

Chapter V

Protection of the environment in relation to armed conflicts

A. Introduction

45. 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.³¹⁹

46. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixty-sixth session (2014), the second report at its sixty-seventh session (2015) and the third report at its sixty-eighth session (2016).³²⁰ On the basis of the draft principles proposed by the Special Rapporteur in the preliminary, second and third reports, the Commission provisionally adopted sixteen draft principles.³²¹

47. At its sixty-ninth session (2017), the Commission established a Working Group, chaired by Mr. Marcelo Vázquez-Bermúdez, to consider the way forward in relation to the topic, as Ms. Jacobsson was no longer a member of the Commission.³²² The Working Group recommended to the Commission the appointment of a new Special Rapporteur to assist with the successful completion of its work on the topic.³²³ Following an oral report by the Chair of the Working Group, the Commission decided to appoint Ms. Marja Lehto as Special Rapporteur.³²⁴

48. At its seventieth (2018) session, the Commission received and considered the first report of the Special Rapporteur³²⁵ and took note of draft principles 19, 20 and 21, which had been provisionally adopted by the Drafting Committee.³²⁶ At its seventy-first session (2019), the Commission provisionally adopted draft principles 19, 20 and 21, which had been provisionally adopted by the Drafting Committee at the seventieth session and taken note of by the Commission at the same session.³²⁷ The Commission considered the second report of the Special Rapporteur.³²⁸

49. Also at its seventy-first session (2019), the Commission adopted, on first reading, the entire set of draft principles on protection of the environment in relation to armed conflicts, which comprised 28 draft principles, together with commentaries thereto.³²⁹ It decided, in

³¹⁹ The decision was made at the 3171st meeting of the Commission, on 28 May 2013 (see *Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 167). For the syllabus of the topic, see *Yearbook ... 2011*, vol. II (Part Two), annex V.

³²⁰ Documents [A/CN.4/674](#) and [Corr.1](#) (preliminary report), [A/CN.4/685](#) (second report) and [A/CN.4/700](#) (third report).

³²¹ See *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, paras. 59–61.

³²² *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10 (A/72/10)*, para. 255. The Working Group had before it the draft commentaries prepared by the Special Rapporteur, even though she was no longer a member of 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.

³²³ *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10 (A/72/10)*, para. 260.

³²⁴ *Ibid.*, para. 262.

³²⁵ Document [A/CN.4/720](#). At its seventieth session (2018), the Commission established 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, provisionally adopted by the Drafting Committee at the sixty-eighth session, and taken note of by the Commission at the same session. See *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, para. 167.

³²⁶ *Ibid.*, para. 172.

³²⁷ *Official Records of the General Assembly, Seventh-fourth Session, Supplement No. 10 (A/74/10)*, para. 62.

³²⁸ Document [A/CN.4/728](#).

³²⁹ *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, paras. 62–67.

accordance with articles 16 to 21 of its statute, to transmit the draft principles, through the Secretary-General, to Governments, international organizations and others for comments and observations.³³⁰

B. Consideration of the topic at the present session

50. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/750), as well as comments and observations received from Governments, international organizations and others (A/CN.4/749).

51. At its 3571st to 3578th meetings, from 28 April to 10 May 2022, the Commission considered the third report of the Special Rapporteur and instructed the Drafting Committee to commence the second reading of the entire set of draft principles, together with a draft preamble, on the basis of the proposals by the Special Rapporteur, taking into account the comments and observations of Governments, international organizations and others, as well as the debate in plenary on the Special Rapporteur's report.

52. The Commission considered the report of the Drafting Committee (A/CN.4/L.968) at its 3584th meeting, held on 27 May 2022, and adopted the entire set of draft principles, together with a preamble, on protection of the environment in relation to armed conflicts on second reading (sect. E.1 below).

53. At its 3602nd to 3606th meetings, from 28 July to 2 August 2022, the Commission adopted the commentaries to the draft principles and the preamble (see sect. E.2 below).

54. In accordance with its statute, the Commission submits the draft principles, together with the preamble, to the General Assembly, with the recommendation set out below.

C. Recommendation of the Commission

55. At its 3606th meeting, on 2 August 2022, the Commission decided, in conformity with article 23 of its statute, to recommend that the General Assembly:

(a) take note of the draft principles on protection of the environment in relation to armed conflicts in a resolution, to annex the principles to the resolution, and to encourage their widest possible dissemination;

(b) commend the draft principles, together with the commentaries thereto, to the attention of States and international organizations and all who may be called upon to deal with the subject.

D. Tribute to the Special Rapporteur

56. At its 3606th meeting, held on 2 August 2022, the Commission, after adopting the draft principles on protection of the environment in relation to armed conflicts, adopted the following resolution by acclamation:

“The International Law Commission,

Having adopted the draft principles on protection of the environment in relation to armed conflicts,

Expresses to the Special Rapporteur, Ms. Marja Lehto, its deep appreciation and warm congratulations for the outstanding contribution she has made to the preparation of the draft principles through her tireless efforts and devoted work, and for the results achieved in the elaboration of draft principles on protection of the environment in relation to armed conflicts.”

57. The Commission also reiterated its deep appreciation for the valuable contribution of the previous Special Rapporteur, Ms. Marie G. Jacobsson, to the work on the topic.

³³⁰ *Ibid.*, para. 68.

E. Text of the draft principles on protection of the environment in relation to armed conflicts

1. Text of the draft principles

58. The text of the draft principles adopted by the Commission, on second reading, at its seventy-third session is reproduced below.

Protection of the environment in relation to armed conflicts

...

Recalling the urgent need and common objectives to reinforce and advance the conservation, restoration and sustainable use of the environment for present and future generations,

Recalling also that Principle 24 of the Rio Declaration on Environment and Development provides, *inter alia*, that States shall respect international law providing protection for the environment in times of armed conflict and cooperate in its further development,

Recognizing that environmental consequences of armed conflicts may be severe and have the potential to exacerbate global environmental challenges, such as climate change and biodiversity loss,

Aware of the importance of the environment for livelihoods, food and water security, maintenance of traditions and cultures, and the enjoyment of human rights,

Emphasizing that environmental factors are to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict,

Conscious of the need to enhance the protection of the environment in relation to both international and non-international armed conflicts, including in situations of occupation,

Considering that effective protection of the environment in relation to armed conflicts requires that measures are taken by States, international organizations and other relevant actors to prevent, mitigate and remediate harm to the environment before, during and after an armed conflict,

...

Part One Introduction

Principle 1 Scope

The present draft principles apply to the protection of the environment before, during or after an armed conflict, including in situations of occupation.

Principle 2 Purpose

The present draft principles are aimed at enhancing the protection of the environment in relation to armed conflicts, including through measures to prevent, mitigate and remediate harm to the environment.

Part Two Principles of general application

Principle 3 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 conflicts.

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

Principle 4
Designation of protected zones

States should designate, by agreement or otherwise, areas of environmental importance as protected zones in the event of an armed conflict, including where those areas are of cultural importance.

Principle 5
Protection of the environment of indigenous peoples

1. States, international organizations and other relevant actors shall take appropriate measures, in the event of an armed conflict, to protect the environment of the lands and territories that indigenous peoples inhabit or traditionally use.

2. When an armed conflict has adversely affected the environment of the lands and territories that indigenous peoples inhabit or traditionally use, States shall undertake appropriate and 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 6
Agreements concerning the presence of military forces

States and international organizations should, as appropriate, include provisions on environmental protection in relation to armed conflict in agreements concerning the presence of military forces. Such provisions should address measures to prevent, mitigate and remediate harm to the environment.

Principle 7
Peace operations

States and international organizations involved in peace operations established in relation to armed conflicts shall consider the impact of such operations on the environment and take, as appropriate, measures to prevent, mitigate and remediate the harm to the environment resulting from those operations.

Principle 8
Human displacement

States, international organizations and other relevant actors should take appropriate measures to prevent, mitigate and remediate harm to the environment in areas where persons displaced by armed conflict are located, or through which they transit, while providing relief and assistance for such persons and local communities.

Principle 9
State responsibility

1. An internationally wrongful act of a State, in relation to an armed conflict, that causes damage to the environment entails the international responsibility of that State, which is under an obligation to make full reparation for such damage, including damage to the environment in and of itself.

2. The present draft principles are without prejudice to the rules on the responsibility of States or of international organizations for internationally wrongful acts.

3. The present draft principles are also without prejudice to:

- (a) the rules on the responsibility of non-State armed groups;
- (b) the rules on individual criminal responsibility.

Principle 10
Due diligence by business enterprises

States should take appropriate measures aimed at ensuring that business enterprises operating in or from their territories, or territories under their jurisdiction, exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area affected by an armed conflict. Such measures include those aimed at ensuring that natural resources are purchased or otherwise obtained in an environmentally sustainable manner.

Principle 11
Liability of business enterprises

States should take appropriate measures aimed at ensuring that business enterprises operating in or from their territories, or territories under their jurisdiction, can be held liable for harm caused by them to the environment, including in relation to human health, in an area affected by an armed conflict. Such measures should, as appropriate, include those aimed at ensuring that a business enterprise can be held liable to the extent that such harm is caused by its subsidiary acting under its *de facto* control. To this end, as appropriate, States should provide adequate and effective procedures and remedies, in particular for the victims of such harm.

Part Three
Principles applicable during armed conflict

Principle 12
Martens Clause with respect to the protection of the environment in relation to armed conflicts

In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

Principle 13
General protection of the environment during armed conflict

1. The environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.
2. Subject to applicable international law:
 - (a) care shall be taken to protect the environment against widespread, long-term and severe damage;
 - (b) the use of methods and means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the environment is prohibited.
3. No part of the environment may be attacked, unless it has become a military objective.

Principle 14
Application of the law of armed conflict to the environment

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

Principle 15
Prohibition of reprisals

Attacks against the environment by way of reprisals are prohibited.

Principle 16
Prohibition of pillage

Pillage of natural resources is prohibited.

Principle 17
Environmental modification techniques

In accordance with their international obligations, States shall not engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State.

Principle 18
Protected zones

An area of environmental importance, including where that area is of cultural importance, designated by agreement as a protected zone shall be protected against any attack, except insofar as it contains a military objective. Such protected zone shall benefit from any additional agreed protections.

Part Four
Principles applicable in situations of occupation

Principle 19
General environmental 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, including harm that is likely to prejudice the health and well-being of protected persons of the occupied territory or otherwise violate their rights.
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.

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 protected 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 harm to the environment.

Principle 21
Prevention of transboundary harm

An Occupying Power shall take appropriate measures to ensure that activities in the occupied territory do not cause significant harm to the environment of other States or areas beyond national jurisdiction, or any area of the occupied State beyond the occupied territory.

Part Five
Principles applicable after armed conflict

Principle 22
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 as a result of the conflict.
2. Relevant international organizations should, where appropriate, play a facilitating role in this regard.

Principle 23
Sharing and granting access to information

1. To facilitate measures to remediate harm to the environment resulting from an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under applicable international law.
2. Nothing in paragraph 1 affects the right to invoke the grounds for refusal to share or grant access to information provided for in applicable international law. Nevertheless, States and international organizations shall cooperate in good faith with a view to providing as much information as possible under the circumstances.

Principle 24
Post-armed conflict environmental assessments and remedial measures

Relevant actors, including States and international organizations, should cooperate with respect to post-armed conflict environmental assessments and remedial measures.

Principle 25
Relief and assistance

When, in relation to an armed conflict, the source of environmental damage is unidentified, or reparation is unavailable, States and relevant international organizations should take appropriate measures so that the damage does not remain unrepaired or uncompensated, and may consider establishing special compensation funds or providing other forms of relief or assistance.

