19.