Principle 26
Remnants of war

1. Parties to an armed conflict shall seek, as soon as possible, to remove or render harmless toxic or other 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 or other 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 27
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.

2. Text of the draft principles and commentaries thereto

59. The text of the draft principles and commentaries thereto adopted by the Commission on second reading at its seventy-third session is reproduced below.

Protection of the environment in relation to armed conflicts

General commentary

- (1) As is always the case with the Commission's outputs, the draft principles are to be read together with the commentaries.
- (2) After the preamble, the draft principles are divided into five parts, including Part One entitled "Introduction" which contains draft principles on the scope and purpose of the draft

principles. Part Two deals with the protection of the environment *before* the outbreak of an armed conflict but also contains draft principles of a more general nature that are of relevance for more than one temporal phase: before, during or after an armed conflict. Part Three pertains to the protection of the environment *during* armed conflict, and Part Four pertains to the protection of the environment in situations of occupation. Part Five contains draft principles relative to the protection of the environment *after* an armed conflict.

(3) The provisions have been cast as draft “principles”. The Commission has previously chosen to formulate the output of its work as draft principles, both for provisions that set forth principles of international law and for non-binding declarations of principles intended to contribute to the progressive development of international law and provide appropriate guidance to States.³³¹ The present set of draft principles contains provisions of different normative value, including those that reflect customary international law, and those containing recommendations for its progressive development.

(4) The draft principles were prepared bearing in mind that the law of armed conflict, where applicable, is *lex specialis* but that other rules of international law, to the extent that they do not enter into conflict with it, also remain applicable. Such rules may generally complement and inform the application of the law of armed conflict. In addition, the fact that the law of armed conflict (*jus in bello*) and the law on the use of force (*jus ad bellum*) may apply at the same time does not affect their distinct nature.

(5) The draft principles use the term “law of armed conflict”. While this term and the more commonly used term “international humanitarian law” can be seen as synonyms in international law,³³² the term “law of armed conflict” was preferred to ensure consistency with the Commission’s articles on the effects of armed conflicts on treaties.³³³

Preamble

...

Recalling the urgent need and common objectives to reinforce and advance the conservation, restoration and sustainable use of the environment for present and future generations,

Recalling also that Principle 24 of the Rio Declaration on Environment and Development provides, *inter alia*, that States shall respect international law providing protection for the environment in times of armed conflict and cooperate in its further development,

Recognizing that environmental consequences of armed conflicts may be severe and have the potential to exacerbate global environmental challenges, such as climate change and biodiversity loss,

Aware of the importance of the environment for livelihoods, food and water security, maintenance of traditions and cultures, and the enjoyment of human rights,

Emphasizing that environmental factors are to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict,

³³¹ Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook ... 1950*, vol. II, document A/1316, Part III, p. 374. See also principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II (Part Two), paras. 66–67, pp. 58–90; and the guiding principles applicable to unilateral declarations of States capable of creating legal obligations, *Yearbook ... 2006*, vol. II (Part Two), para. 176, p. 161.

³³² For a description of the semantics, see Y. Dinstein (ed.), *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd ed. (Cambridge, Cambridge University Press, 2016), at paras. 56–57 and 60–67.

³³³ *Yearbook ... 2011*, vol. II (Part Two), paras. 89–101.

Conscious of the need to enhance the protection of the environment in relation to both international and non-international armed conflicts, including in situations of occupation,

Considering that effective protection of the environment in relation to armed conflicts requires that measures are taken by States, international organizations and other relevant actors to prevent, mitigate and remediate harm to the environment before, during and after an armed conflict,

...

Commentary

(1) The preamble seeks to provide a conceptual framework for the draft principles, setting out the general context in which they were developed, as well as their main purposes. The preamble, consisting of seven paragraphs, provides a general introduction to the draft principles without reflecting the detail of the specific issues covered by them.

(2) The first paragraph contains a general statement of the urgency of the protection of the environment and of its importance for both present and future generations. This statement has been modelled on a preambular paragraph of the Political declaration of the special session of the United Nations Environmental Assembly to commemorate the fiftieth anniversary of the establishment of the United Nations Environment Programme.³³⁴ Given the universal membership of the United Nations Environmental Assembly, the reference to the advancement and reinforcement of the conservation, restoration and sustainable use of the environment as “common objectives” indicates a global commitment taken by States, together with international organizations and other stakeholders.

(3) The second paragraph contains an express reference to international law and the protection of the environment in times of armed conflict. It recalls principle 24 of the Rio Declaration on Environment and Development, which provides, *inter alia*, that States shall respect international law providing protection for the environment in times of armed conflict and cooperate in its further development.³³⁵ In addition to principle 24, other principles of the Rio Declaration are related to the present set of draft principles. Principle 2 concerns the responsibility of States to ensure that activities under their jurisdiction or control do not cause damage to the environment of other States or of areas beyond national jurisdiction, principle 10 concerns access to environmental information, and principle 23 concerns the protection of the environment and natural resources of people under oppression, domination or occupation. Principles of the Rio Declaration have also been referred to in the previous work of the Commission.³³⁶

(4) The third preambular paragraph refers to environmental consequences of armed conflicts, which may be severe and have the potential to exacerbate global environmental challenges, such as climate change and biodiversity loss. It was understood that the word

³³⁴ United Nations Environmental Assembly, Special Session resolution 1/4 of 3 March 2022, “Political declaration of the special session of the United Nations Environmental Assembly to commemorate the fiftieth anniversary of the United Nations Environment Programme” (UNEP/EA.SS:1/4), fifth preambular paragraph.

³³⁵ See the Rio Declaration on Environment and Development, (Rio Declaration), Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, vol. I, Resolutions adopted by the Conference (United Nations publication, Sales No. E.93.I.8 and corrigendum; A/CONF/151/26/Rev.1 (vol. I) and Corr.1), resolution 1, annex I, p. 5, principle 24: “Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary”.

³³⁶ Articles on the prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 97, fourth preambular paragraph; principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II (Part Two), para. 66, first preambular paragraph; draft articles on the law of transboundary aquifers, *Yearbook ... 2008*, vol. II (Part Two), para. 53, fourth preambular paragraph.

“severe” also encompasses that the effects can be long-term or irreversible.³³⁷ This is particularly evident in the context of the loss of biological diversity; when a species becomes extinct, it cannot be restored. The paragraph also refers to the fact that environmental effects of armed conflicts are not only local but may have broader ramifications. Research shows that armed conflicts have frequently taken place in biodiversity hotspots.³³⁸ Deforestation as a result of armed conflict may similarly have serious local effects, but also contributes to climate change.³³⁹

(5) The fourth paragraph refers to the interrelationship between the environment on the one hand and livelihoods, food and water security, maintenance of traditions and cultures, and the enjoyment of human rights, on the other. This general statement is in line with the recognition by the International Court of Justice “that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn”.³⁴⁰ The link between human rights and the environment has also been recognized by States, most recently in the General Assembly resolution on the human right to a clean, healthy and sustainable environment.³⁴¹ Reference can also be made to the two resolutions of the United Nations Environmental Assembly on the protection of the environment in areas affected by an armed conflict, which recognize “that sustainable development and the protection of the environment contribute to human well-being and the enjoyment of human rights”.³⁴²

(6) The fifth paragraph borrows language from the Advisory Opinion of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons*, which emphasizes that environmental factors are to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict,³⁴³ for instance with respect to the assessment of what is necessary and proportionate in the pursuit of legitimate military objectives.³⁴⁴ The Advisory Opinion also contains further important clarifications concerning the interconnections between the law of armed conflict, on the one hand, and international environmental law and international human rights law, on the other.

(7) The sixth and seventh paragraphs seek to direct the reader to the scope and purpose of the draft principles as contained in draft principles 1 and 2, respectively. The sixth paragraph reflects the general applicability of the draft principles to different types of conflicts, as well as the enhancement of the protection of the environment in relation to armed conflicts as the purpose of the draft principles. The seventh paragraph focuses on the notion of measures to prevent, mitigate and remediate harm to the environment, which forms an important component of the draft principles. The paragraph refers to States, international organizations and other relevant actors, as different draft principles are addressed to them.

³³⁷ See *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 78, para. 140, in which the International Court of Justice refers to “the often irreversible character of damage to the environment”.

³³⁸ T. Hansson *et al.*, “Warfare in biodiversity hotspots”, *Conservation Biology*, vol. 23 (2009), pp. 578–587 (between 1950 and 2000, more than 80 per cent of armed conflicts took place in biodiversity hotspots: *ibid.*, p. 578). See also ICRC, *When Rain Turns into Dust. Understanding and Responding to the Combined Impact of Armed Conflict and the Climate and Environment Crisis in People’s Lives* (2020).

³³⁹ See IPCC, *Climate Change and Land: an IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security and Greenhouse Gas Fluxes in Terrestrial Ecosystems* (2019). See also S. Maljean-Dubois, “Le droit international de biodiversité”, *Collected Courses of the Hague Academy of International Law*, vol. 407 (2020), pp. 123–542.

³⁴⁰ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 241, para. 29.

³⁴¹ See General Assembly resolution 76/300 of 28 July 2022. See also Human Rights Council resolution 48/13 of 8 October 2021.

³⁴² United Nations Environmental Assembly resolutions 2/15 of 27 May 2016 on “Protection of the environment in areas affected by armed conflict” (UNEP/EA.2/Res.15), thirteenth preambular paragraph, and 3/1 of 6 December 2017 on “Pollution mitigation and control in areas affected by armed conflict or terrorism” (UNEP/EA.3/Res.1), eighth preambular paragraph.

³⁴³ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), p. 243, para. 33.

³⁴⁴ *Ibid.*, paras. 30 and 33.

Part One
Introduction

Principle 1
Scope

The present draft principles apply to the protection of the environment before, during or after an armed conflict, including in situations of occupation.

Commentary

(1) This provision describes the scope of the draft principles. It provides that they cover three temporal phases: before, during, and after armed conflict. Situations of occupation are covered as a special type of international armed conflicts. The disjunctive “or” seeks to underline that not all draft principles would be applicable during all phases. However, it is worth emphasizing that there is, at times, a certain degree of overlap between these three phases.

(2) The division of the principles into the temporal phases described above (albeit without strict dividing lines) sets out the scope *ratione temporis* of the draft principles. Regarding the scope *ratione materiae* of the draft principles, reference is made to the term “protection of the environment” as it relates to the term “armed conflict”. No distinction is generally made in these draft principles between international armed conflicts and non-international armed conflicts.

(3) In addition to States, several draft principles are addressed to international organizations, or to parties to an armed conflict, including non-State armed groups, or to other relevant actors, such as civil society organizations. The scope *ratione personae* of the draft principles is clear from the wording of each provision, together with the commentary.

Principle 2
Purpose

The present draft principles are aimed at enhancing the protection of the environment in relation to armed conflicts, including through measures to prevent, mitigate and remediate harm to the environment.

Commentary

(1) This provision outlines the fundamental purpose of the draft principles. It makes it clear that the draft principles aim to enhance the protection of the environment in relation to armed conflicts and signals the general kinds of measures that would be required to offer the necessary protection. Such measures include preventive measures, which aim to avoid or in any event to minimize damage to the environment during armed conflict, and measures which aim to mitigate or remediate harm that has already been caused as a result of armed conflict.

(2) Similar to the provision on scope, the present provision covers all three temporal phases, including situations of occupation. While the three phases are closely connected, the reference to prevention relates primarily to the situation before and during armed conflict, and the references to mitigation and remediation principally concern the post-conflict phase. It should be noted that a State may take remedial measures to restore the environment even before the conflict has ended.

(3) While prevention 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, encompasses any measure of remediation that may be taken to restore the environment. This might include, *inter alia*, taking into account loss or damage by impairment to the environment, costs of reasonable measures of reinstatement, as well as reasonable costs of clean-up associated with the costs of reasonable response measures.

Part Two

Principles of general application

Principle 3

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

Commentary

(1) Draft principle 3 recognizes that States are required to take effective measures to enhance the protection of the environment in relation to armed conflicts. Paragraph 1 recalls obligations under international law and paragraph 2 encourages States to voluntarily take further effective 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 conflicts”, also inserted in both paragraphs, is intended to underline the connection of environmental protection to armed conflict.

(2) Paragraph 1 reflects that States have obligations under international law to enhance the protection of the environment in relation to armed conflicts and addresses the measures that States are obliged to take to this end. The word “shall” 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 international 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 and may change over time.

(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 conflicts.³⁴⁵ 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.³⁴⁶ Several of the present draft principles refer to existing customary or treaty-based obligations of States relevant to the protection of the environment in relation to armed conflicts.

(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.³⁴⁷ This obligation can also be linked to

³⁴⁵ See ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary* (Geneva, 2020), available from <https://shop.icrc.org/guidelines-on-the-protection-of-the-natural-environment-in-armed-conflict-rules-and-recommendations-relating-to-the-protection-of-the-natural-environment-under-international-humanitarian-law-with-commentary.html> (accessed on 2 August 2022).

³⁴⁶ For the effective implementation of environmental and human rights obligations, also in relation to armed conflicts, see UNEP, *Environmental Rule of Law: First Global Report* (2019), available at www.unep.org/resources/assessment/environmental-rule-law-first-global-report (last accessed on 2 August 2022).

³⁴⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3 (hereinafter, Additional Protocol I), art. 83. See also Geneva

common article 1 of the Geneva Conventions, in which States parties undertake to respect and ensure respect for the Conventions in all circumstances.³⁴⁸ Such dissemination can take place for instance through integrating the relevant rules into legislation, as well as administrative and institutional measures, such as their inclusion in military manuals³⁴⁹ and codes of conduct.³⁵⁰

(6) The obligation to respect and ensure respect is also interpreted to require that States, to the extent possible, exert their influence to prevent and stop violations of the law of armed conflict.³⁵¹ 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 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 Additional Protocol I. According to this provision, a State party is under an obligation to determine whether the employment of a new weapon would, in some or all circumstances, be prohibited by Additional Protocol I or “by any other rule of international law applicable” to the State party.³⁵² 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

Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I) (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 970, p. 31 (hereinafter, First Geneva Convention), art. 47; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II) (Geneva, 12 August 1949), *ibid.*, No. 971, p. 85 (hereinafter, Second Geneva Convention), art. 48; Geneva Convention relative to the Treatment of Prisoners of War (Convention III) (Geneva, 12 August 1949), *ibid.*, No. 972, p. 135 (hereinafter, Third Geneva Convention), art. 127; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) (Geneva, 12 August 1949), *ibid.*, No. 973, p. 287 (hereinafter, Fourth Geneva Convention), art. 144; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Additional Protocol II) (Geneva, 8 June 1977), *ibid.*, No. 17513, p. 609, art. 19; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Additional Protocol III) (Geneva, 8 December 2005), *ibid.*, vol. 2404, No. 43425, p. 261, art. 7; and 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 (Convention on Certain Conventional Weapons) (Geneva, 10 October 1980), *ibid.*, vol. 1342, No. 22495, p. 137, art. 6. See also J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. I, *Rules* (Cambridge, Cambridge University Press, 2005), rule 143, pp. 505–508.

³⁴⁸ First Geneva Convention, art. 1; Second Geneva Convention, art. 1; Third Geneva Convention, art. 1; Fourth Geneva Convention, art. 1.

³⁴⁹ Examples of States that have introduced such provisions in their military manuals include Argentina, Australia, Belgium, Benin, Burundi, Canada, 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 at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule45 (accessed on 31 May 2022).

³⁵⁰ See ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict* (footnote 345 above), paras. 303–304. See also more generally Rules 26 and 27.

³⁵¹ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, *I.C.J. Reports 1986*, p. 14, at pp. 114–115, para. 220; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, *I.C.J. Reports 2004*, p. 136, at pp. 199–200, paras. 158–159; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 347 above), rule 144, p. 509. See also ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict* (footnote 345 above), paras. 303–304. For a more comprehensive overview, including on different positions regarding the existence and extent of positive obligations in this regard, see ICRC commentary (2020) to the Third Geneva Convention, art. 1, para. 202 (the commentaries on the Geneva Conventions of 1949 and the Protocols thereto are available from www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions (accessed on 2 August 2022)).

³⁵² Additional Protocol I, art. 36.

be used.³⁵³ According to the International Committee of the Red Cross (ICRC) commentary on the Additional Protocols, article 36 “implies the obligation to establish internal procedures for the purpose of elucidating the issue of legality”. A number of States, including States not party to Additional Protocol I, are known to have established such procedures.³⁵⁴

(8) The obligation to conduct “a weapons review” binds all States parties to Additional Protocol I. The reference to “any other rule of international law applicable” makes it clear that the obligation goes beyond merely studying whether the employment of a certain weapon would be contrary to Additional Protocol I, including articles 35 and 55, which are of direct relevance to the protection of the environment. In other words, there is a need to 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 also includes taking into account any applicable international environmental law and human rights obligations.³⁵⁵

(9) While Additional Protocol I applies only to international armed conflicts, the weapons review provided for in article 36 also promotes respect for the law in non-international armed conflicts. For instance, 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.³⁵⁶ These rules are not limited to international armed conflict.³⁵⁷ 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. Furthermore, with regard to both international and non-international armed conflicts, the prohibitions of certain weapons, means and methods of warfare (such as biological and chemical weapons) under treaty or customary international law must be observed when engaging in a weapons review.

(10) States also have the obligation to investigate war crimes that may have been committed by their nationals or armed forces, or on their territory, or over which they have

³⁵³ C. Pilloud and J. Pictet, “Article 35: Basic rules”, in Y. Sandoz, C. Swinarski and B. Zimmerman (eds.), *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987), p. 398, para. 1402. The commentary on “Article 36: New weapons” refers to this section for an explanation of means and methods on p. 425, para. 1472.

³⁵⁴ Based on information received from ICRC in June 2022, 13 States are known to have in place national mechanisms to review the legality of weapons and have made public their review mechanisms through domestic legislation, military manuals, public statements or other sources: Australia, Belgium, Denmark, Germany, Israel, Italy, the Netherlands, New Zealand, Norway, Sweden, Switzerland, the United Kingdom and the United States. Another six States have indicated publicly that they conduct legal reviews without making public national review procedures or the instruments setting up such procedures: Argentina, China, Canada, Finland, France and the Russian Federation. Five other States have indicated to ICRC that they carry out reviews pursuant to Ministry of Defence’s mandate and instructions. Additionally, Spain is in the process of revising an instruction in order to implement weapons review.

³⁵⁵ 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 Casey-Maslen (ed.), *Weapons under International Human Rights Law* (Cambridge, Cambridge University Press, 2014).

³⁵⁶ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (see footnote 347 above), rules 70 and 71, pp. 237–250.

³⁵⁷ By virtue of the rule of customary international law 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 at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule71#Fn_1_19 (accessed on 2 August 2022). See also ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), Rule 32 and commentary thereto.

jurisdiction, and, if appropriate, prosecute the suspects.³⁵⁸ This obligation extends to war crimes that concern the environment, for instance the pillaging of natural resources,³⁵⁹ and the extensive destruction and appropriation of property that is not justified by military necessity and is carried out wantonly and unlawfully.³⁶⁰

(11) Paragraph 2 of the draft principle addresses voluntary measures that would further enhance the protection of the environment in relation to armed conflict. Like the measures referred to in paragraph 1, the measures taken by States may be of legislative, judicial, administrative or other nature. To the extent that they do not reflect customary or treaty-based obligations of States, the current draft principles provide examples of effective voluntary measures to enhance the protection of the environment in relation to armed conflicts.

(12) Paragraph 2 also covers situations in which a State is not bound by a certain treaty but applies its provisions as a matter of policy. It may furthermore refer to situations in which certain treaty provisions or rules of customary international law applicable to international armed conflicts are applied as a matter of policy to the protection of the environment irrespective of the type of armed conflict in question. The ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict include a recommendation to this effect.³⁶¹ States could furthermore conclude special agreements providing additional protection to the environment in situations of armed conflict.³⁶²

(13) In addition to encouraging States to take voluntary measures to enhance the protection of the environment in relation to armed conflicts beyond their obligations under international law, the paragraph captures recent developments in the practice of States to this end.³⁶³ Other

³⁵⁸ First Geneva Convention, art. 50; Second Geneva Convention, art. 51; Third Geneva Convention, art. 130; Fourth Geneva Convention, art. 147; Additional Protocol I, arts. 11 and 85; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 347 above), rules 157 and 158, pp. 604–610. According to these two rules, States must exercise the criminal jurisdiction which their national legislation confers upon their courts, be it limited to territorial and personal jurisdiction, or including also universal jurisdiction, which is obligatory for grave breaches. See also Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3, art. 8, para. 2 (a) (iv), and (b) (ii), (v), (xiii), (xvi), (xvii) and (xviii), as well as art. 8, para. 2 (e) (v), (xii), (xiii), and (xiv). See also ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), Rule 28 and commentary thereto.

³⁵⁹ Convention (IV) Respecting the Laws and Customs of War on Land (The Hague, 18 October 1907), Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land, *Consolidated Treaty Series*, vol. 207, p. 277 (the Hague Regulations), arts. 28 and 47; Fourth Geneva Convention, art. 33, para. 2; Additional Protocol I, art. 4, para. 2 (g); ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), Rule 14.

³⁶⁰ Hague Regulations, art. 23 (g); Fourth Geneva Convention, art. 53; ICRC, Guidelines on the Protection of the Natural Environment (footnote 345 above), Rule 13.

³⁶¹ ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), Recommendation 18: “If not already under the obligation to do so under existing rules of international humanitarian law, each party to a non-international armed conflict is encouraged to apply to that conflict all or part of the international humanitarian law rules protecting the natural environment in international armed conflicts”. See also ICRC, resolution 1 adopted by the 33rd International Conference of the Red Cross and Red Crescent, 9–12 December 2019 (33IC/19/R1), “Bringing IHL home: A road map for better national implementation of international humanitarian law”: para. 13 of the resolution “invites States to share examples of and exchange good practices of national implementation measures taken in accordance with IHL obligations as well as other measures that may go beyond States’ IHL obligations”.

³⁶² For special agreements, see First Geneva Convention, art. 6; Second Geneva Convention, art. 6; Third Geneva Convention, art. 6; Fourth Geneva Convention, art. 7. See also common art. 3 of the Geneva Conventions. See further ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), Recommendation 17, “Conclusion of agreements to provide additional protection to the natural environment”.

³⁶³ See, e.g., Slovenia, Rules of Service in the Slovenian Armed Forces, item 210, available at <https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2009-01-3757?sop=2009-01-3757> (accessed on 2 August 2022); Paraguay, National Defence Council, *Política de Defensa Nacional de la Republica de Paraguay* [National Defence Policy of the Republic of Paraguay], 7 October 1999, para. I (A), available at

measures that should be taken by States can aim at enhancing cooperation, as appropriate, with other States, as well as with relevant international organizations.

Principle 4
Designation of protected zones

States should designate, by agreement or otherwise, areas of environmental importance as protected zones in the event of an armed conflict, including where those areas are of cultural importance.

Commentary

(1) Draft principle 4 is entitled “Designation of protected zones” and provides that States should designate, by agreement or otherwise, areas of environmental importance as protected zones, including where those areas are of cultural importance. Part Two (“Principles of general application”), where this provision is placed, deals with the pre-conflict stage, when peace is prevailing, but also contains principles of a more general nature that are relevant to more than one temporal phase. While the designation of protected zones could take place at any time, it should preferably be done before or at least at the outset of an armed conflict. The phrase “in the event of an armed conflict” indicates that the designation of an area as a protected zone may be made with a possible future event of an armed conflict in mind. In addition, draft principle 4 has a corresponding draft principle (draft principle 18) which is placed in Part Three “Principles applicable during armed conflict”.

(2) The areas referred to in draft principle 4 may be designated by agreement or otherwise. The types of situations foreseen may include, *inter alia*, an agreement concluded verbally or in writing, or through reciprocal and concordant declarations, as well as those created through a unilateral declaration or designation through an international organization. It should be noted that the word “State” does not preclude the possibility of agreements being concluded with non-State actors.

(3) It is not uncommon that geographic areas are assigned a special legal status as a means to ensure their protection and preservation. This can be done through international agreements or through national legislation. In some instances such areas are not only protected in peacetime, but are also protected from attack during an armed conflict.³⁶⁴ As a rule, this is the case with demilitarized and neutralized zones. Demilitarized zones are established by the parties to a conflict and imply that the parties are prohibited from extending their military operations to that zone if such an extension is contrary to the terms of their agreement.³⁶⁵ Demilitarized zones can also be established and implemented in peacetime.³⁶⁶ Most notably from the point of view of environmental protection, no particular criteria have been set regarding the type of area that can be designated as a demilitarized zone, which therefore can be established even outside populated areas.

https://www.mdn.gov.py/application/files/1114/4242/5025/Politica_de_Defensa.pdf (accessed on 2 August 2022). See also contributions in the Sixth Committee from Croatia (A/C.6/70/SR.24), para. 89, Cuba (*ibid.*), para. 10, Czech Republic (*ibid.*), para. 45, New Zealand, (A/C.6/74/SR.26), para. 92, Palau (A/C.6/70/SR.25), paras. 27–28.

³⁶⁴ A/CN.4/685, para. 210.

³⁶⁵ See Additional Protocol I, art. 60. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 347 above), rule 36, p. 120. The ICRC study on customary law considers that this constitutes a rule under customary international law and is applicable in both international and non-international armed conflicts.

³⁶⁶ See e.g. Antarctic Treaty (Washington, 1 December 1959), United Nations, *Treaty Series*, vol. 402, No. 5778, p. 71, art. I. See, e.g., the definition found in M. Björklund and A. Rosas, *Ålandsöarnas Demilitarisering och Neutralisering* (Åbo, Åbo Academy Press, 1990). The Åland Islands are both demilitarized and neutralized. Björklund and Rosas list as further examples of demilitarized and neutralized areas Spitzbergen, Antarctica and the Strait of Magellan (*ibid.*, p. 17). See also L. Hannikainen, “The continued validity of the demilitarized and neutralized status of the Åland Islands”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 54 (1994), p. 614, at p. 616.

(4) Granting special protection to areas of ecological importance was suggested at the time of the drafting of the Additional Protocols to the Geneva Conventions.³⁶⁷ Reference can furthermore be made to the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, which encouraged the parties to the conflict “to agree that no hostile actions will be conducted in marine areas containing: (a) rare or fragile ecosystems; or (b) the habitat of depleted, threatened or endangered species or other forms of marine life.”³⁶⁸ The United Nations Environment Programme also recommended in 2009 that a new legal instrument be elaborated “for place-based protection of critical natural resources and areas of ecological importance during armed conflicts”.³⁶⁹ Most recently, the ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict recommended that areas of particular environmental significance or fragility could be designated as demilitarized zones.³⁷⁰

(5) Certain multilateral environmental conventions also establish area-based protection of the environment. For instance, the Convention on Biological Diversity requests States parties, as far as possible and appropriate, to “establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity”.³⁷¹ Under the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention),³⁷² endangered sites can be listed in the Montreux Records “where an adverse change in ecological character has occurred, is occurring, or is likely to occur, and which are therefore in need of priority conservation attention”.³⁷³ According to the Convention concerning the Protection of the World Cultural and Natural Heritage, a site can be included by the World Heritage Committee on the List of World Heritage in Danger.³⁷⁴ Sites threatened or affected by an armed conflict are included in both the World Heritage Convention and the Ramsar Convention lists.³⁷⁵

³⁶⁷ The working group of Committee III of the Conference submitted a proposal for a draft article 48 *ter* providing that “publicly recognized nature reserves with adequate markings and boundaries declared as such to the adversary shall be protected and respected except when such reserves are used specifically for military purposes”. See C. Pilloud and J. Pictet, “Article 55: Protection of the natural environment” in Sandoz *et al.*, *ICRC Commentary on the Additional Protocols ...* (footnote 353 above), p. 664, paras. 2138–2139.

³⁶⁸ L. Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (International Institute of Humanitarian Law, Cambridge, Cambridge University Press, 1995), para. 11. The paragraph reflects art. 194, para. 5, of the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, p. 397.

³⁶⁹ United Nations Environment Programme, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (Nairobi, United Nations Environment Programme, 2009), Recommendation 9, available at https://wedocs.unep.org/bitstream/handle/20.500.11822/7813/-Protecting%20the%20Environment%20During%20Armed%20Conflict_An%20Inventory%20and%200Analysis%20of%20International%20Law-2009891.pdf?sequence=3&isAllowed= (accessed on 2 August 2022).

³⁷⁰ ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), Recommendation 17 and commentary thereto.

³⁷¹ Convention on Biological Diversity (Rio de Janeiro, 5 June 1992), United Nations, *Treaty Series*, vol. 1760, No. 30619, p. 79, art. 8 (“In-situ conservation”). See also S.L. Maxwell *et al.*, “Area-based conservation in the twenty-first century”, *Nature*, No. 586 (2020), pp. 217–227.

³⁷² Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar, 2 February 1971), United Nations, *Treaty Series*, vol. 996, No. 14583, p. 245.

³⁷³ Ramsar Convention, resolution VI.1 (1996) adopted by the 6th Meeting of the Conference of the Contracting Parties (Brisbane, Australia, 19–27 March 1996), annex 3, Guidelines for operation of the Montreux Record, art. 3.1.

³⁷⁴ Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Convention) (Paris, 16 November 1972), United Nations, *Treaty Series*, vol. 1037, No. 15511, p. 151, art. 11, para. 4. See also the UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention (8 July 2015) WHC.15/01.

³⁷⁵ Out of the 52 properties listed in accordance with article 11, paragraph 4, of the World Heritage Convention, 33 are endangered because of an armed conflict. The list is available at <https://whc.unesco.org/en/danger/> (last accessed on 14 June 2022). The Montreux Records are available at www.ramsar.org/search?search_api_views_fulltext=montreux+records (last accessed on 2 August 2022).

(6) When designating protected zones under this draft principle, particular weight should be given to the protection of areas of environmental importance that are susceptible to the adverse consequences of hostilities.³⁷⁶ In line with the conventions referred to above, the provision does not contain any further qualifier, such as “major”, which could be seen as unnecessarily raising the threshold beyond existing standards, and takes into account that any area can be designated as a demilitarized zone under the law of armed conflict.

(7) Protected zones designated in accordance with the current draft principle may also be areas of cultural importance, as it is sometimes difficult to draw a clear line between areas which are of environmental importance and areas which are of cultural importance. This is also recognized in the World Heritage Convention: the fact that the heritage sites under this Convention are selected on the basis of a set of 10 criteria, including both cultural and natural (without differentiating between them), illustrates this point.³⁷⁷ The International Union for Conservation of Nature and Natural Resources (IUCN) furthermore defines a protected area as “a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values”.³⁷⁸

(8) It should be recalled that, prior to an armed conflict, States parties to the Convention for the Protection of Cultural Property in the Event of Armed Conflict³⁷⁹ (1954 Hague Convention) and its Protocols, are under the obligation to establish inventories of cultural property items that they wish to enjoy protection in the case of an armed conflict, in accordance with article 11, paragraph 1, of the 1999 Protocol to the Convention.³⁸⁰ In peacetime, States parties are required to take other measures that they find appropriate to protect their cultural property from anticipated adverse impacts of armed conflicts, in accordance with article 3 of the Convention.

(9) The purpose of the present draft principle is not to affect the regime of the 1954 Hague Convention, which is distinct in its scope and purpose. While draft principle 4 does not extend to cultural objects *per se*, the term “cultural” is used in this context to indicate the existence of a close linkage to the environment. The term would include, for example, ancestral lands of indigenous peoples, who depend on the environment for their sustenance and livelihood.

(10) The designation of the areas foreseen by this draft principle can be related to the rights of indigenous peoples, particularly if the protected area also serves as a sacred area which warrants special protection. In some cases, the protected area may also serve to conserve the particular culture, knowledge and way of life of the indigenous populations living in the area concerned. The importance of preserving indigenous culture and knowledge has been formally recognised in international law under the Convention on Biological Diversity.³⁸¹ In addition, the United Nations Declaration on the Rights of Indigenous Peoples³⁸² refers to the right to manage, access and protect religious and cultural sites.

(11) The term “cultural importance”, which is also used in draft principle 18, builds on the recognition of the close connection between the environment, cultural objects and

³⁷⁶ See [A/CN.4/685](#), para. 225. See also C. Droegge and M.-L. Tougas, “The protection of the natural environment in armed conflict – existing rules and need for further legal protection”, *Nordic Journal of International Law*, vol. 82 (2013), pp. 21–52, at p. 43.

³⁷⁷ UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention (see footnote 374 above), para. 77.1. At present, 197 sites representing natural heritage across the world are listed on the World Heritage List. A number of these also feature on the List of World Heritage in Danger in accordance with article 11, paragraph 4, of the World Heritage Convention.

³⁷⁸ Available at <https://portals.iucn.org/library/sites/library/files/documents/PAG-019.pdf> (last accessed 2 August 2022).

³⁷⁹ Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954), United Nations, *Treaty Series*, vol. 249, No. 3511, p. 240.

³⁸⁰ Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999 Second Protocol) (The Hague, 26 March 1999), *ibid.*, vol. 2253, No. 3511, p. 172.

³⁸¹ Convention on Biological Diversity, art. 8 (j). See also Intergovernmental Science-Policy Panel on Biodiversity and Ecosystem Services, Summary for policymakers of the methodological assessment of the diverse values and valuation of nature, IPBES/9/L.13, 9 July 2022.

³⁸² General Assembly resolution [61/295](#), annex, art. 12.

characteristics in the landscape in environmental protection instruments such as the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.³⁸³ Reference can also be made to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, which stipulates that “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”.³⁸⁴ Moreover, the Convention on Biological Diversity acknowledges the cultural value of biodiversity.³⁸⁵

(12) A few examples of domestic legislation referring to the protection of both cultural and environmental areas can also be mentioned in this context. For example, the Act on the Protection of Cultural Property of 29 August 1950 of Japan, provides for animals and plants which have a high scientific value to be listed as “protected cultural property”.³⁸⁶ The National Parks and Wildlife Act of 1974 of New South Wales in Australia may apply to any area of natural, scientific or cultural significance,³⁸⁷ and the Italian Protected Areas Act of 6 December 1991 defines “nature parks” as areas of natural and environmental value constituting homogeneous systems characterised by their natural components, their landscape and aesthetic values and the cultural tradition of the local populations.³⁸⁸

Principle 5

Protection of the environment of indigenous peoples

1. States, international organizations and other relevant actors shall take appropriate measures, in the event of an armed conflict, to protect the environment of the lands and territories that indigenous peoples inhabit or traditionally use.
2. When an armed conflict has adversely affected the environment of the lands and territories that indigenous peoples inhabit or traditionally use, States shall undertake appropriate and 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 5 concerns the protection of the environment of indigenous peoples in relation to armed conflicts. The draft principle recognizes the crucial role that these peoples, lands and territories play in the conservation of biological diversity.³⁸⁹ According to

³⁸³ Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993), Council of Europe, *European Treaty Series*, No. 150, art. 2, para. 10 (defining the term “environment” for the purpose of the Convention to include: “natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape”).

³⁸⁴ Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992), United Nations, *Treaty Series*, vol. 1936, No. 33207, p. 269, art. 1, para. 2.

³⁸⁵ Convention on Biological Diversity, preamble and annex I, para. 1.

³⁸⁶ Japan, Law for the Protection of Cultural Property, Law No. 214, 30 May 1950. Available from www.unesco.org/culture/natlaws/media/pdf/japan/japan_lawprotectionculturalproperty_engtof.pdf (accessed on 2 August 2022).

³⁸⁷ Australia, New South Wales Consolidated Acts, National Parks and Wildlife Act, Act 80 of 1974. Available from www.austlii.edu.au/au/legis/nsw/consol_act/npawa1974247/ (accessed on 2 August 2022).

³⁸⁸ Italy, Act No. 394 laying down the legal framework for protected areas, 6 December 1991. Available from <http://faolex.fao.org> (accessed on 2 August 2022).

³⁸⁹ While indigenous peoples account for just 6 per cent of the total human population, they hold tenure over 25 per cent of the world’s land surface and safeguard 80 per cent of the global land biodiversity. See The World Bank, “Indigenous peoples”, 14 April 2022, available at www.worldbank.org/en/topic/indigenouspeoples (accessed on 16 June 2022). See also Department of Economic and Social Affairs, “Challenges and opportunities for indigenous peoples’ sustainability”,

paragraph 1, States, international organizations and other relevant actors shall, due to the special relationship between indigenous peoples and their environment, take appropriate measures to protect the lands and territories of indigenous peoples in the event of an armed conflict.

(2) As a general reminder of the need to protect the environment of indigenous peoples, paragraph 1 addresses a broad range of actors: States, international organizations and other relevant actors. Paragraph 1 takes into account the role of international organizations when administering territory, as well as the role that certain non-State armed groups may play when exercising *de facto* control over a territory. Regarding the latter, it should be recalled that parties to an armed conflict have an obligation to protect the environment in accordance with the law of armed conflict. While the extent to which non-State armed groups have obligations under human rights law is still debated, their obligations are well established in situations in which they exercise control over a territory.

(3) Paragraph 2, however, is only addressed to States. It recognizes that where armed conflict has adversely affected the environment of indigenous peoples' lands and territories, States shall undertake remedial measures. In light of the special relationship between indigenous peoples and their environment, these steps shall be taken in a manner that respects this relationship and in consultation and cooperation with such peoples, in particular through their own leadership and representative institutions.

(4) The special relationship between indigenous peoples and their environment has been recognized, protected and upheld by international instruments such as the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization and the United Nations Declaration on the Rights of Indigenous Peoples,³⁹⁰ as well as in the practice of States and in the jurisprudence of international courts and tribunals. To this end, the lands of indigenous peoples have been recognized as having a fundamental importance for their collective physical and cultural survival as peoples.³⁹¹

(5) Paragraph 1 is based 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”,³⁹² and article 7, paragraph 4, of ILO Convention No. 169, 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”. It furthermore builds on the jurisprudence of regional courts and tribunals.³⁹³ Reference can

23 April 2021, available at www.un.org/development/desa/dspd/2021/04/indigenous-peoples-sustainability/ (accessed on 16 June 2022).

³⁹⁰ See International Labour Organization (ILO), Convention concerning Indigenous and Other Tribal Peoples in Independent Countries (Geneva, 27 June 1989) (Indigenous and Tribal Peoples Convention, 1989 (No. 169)), which revised the Indigenous and Tribal Populations Convention, 1957 (No. 107); United Nations Declaration on the Rights of Indigenous Peoples, art. 26. See also American Declaration on the Rights of Indigenous Peoples, adopted on 15 June 2016, Organization of American States, General Assembly, *Report of the Forty-Sixth Regular Session, Santo Domingo, Dominican Republic, June 13–15, 2016*, XLVI-O.2, *Proceedings*, vol. 1, resolution AG/RES. 2888 (XLVI-O/16).

³⁹¹ The Inter-American Court of Human Rights recognized “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”, see *Río Negro Massacres v. Guatemala*, Judgment (Preliminary Objection, Merits, Reparations and Costs), Series C, Case No. 250, 4 September 2012, para. 177, footnote 266. See also *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), Series C, Case No. 125, 17 June 2005, para. 135, and *Case of Chitay Nech et al. v. Guatemala*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), Series C, Case No. 212, 25 May 2010, para. 147, footnote 160.

³⁹² See also American Declaration on the Rights of Indigenous Peoples, art. XIX, para. 4.

³⁹³ Inter-American Court of Human Rights: *Sawhoyamaxa Indigenous Community v. Paraguay* (Merits, Reparations and Costs), Series C, No. 146, 29 March 2006; *Saramaka People v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), Series C, No. 172, 28 November 2007,

also be made to the obligation under the Convention on Biological Diversity to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.³⁹⁴

(6) The specific rights of indigenous peoples over certain lands or territories are 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 and territories connected to indigenous peoples, and over which they have various rights and protected status. The phrase “lands and territories which indigenous peoples inhabit or traditionally use” builds on established language on the relevant international instruments.³⁹⁵

(7) Armed conflict may have the effect of increasing existing vulnerabilities to environmental harm or creating new types of environmental harm on the lands and 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, international organizations and other relevant actors shall take appropriate measures to protect the relationship that indigenous peoples have with their ancestral lands and territories. The appropriate protective measures referred to in paragraph 1 may be taken, in particular, before or during an armed conflict. Under this provision, States, international organizations and other relevant actors are expected to take measures only if they have a connection to the indigenous people and environment at issue. The word “appropriate” also qualifies the obligation and allows for the measures to be adjusted according to the circumstances.

(8) According to the United Nations Declaration on the Rights of Indigenous Peoples, the concerned State shall 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 people concerned.³⁹⁶ 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 4. In general, the concerned State shall consult effectively with the indigenous peoples concerned prior to using their lands or territories for military activities.³⁹⁷ 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.³⁹⁸

para. 134; *Río Negro Massacres v. Guatemala* (see footnote 391 above); and *Kaliña y Lokono Peoples v. Suriname* (Merits, Reparations and Costs), Series C, No. 309, 25 November 2015. See further *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, African Court on Human and Peoples’ Rights, Case No. 006/2012, Judgment, 25 May 2017, paras. 122–131, and *Centre for Minority Rights in Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No. 276/2003, African Commission on Human and Peoples’ Rights, Decision, 4 February 2010.

³⁹⁴ Convention on Biological Diversity, art. 8 (j). See also para. (10) of the commentary to draft principle 4 above.

³⁹⁵ See, for example, “lands or territories, or both as applicable, which they occupy or otherwise use” used in art. 13, para. 1, of ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), or “lands, territories and resources” used in the preamble of the United Nations Declaration on the Rights of Indigenous Peoples.

³⁹⁶ 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 people concerned.

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.”

³⁹⁷ *Ibid.*

³⁹⁸ See the American Declaration on the Rights of Indigenous Peoples, art. XXX, paras. 3 and 4, which read:

(9) Paragraph 2 focuses on the harm caused as a result of an armed conflict. 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 lands and territories that indigenous peoples inhabit or traditionally use.³⁹⁹ In doing so, it seeks to ensure the participatory rights of indigenous peoples in issues relating to their territories in a post-conflict context.

(10) In such a case, the concerned States shall undertake appropriate and effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and, in particular, through their own representative institutions. The word “shall” reflects the established nature of the obligation of consultation.⁴⁰⁰

(11) The reference to 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.⁴⁰¹ The reference to appropriate consultations allows for the representative structures to be adjusted to the particular situation. It also draws attention to the need for the consultations to be culturally appropriate.⁴⁰² The consultations must in any event be effective in practice in order not to put in jeopardy the substantive right of indigenous peoples to redress.⁴⁰³

“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 ...”.

³⁹⁹ According to the United Nations Declaration on the Rights of Indigenous Peoples, article 28, “[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”. Similarly, the American Declaration on the Rights of Indigenous Peoples, art. XXXIII, 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 full and effective participation of indigenous peoples, shall provide the necessary mechanisms for the exercise of this right.”

⁴⁰⁰ 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”. See *Saramaka People v. Suriname* (footnote 393 above), para. 134. See also the Indigenous and Tribal Peoples Convention, 1989 (No. 169), art. 6, para. 1. See further ILO, “Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Handbook for ILO Tripartite constituents” (Geneva, International Labour Office, 2013), which refers to the consultations using such words as “good faith”, “genuine dialogue” and “meaningful”. In Canada, the duty to consult with indigenous peoples has been interpreted to mean good faith consultation with requirements depending on the potential adverse effect. See, e.g. Canada, Supreme Court of Canada, *Haida Nation v. British Columbia (Minister of Forests)*, Judgment, 18 November 2004.

⁴⁰¹ 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”. See *Saramaka People v. Suriname* (footnote 393 above), para. 134.

⁴⁰² Report of the Special Rapporteur on the Rights of Indigenous Peoples (A/HRC/45/34), para. 55.

⁴⁰³ For the right of redress of indigenous peoples, see United Nations Declaration of the Rights of Indigenous Peoples, art. 28, and the American Declaration on the Rights of Indigenous Peoples, art. XXXIII.

Principle 6

Agreements concerning the presence of military forces

States and international organizations should, as appropriate, include provisions on environmental protection in relation to armed conflict in agreements concerning the presence of military forces. Such provisions should address measures to prevent, mitigate and remediate harm to the environment.

Commentary

(1) Draft principle 6 addresses agreements concluded between States or between States and international organizations, concerning the presence of military forces. The phrase “in relation to armed conflict” reflects 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.

(2) The draft principle is cast in general terms to refer to “agreements concerning the presence of military forces”. 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 matters relating to environmental protection have been included in agreements concerning the presence of military forces concluded with host States.⁴⁰⁴ The word “should” indicates that the principle 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 include the United States-Iraq agreement on the withdrawal from and temporary presence of United States forces in Iraq, which contains an explicit provision on the protection of the environment.⁴⁰⁵ 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.⁴⁰⁶ The status-of-mission agreement under the European Security and Defence Policy also makes several references to environmental obligations.⁴⁰⁷ Relevant treaty practice not directly related to armed conflicts includes the agreement between Germany and other NATO States, which provides that potential environmental effects shall be identified, analysed and evaluated, in

⁴⁰⁴ 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 (*Official Journal* L 082, 29/03/2003 P. 0046 – 0051, annex; hereinafter, “*Concordia* status-of-forces agreement”), art. 9, provided a duty to respect international norms regarding, *inter alia*, the sustainable use of natural resources. See 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, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22003A0329\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22003A0329(01)) (accessed on 2 August 2022).

⁴⁰⁵ 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”). Available at https://www.dcaf.ch/sites/default/files/publications/documents/US-Iraqi_SOFA-en.pdf (accessed on 2 August 2022).

⁴⁰⁶ 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), *International Legal Materials*, vol. 54 (2015), pp. 272–305, art. 5, para. 6, art. 6, para. 1, and art. 7, para. 2.

⁴⁰⁷ 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, paragraph 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). Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A42003A1231%2801%29> (accessed on 2 August 2022).

order to avoid environmental burden.⁴⁰⁸ Similarly, the Memorandum of Special Understanding between the United States and the Republic of Korea contains provisions on environmental protection.⁴⁰⁹ Furthermore, in 2015, Japan and the United States concluded a Supplementary Agreement on cooperation in the field of environmental stewardship relating to the United States Armed Forces in Japan.⁴¹⁰ Reference can further be made to the status-of-forces agreement between the United States and Australia, which contains a relevant provision on damage claims,⁴¹¹ and the Enhanced Defense Cooperation Agreement between the United States and the Philippines, which contains provisions seeking to prevent environmental damage and provides for a review process.⁴¹² Certain arrangements applicable to short-term presence of foreign armed forces in a country for the purpose of exercises, transit by land or training, also contain environmental provisions.⁴¹³

(4) 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 from facilities and areas granted to the deploying State;⁴¹⁴ an understanding that the agreement will be implemented in a manner consistent with protecting the environment;⁴¹⁵ cooperation and sharing of information between the host State and the sending State regarding issues that could affect the health and environment of citizens;⁴¹⁶ measures to prevent environmental damage;⁴¹⁷ spill response and prevention,⁴¹⁸ periodic environmental performance assessments;⁴¹⁹ review processes;⁴²⁰ application of the

⁴⁰⁸ 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), United Nations, *Treaty Series*, vol. 481, No. 6986, p. 329, 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.

⁴⁰⁹ Memorandum of Special Understanding 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 at www.usfk.mil/Portals/105/Documents/SOFA/A12_MOSU.Environmental.Protection.pdf (accessed on 2 August 2022).

⁴¹⁰ Agreement between Japan and the United States of America on cooperation in the field of environmental stewardship relating to the United States Armed Forces in Japan, Supplementary to the Agreement under Article VI of the Treaty of Mutual Cooperation and Security between Japan and the United States of America, regarding Facilities and Areas and the Status of United States Armed Forces in Japan (Washington, D.C., 28 September 2015), *Treaties and Other International Acts Series* 15-928, available at <https://purl.fdlp.gov/GPO/gpo66458> (accessed on 2 August 2022).

⁴¹¹ Agreement concerning the Status of United States Forces in Australia (Canberra, 9 May 1963), United Nations, *Treaty Series*, vol. 469, No. 6784, p. 55 (United States-Australia Agreement), art. 12, para. 7.

⁴¹² Agreement between the Philippines and the United States on enhanced defense cooperation (United States-Philippines Agreement) (Quezon City, 28 April 2014), art. IX. Available at www.officialgazette.gov.ph/2014/04/29/document-enhanced-defense-cooperation-agreement/ (accessed on 2 August 2022).

⁴¹³ 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 at www.defmin.fi/files/2898/HNS_MOU_FINLAND.pdf (accessed on 9 June 2022) reference HE 82/2014. According to art. 5.3 (g), sending nations must follow host nation environmental regulations as well as any host nation’s regulations for the storage, movement, or disposal of hazardous materials.

⁴¹⁴ See United States-Republic of Korea Memorandum.

⁴¹⁵ See United States-Iraq Agreement, art. 8.

⁴¹⁶ See United States-Republic of Korea Memorandum.

⁴¹⁷ See United States-Philippines Agreement, art. IX, para. 3, and NATO-Germany Agreement, art. 54A.

⁴¹⁸ Supplementary Agreement between Japan and the United States, art. 3, para. 1.

⁴¹⁹ These assessments could identify and evaluate the environmental aspects of the operation and can be accompanied by a commitment to plan, program and budget for these requirements accordingly, as in done the United States-Republic of Korea Memorandum.

⁴²⁰ See United States-Philippines Agreement, art. IX, para. 2.

environmental laws of the host State⁴²¹ or, similarly, a commitment by the deploying State to respect the host State's environmental laws, regulations and standards;⁴²² a duty to respect international norms regarding the sustainable use of natural resources;⁴²³ the taking of restorative measures where detrimental effects are unavoidable;⁴²⁴ and the regulation of environmental damage claims.⁴²⁵

(5) The phrase “as appropriate” signals two different considerations. First, it takes into account that sometimes it may be especially important that the agreement contains provisions on environmental protection, for instance where a protected zone would be at risk of being adversely affected by the presence of military forces. Second, the draft principle does not apply to agreements in which it would not be appropriate to refer to armed conflicts. The phrase “as appropriate” therefore provides nuance to this provision and allows it to capture different situations.

Principle 7 **Peace operations**

States and international organizations involved in peace operations established in relation to armed conflicts shall consider the impact of such operations on the environment and take, as appropriate, measures to prevent, mitigate and remediate the harm to the environment resulting from those operations.

Commentary

(1) Peace operations can relate to armed conflicts in multiple ways. Previously, many peace operations were deployed following the end of hostilities and the signing of a peace agreement.⁴²⁶ 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.⁴²⁷ Moreover, modern United Nations peacekeeping missions are multidimensional and address a range of peacebuilding activities, from providing secure environments to monitoring human rights or rebuilding the capacity of a State.⁴²⁸ Mandates also include the protection of civilians.⁴²⁹ Draft principle 7 intends 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) There is no clear or definitive definition for “peace operation” or “peacekeeping” in existing international law. The current draft principle is intended to cover broadly all such peace operations that are established in relation to armed conflict. The Agenda for Peace highlighted that “peacemaking” was action to bring hostile parties to agreement, especially

⁴²¹ See NATO-Germany Agreement, art. 54A, and United States-Australia Agreement, art. 12, para. 7 (e) (i).

⁴²² See United States-Iraq agreement, art. 8.

⁴²³ As is done in art. 9 of the *Concordia* status-of-forces agreement.

⁴²⁴ See NATO-Germany Agreement, art. 54A.

⁴²⁵ NATO-Germany Agreement, art. 41, and United States-Australia Agreement, art. 12, para. 7 (e) (i).

⁴²⁶ Report of the High-level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people (contained in [A/70/95-S/2015/446](#)), para. 23.

⁴²⁷ *Ibid.*

⁴²⁸ 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. See also A. Geslin, “Les organisations internationales et régionales de sécurité et de défense face à la problématique environnementale” in S. J. Kirschbaum, *Les défis du système de sécurité* (Brussels, Bruylant, 2014), pp. 77–94.

⁴²⁹ See for example the following mandates of United Nations-led missions found in Security Council resolutions: United Nations Mission in Sierra Leone (1289 (2000)); United Nations Observer Mission in the Democratic Republic of the Congo (1291 (2000)); United Nations Mission in Liberia (1509 (2003) and 2215 (2015)); United Nations Operation in Burundi (1545 (2004)); United Nations Stabilization Mission in Haiti (1542 (2004)); United Nations Operation in Côte d’Ivoire (1528 (2004) and 2226 (2015)); United Nations Mission in the Sudan (1590 (2005)); African Union-United Nations Hybrid Operation in Darfur (1769 (2007)); and United Nations Mission in the Central African Republic and Chad (1861 (2009)).

through peaceful means;⁴³⁰ “peacekeeping” was the deployment of a United Nations presence in the field, involving military and/or police personnel, and frequently civilians as well;⁴³¹ while “peacebuilding” was to take the form of cooperative projects in a mutually beneficial undertaking to enhance the confidence fundamental to peace.⁴³² 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”.⁴³³ The Security Council understands “United Nations peace operations as peacekeeping operations and special political missions”.⁴³⁴ The term “peace operations” aims to cover all these types of operations, and operations broader than United Nations peacekeeping operations, including peace enforcement operations and operations by regional organizations.

(3) The words “established in relation to armed conflicts” delineate the scope of draft principle 7. They make clear the need for a 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 peace operations have a direct link to armed conflict. Where a peace operation deployed in armed conflict becomes involved in hostilities, obligations under the law of armed conflict apply.

(4) The present draft principle covers operations where States and international organizations are involved in peace operations established in relation to armed conflicts and where multiple actors may be present. All these actors will have some effect on the environment. The different departments and bodies within the United Nations recognize the potential damage by peacekeeping operations to the local environment.⁴³⁵

(5) 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 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 could be negatively affected by a peace operation. At the same time, it is understood that “appropriate” measures to be taken may differ depending on the context of the operation. 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.

(6) The draft principle reflects the enhanced recognition by States and international organizations such as the United Nations, the European Union,⁴³⁶ and NATO,⁴³⁷ of the

⁴³⁰ “An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping” (A/47/277-S/24111), para. 20. See also the supplement thereto, a position paper by the Secretary-General on the occasion of the fiftieth anniversary of the United Nations (A/50/60-S/1995/1).

⁴³¹ *Ibid.*

⁴³² *Ibid.*, para. 56.

⁴³³ A/70/95-S/2015/446, para. 18.

⁴³⁴ Security Council resolution 2594 (2021), fourth preambular paragraph.

⁴³⁵ United Nations, Department of Operational Support, “DOS environment strategy for peace operations (2017–2023)”. Available at https://operationalsupport.un.org/sites/default/files/dos_environment_strategy_execsum_phase_two.pdf (accessed on 9 June 2022). See also United Nations, Chief Executives Board for Coordination, “Strategy for sustainability management in the UN system 2020–2030” (CEB/2019/3/Add.2). Available at https://unemg.org/wp-content/uploads/2019/09/INF_3_Strategy-for-Sustainability-Management-in-the-UN-System.pdf (accessed on 2 August 2022).

⁴³⁶ See, e.g., European Union, “Military concept on environmental protection and energy efficiency for EU-led military operations”, 14 September 2012, document EEAS 01574/12.

⁴³⁷ 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. NATO has also developed a number of standardization agreements concerning, for instance, environmental protection during

environmental impact of peace operations and the need to take necessary measures to prevent, mitigate and remediate negative effects. The phrase “shall consider the [environmental] impact” corresponds to the standard formulation used by the Security Council in the mandates of peace operations, which explicitly tasks the operations to consider the environmental impact of their operations.⁴³⁸ Such operations are expected to budget for and implement multi-year plans regarding waste, energy infrastructure and water and wastewater management, and to ensure that environmental impact assessments are routinely implemented.⁴³⁹ Some United Nations field missions have dedicated environmental units to develop and implement mission-specific environmental policies and oversee environmental compliance.⁴⁴⁰ Reference can also be made to the developing practice regarding climate action, for instance recent NATO decisions concerning the reduction of military emissions.⁴⁴¹ The phrase “as appropriate” indicates a level of flexibility concerning the types of measures to be taken in different situations.

(7) Draft principle 7 is distinct in character from draft principle 6. Peace operations, unlike agreements concerning the presence of military forces, 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 7 is also intended to be broader and more general in scope, and to direct focus on the activities of such peace operations.

Principle 8 Human displacement

States, international organizations and other relevant actors should take appropriate measures to prevent, mitigate and remediate harm to the environment in areas where persons displaced by armed conflict are located, or through which they transit, while providing relief and assistance for such persons and local communities.

Commentary

(1) Draft principle 8 addresses the inadvertent environmental effects of conflict-related human displacement. The draft principle recognizes the interconnectedness of providing

NATO-led military activities (NATO STANAG 7141), available at <https://standards.globalspec.com/std/10301156/STANAG%207141> (accessed on 2 August 2022) and environmental protection best practices and standards for military camps in NATO operations (NATO STANAG 2582), available at <https://standards.globalspec.com/std/9994281/STANAG%202582> (accessed on 2 August 2022).

⁴³⁸ See, for instance, Security Council 2612 (2021), para. 45 (“Requests MONUSCO to consider the environmental impacts of its operations when fulfilling its mandated tasks”). Similar phraseology can be found, for instance, in Security Council resolutions 2531 (2020), para. 59; 2502 (2019), para. 44; 2448 (2018), para. 54; 2423 (2018), para. 67; 2348 (2017), para. 48; 2364 (2017), para. 41; 2295 (2016), para. 39.

⁴³⁹ Department for Operational Support, “DOS environment strategy for peace operations ...” (see footnote 435 above).

⁴⁴⁰ “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.

⁴⁴¹ See Brussels Summit Communiqué issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Brussels 14 June 2021, para. 6 (“To that end we agree: ... g) ... to significantly reduce greenhouse gas emissions from military activities and installations”). See also NATO Climate Change and Security Action Plan, 14 June 2021, para. 6, which refers to the obligations of the member States under the United Nations Framework Convention on Climate Change (New York, 9 May 1992, United Nations, *Treaty Series*, vol. 1771, No. 30882, p. 107), and the Paris Agreement of 2015 (Paris, 4 November 2016, United Nations, *Treaty Series*, vol. 3156, No. 54113). Both NATO documents are available at www.nato.int/cps/en/natohq/news_185000.htm?selectedLocale=en (accessed on 2 August 2022). See further United Nations, United Nations Secretariat Climate Action Plan 2020–2030, September 2019. Available at www.un.org/management/sites/www.un.org.management/files/united-nations-secretariat-climate-action-plan.pdf (accessed on 2 August 2022).

relief for those displaced by armed conflict and reducing the impact of displacement on the environment. The draft principle covers both international and internal displacement.

(2) Population displacement typically follows the outbreak of an armed conflict, giving rise to significant human suffering as well as environmental damage.⁴⁴² The United Nations Environment Programme has reported on “the massive movement of refugees and internally displaced people ... across the country” as perhaps “the most immediate consequence of the conflict [in Liberia]”,⁴⁴³ as well as of “clear and significant” “links between displacement and the environment” in the Sudan.⁴⁴⁴ In Rwanda, the population displacement and resettlement related to the 1990–1994 conflict and genocide “had a major impact on the environment, substantially altering land cover and land use in many parts of the country”,⁴⁴⁵ as well as causing extensive environmental damage in the neighbouring Democratic Republic of the Congo.⁴⁴⁶

(3) Reference can also be made to a 2014 study on the protection of the environment during armed conflict, which emphasizes the humanitarian and environmental impacts of displacement in various conflicts.⁴⁴⁷ The study notes with reference to the Democratic Republic of the Congo that “massive conflict-induced displacement of civilian populations associated with protracted conflict may have even more destructive effects [on] the environment than actual combat operations”.⁴⁴⁸ Non-international armed conflicts, in particular, have caused important effects in terms of displacement, including the environmental strain in the affected areas.⁴⁴⁹ In a similar manner, research based on the post-conflict environmental assessments conducted since the 1990s by the United Nations Environment Programme, the United Nations Development Programme and the World Bank has identified human displacement as one of the six principal pathways for direct environmental damage in conflict.⁴⁵⁰

(4) As the Office of the United Nations High Commissioner for Refugees (UNHCR) has pointed out, considerations relating to access to water, the location of refugee camps and settlements, as well as food assistance by relief and development agencies, “all have a direct bearing on the environment”.⁴⁵¹ Uninformed decisions concerning the siting of a refugee camp in or near a fragile or internationally protected area may result in irreversible – local and distant – impacts on the environment. Areas of high environmental value suffer

⁴⁴² See UNHCR, *UNHCR Environmental Guidelines* (Geneva, 2005). Available at www.refworld.org/docid/4a54bbd10.html (accessed on 2 August 2022). See also UNHCR, CARE International and IUCN, “Environmental perspectives of camp phase-out and closure: a compendium of lessons learned from Africa”, 1 August 2009. Available at www.unhcr.org/en-us/protection/environment/4a967ce69/environmental-perspectives-camp-phase-out-closure-compendium-lessons-learned.html?query=environmental (accessed on 2 August 2022).

⁴⁴³ United Nations Environment Programme, *Desk Study on the Environment in Liberia* (United Nations Environment Programme, 2004), p. 23. Available at <http://wedocs.unep.org/handle/20.500.11822/8396> (accessed on 2 August 2022).

⁴⁴⁴ United Nations Environment Programme, *Sudan Post-Conflict Environmental Assessment* (Nairobi, 2007), p. 115. Available at <https://wedocs.unep.org/handle/20.500.11822/22234> (accessed on 2 August 2022).

⁴⁴⁵ United Nations Environment Programme, *Rwanda: From Post-Conflict to Environmentally Sustainable Development* (Nairobi, 2011), p. 74. Available at https://postconflict.unep.ch/publications/UNEP_Rwanda.pdf (accessed on 2 August 2022).

⁴⁴⁶ As more than 2 million people moved in and out of the country, up to 800,000 people in camps along the border to the Democratic Republic of the Congo had to rely on firewood from the nearby Virunga national park. *Ibid.*, pp. 65–66.

⁴⁴⁷ International Law and Policy Institute, *Protection of the Natural Environment in Armed Conflict: An Empirical Study*, Report 12/2014 (Oslo, 2014).

⁴⁴⁸ *Ibid.*, p. 5.

⁴⁴⁹ *Ibid.*, p. 6.

⁴⁵⁰ D. Jensen and S. Lonergan, “Natural resources and post-conflict assessment, remediation, restoration and reconstruction: lessons and emerging issues”, in Jensen and Lonergan (eds.), *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding* (Abingdon, Earthscan from Routledge, 2012), pp. 411–450, p. 414.

⁴⁵¹ *UNHCR Environmental Guidelines* (footnote 442 above), p. 5. See also G. Lahn and O. Grafham, “Heat, light and power for refugees: saving lives, reducing costs” (Chatham House, 2015).

particularly serious impacts that may be related to the area's biological diversity, its function as a haven for endangered species or for the ecosystem services these provide.⁴⁵² The United Nations Environment Programme⁴⁵³ and the United Nations Environmental Assembly have similarly drawn attention to the environmental impact of displacement.⁴⁵⁴ The General Assembly adopted in 2016 the New York Declaration for Refugees and Migrants, which, *inter alia*, draws attention to the need to combat environmental degradation and contains a commitment to “support environmental, social and infrastructural rehabilitation in areas affected by large movements of refugees”,⁴⁵⁵ and in 2018 the global compact on refugees.⁴⁵⁶ ICRC, too, raises the issue in the updated Guidelines on the Protection of the Natural Environment in Armed Conflict.⁴⁵⁷

(5) The African Union Convention for the Protection of Internally Displaced Persons in Africa, also known as the Kampala Convention, stipulates that States parties shall “[t]ake necessary measures to safeguard against environmental degradation in areas where internally displaced persons are located, either within the jurisdiction of the State Parties, or in areas under their effective control”.⁴⁵⁸ The Kampala Convention applies to internal displacement “in particular as a result of or in order to avoid the effects of armed conflict, situation of generalized violence, violations of human rights or natural or human-made disasters”.⁴⁵⁹

(6) Other recent developments related to displacement and the environment include the Task Force on Displacement, which was established by the Conference of the Parties to the United Nations Framework Convention on Climate Change, and mandated to produce recommendations on integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change.⁴⁶⁰ In 2015, States adopted the Sendai Framework for Disaster Risk Reduction, which calls, *inter alia*, for the promotion of transboundary cooperation to build resilience and reduce the risk of disasters and the risk of displacement.⁴⁶¹ The more recent Global Compact for Safe, Orderly and Regular Migration likewise includes a section on the relationship between migration and environmental degradation.⁴⁶² Although some of these developments focus on the environmental reasons for

⁴⁵² *Ibid.*, p. 7.

⁴⁵³ See United Nations Environment Programme, *Rwanda: From Post-Conflict to Environmentally Sustainable Development* (footnote 445 above). See also United Nations Environment Programme, *Sudan Post-Conflict Environmental Assessment* (footnote 444 above).

⁴⁵⁴ See United Nations Environmental Assembly resolution 2/15 (see footnote 342 above), para. 1.

⁴⁵⁵ New York Declaration for Refugees and Migrants, General Assembly resolution 71/1 of 19 September 2016, paras. 43 and 85.

⁴⁵⁶ Global compact on refugees, General Assembly resolution 73/151 of 17 December 2018: see Report of the United Nations High Commissioner for Refugees: Part II: Global compact on refugees, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 12 (A/73/12 (Part II))*, paras. 78–79.

⁴⁵⁷ ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), paras. 3, 151 and 152.

⁴⁵⁸ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala, 23 October 2009), art. 9, para. 2 (j). Available at <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa> (accessed on 2 August 2022). The Convention entered into force on 6 December 2012.

⁴⁵⁹ *Ibid.*, art. 1 (k).

⁴⁶⁰ Conference of the Parties of the United Nations Framework Convention on Climate Change, Decision 1/CP.21 “Adoption of the Paris Agreement”, para. 49, in Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, Addendum (FCCC/CP/2015/10/Add.1). See also the Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, vol. 1 (2015). Available at <https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf> (accessed on 8 July 2019).

⁴⁶¹ Sendai Framework for Disaster Risk Reduction 2015–2030, para. 28 (adopted at the Third United Nations World Conference on Disaster Risk Reduction and endorsed by the General Assembly in resolution 69/283 of 3 June 2015). Available at <https://disasterdisplacement.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf> (accessed on 2 August 2022).

⁴⁶² General Assembly resolution 73/195 of 19 December 2018, annex. See also General Assembly resolution 73/326 of 19 July 2019 and Global Compact for Safe, Orderly and Regular Migration: Report of the Secretary-General (A/76/642).

– rather than the environmental effects of – displacement, they are indicative of a recognition among States of the nexus between environment and displacement, and the need to foster cooperation and regulation in that field.

(7) Draft principle 8 addresses States, international organizations and other relevant actors, including non-State armed groups, which may exercise *de facto* control over territories in which displaced persons are located or through which they transit. International organizations involved in the protection of displaced people and the environment in conflict-affected areas include UNHCR, the United Nations Environment Programme and other United Nations agencies, as well as the European Union, the African Union, and NATO. “Other relevant actors” referred to in the draft principle may include, *inter alia*, international donors, ICRC, and international non-governmental organizations. All these actors are to take appropriate measures to prevent and mitigate environmental degradation in areas where persons displaced by armed conflict are located, while providing relief and assistance for such persons and local communities in accordance with their international obligations. The terms “relief and assistance” refer generally to the kind of assistance involved where human displacement occurs. These terms are not intended to convey any different meaning from how they are understood in humanitarian work.

(8) Draft principle 8 includes a reference to relief for displaced persons and local communities. The UNHCR Environmental Guidelines note in this regard that the “state of the environment ... will have a direct bearing on the welfare and well-being of people living in that vicinity, whether refugees, returnees or local communities”.⁴⁶³ Providing livelihoods for displaced people is intimately connected with preserving and protecting the environment in which local and host communities are located. Better environmental governance increases resilience for host communities, displaced persons, and the environment as such.

(9) Similarly, the International Organization for Migration has highlighted the importance of “reducing the vulnerability of displaced persons as well as their impacts on the receiving society and ecosystem” as an emerging issue that requires addressing,⁴⁶⁴ and has furthermore developed an Atlas of Environmental Migration.⁴⁶⁵ The World Bank has drawn attention to the issue in its 2009 report “Forced displacement – The development challenge”.⁴⁶⁶ The report highlights the development impacts that displacement can have on environmental sustainability and development, including through environmental degradation.⁴⁶⁷ Reference can also be made to the Draft International Covenant on Environment and Development of IUCN, which includes a paragraph on displacement reading as follows: “Parties shall take all necessary measures to provide relief for those displaced by armed conflict, including internally displaced persons, with due regard to environmental obligations”.⁴⁶⁸

(10) The reference to “providing relief” to persons displaced by conflict and to local communities in draft principle 8 should also be read in light of the Commission’s previous work on the topic “Protection of persons in the event of disasters”.⁴⁶⁹ As explained in the relevant commentary, the draft articles would apply in situations of displacement that,

⁴⁶³ UNHCR *Environmental Guidelines* (footnote 442 above), p. 5.

⁴⁶⁴ International Organization for Migration, *Compendium of Activities in Disaster Risk Reduction and Resilience* (Geneva, 2013), as referenced in *IOM Outlook on Migration, Environment and Climate Change* (Geneva, 2014), p. 82.

⁴⁶⁵ D. Ionesco, D. Mokhnacheva, F. Gemenne, *The Atlas of Environmental Migration* (Abingdon, Routledge 2019).

⁴⁶⁶ A. Christensen and N. Harild, “Forced displacement – The development challenge” (Social Development Department, The World Bank Group, Washington, D.C., 2009).

⁴⁶⁷ *Ibid.*, pp. 4 and 11.

⁴⁶⁸ IUCN, Draft International Covenant on Environment and Development (2015), art. 40, on military and hostile activities (formerly art. 38). Available from www.iucn.org.

⁴⁶⁹ Draft articles on the protection of persons in the event of disasters, *Yearbook ... 2016*, vol. II (Part Two), paras. 48–49. See also General Assembly resolution 73/209 of 20 December 2018.

because of their magnitude, can be viewed as “complex emergencies”, including where a disaster occurs in an area where there is an armed conflict.⁴⁷⁰

(11) Draft principle 8 concerns both areas where displaced persons are located and areas through which they transit. The notions “location” and “transit” are widely used in the context of human displacement but are rarely given a specific interpretation.⁴⁷¹ UNHCR recognizes in its practice both formal and institutionalized settings, such as camps, and non-camp informal and non-institutionalized settlements as areas where displaced persons are located and thus includes within the term “located” both permanent and temporary arrangements.⁴⁷² In the application of the Kampala Convention, international organizations have similarly interpreted the phrase “where internally displaced persons are located”⁴⁷³ to include a broad spectrum of camps, as well as urban and rural settings.⁴⁷⁴ The International Organization for Migration defines “transit” as a stopover of passage of varying length while travelling between two or more countries.⁴⁷⁵ It defines a “country of transit” as a country through which migratory flows, whether regular or irregular, move.⁴⁷⁶ The terms of “transit camp” and “transit centre”, furthermore, refer to temporary arrangements to accommodate displaced persons securely.⁴⁷⁷ For the present draft principle, the distinction between location and transit is not relevant as such. The terms “located” and “transit” are not meant to be interpreted in a strict way, but rather should be taken as broadly and comprehensively as possible, encompassing the idea of movement of persons.

(12) Draft principle 8 is located in Part Two given that conflict-related human displacement is a phenomenon that may have to be addressed both during and after an armed conflict, including in situations of occupation.

Principle 9 **State responsibility**

1. An internationally wrongful act of a State, in relation to an armed conflict, that causes damage to the environment entails the international responsibility of that State, which is under an obligation to make full reparation for such damage, including damage to the environment in and of itself.
2. The present draft principles are without prejudice to the rules on the responsibility of States or of international organizations for internationally wrongful acts.

⁴⁷⁰ Para. (9) of the commentary to art. 18, para. 2, *ibid.*, at p. 58. See also draft art. 3 (a): “disaster” was defined, for the purposes of the draft articles, as “a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society”. *Ibid.*, at p. 25.

⁴⁷¹ See, for instance, UNHCR, “Global trends: forced displacement in 2018” (2019), available at www.unhcr.org/5d08d7ee7.pdf (accessed on 15 June 2022); UNHCR, Global Protection Cluster Working Group, *Handbook for the Protection of Internally Displaced Persons* (2007); OHCHR, “Situation of migrants in transit” (2016), available at www.ohchr.org/sites/default/files/2021-12/INT_CMW_INF_7940_E.pdf (accessed on 2 August 2022); International Organization for Migration, “Glossary on migration” (2019); UNHCR, “Site planning for transit centres” in *Emergency Handbook*, 4th ed. (2015), available from <https://emergency.unhcr.org/entry/31295/site-planning-for-transit-centres>; UNHCR, “Master glossary of terms” (2006), available at www.unhcr.org/glossary/# (accessed on 2 August 2022).

⁴⁷² UNHCR, “Global trends: forced displacement ...” (see previous footnote), pp. 59 and 62; UNHCR, *Handbook for the Protection of Internally Displaced Persons* (see previous footnote), p. 333.

⁴⁷³ Kampala Convention, art. 9, para. 2 (j).

⁴⁷⁴ African Union *et al.*, “Making the Kampala Convention work for IDPs” (2010), p. 27. Available at www.internal-displacement.org/sites/default/files/publications/documents/2010-making-the-kampala-convention-work-thematic-en.pdf (accessed on 2 August 2022).

⁴⁷⁵ International Organization for Migration, “Glossary on migration” (see footnote 471 above), p. 217.

⁴⁷⁶ *Ibid.* pp. 39–40.

⁴⁷⁷ United Nations Environment Programme, *Environmental Considerations of Human Displacement in Liberia: A Guide for Decision-Makers and Practitioners* (Geneva, 2006) p. ix. Available at http://postconflict.unep.ch/publications/liberia_idp.pdf (accessed on 2 August 2022).

3. The present draft principles are also without prejudice to:
 - (a) the rules on the responsibility of non-State armed groups;
 - (b) the rules on individual criminal responsibility.

Commentary

(1) Draft principle 9 focuses on the international responsibility of States for damage caused to the environment in relation to an armed conflict. Paragraph 1 is based on the general rule that every internationally wrongful act of a State entails its international responsibility and gives rise to an obligation to make full reparation for the damage that may be caused by the act. The paragraph reaffirms the applicability of this principle to internationally wrongful acts in relation to armed conflict that cause environmental damage, including damage caused to the environment in and of itself.

(2) Paragraph 1 has been modelled on articles 1 and 31, paragraph 1, of the articles on responsibility of States for internationally wrongful acts. Although no reference is made to other articles, the draft principle is to be applied in accordance with the rules on the responsibility of States for internationally wrongful acts, including those specifying the conditions for internationally wrongful acts. This means, *inter alia*, that conduct amounting to an internationally wrongful act may consist of action or omission. Furthermore, for the international responsibility of a State to arise in relation to an armed conflict, the act or omission must be attributable to that State and amount to a violation of its international obligation.⁴⁷⁸

(3) An act or omission attributable to a State that causes harm to the environment in relation to an armed conflict is wrongful if two conditions are met. First, the act or omission in question violates the law on the use of force or one or more of the substantive rules of the law of armed conflict providing protection to the environment,⁴⁷⁹ or other rules of international law applicable in the situation, including but not limited to international human rights law.⁴⁸⁰ Second, such a rule, or rules, are binding on the State. The scope of the responsibility of the State, as well as the threshold for compensable environmental harm, may vary depending on the applicable primary rules.

(4) The rules of the law of armed conflict concerning the responsibility of States are clear and well-established. The law of armed conflict extends the responsibility of a State party to an armed conflict to “all acts committed by persons forming part of its armed forces”.⁴⁸¹ As

⁴⁷⁸ Art. 1 of the articles on responsibility of States for internationally wrongful acts: “Every internationally wrongful act of a State entails the international responsibility of that State”, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, pp. 32–34.

⁴⁷⁹ This includes articles 35, paragraph 3, and 55 of Additional Protocol I and their customary counterparts, the principles of distinction, proportionality, military necessity and precautions in attack, as well as other rules concerning the conduct of hostilities, and the law of occupation, also reflected in the present draft principles.

⁴⁸⁰ Furthermore, to the extent that international criminal law provides protection to the environment in armed conflict, the relevant international crimes may trigger State responsibility. See art. 1 of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, and para. (3) of the commentary to art. 58, *ibid.*, at p. 142. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment*, *I.C.J. Reports 2007*, p. 43, at p. 116, para. 173.

⁴⁸¹ Convention (IV) Respecting the Laws and Customs of War on Land (Hague Convention IV) (The Hague, 18 October 1907), J.B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1915), p. 100, art. 3: “[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.” See also Additional Protocol I, art. 91; See ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict* (footnote 345 above), Rule 26, para. 303. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 347 above), rule 149, at p. 550. This rule also extends to private acts of armed forces, see M. Sassòli, “State responsibility for violations of international humanitarian law”, *International Review of the Red Cross*, vol. 84 (2002),

far as the law on the use of force is concerned, a violation of Article 2, paragraph 4, of the Charter of the United Nations entails responsibility for damage caused by that violation, whether or not resulting from a violation of the law of armed conflict.⁴⁸² A further basis for responsibility for conflict-related environmental harm – in particular but not exclusively – in situations of occupation may be found in international human rights obligations. Degradation of environmental conditions may violate a number of specific human rights, including the right to life, the right to health and the right to food, as has been reflected in the jurisprudence of regional human rights courts and human rights treaty bodies.⁴⁸³ In situations of occupation, furthermore, the Occupying Power is responsible for acts in violation of human rights law or the law of armed conflict even when they are committed by private actors, unless it can establish that the particular injury occurred notwithstanding its due diligence in seeking to prevent such violations.⁴⁸⁴

(5) Environmental damage caused in armed conflict was recognized as compensable under international law when the United Nations Compensation Commission (UNCC) was established by the Security Council in 1991 to deal with claims concerning the Iraqi invasion and occupation of Kuwait.⁴⁸⁵ The UNCC jurisdiction was based on Security Council resolution 687 (1991), which reaffirmed the responsibility of Iraq under international law “for any direct loss or damage – including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait”.⁴⁸⁶

(6) The experience of UNCC in dealing with environmental claims has been groundbreaking in the area of reparations for wartime environmental harm, and an important

pp. 401–434; C. Greenwood, “State responsibility and civil liability for environmental damage caused by military operations”, in R.J. Grunawalt, J.E. King and R.S. McClain (eds.), “Protection of the environment during armed conflict”, *International Law Studies*, vol. 69 (1996), pp. 397–415, at pp. 405–406.

⁴⁸² See Eritrea-Ethiopia Claims Commission, Decision No. 7, Guidance Regarding Jus ad Bellum Liability, 26 UNRIAA (2009), p. 631, para. 13. See also ICRC commentary (1987) to Additional Protocol I, art. 91, para. 3650. See also *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order, 16 March 2022, General List No. 182, paras. 60 and 74.

⁴⁸³ See *Yanomami v. Brazil*, Case No. 12/85, Inter-American Commission on Human Rights, resolution No. 12/85, Case No. 7615, 5 March 1985; *Öneryıldız v. Turkey*, Application No. 48939/99, Judgment, European Court of Human Rights, 30 November 2004, ECHR 2004-XII; *Powell and Rayner v. the United Kingdom*, Application No. 9310/81, Judgment, European Court of Human Rights, 21 February 1990; *López Ostra v. Spain*, Application No. 16798/90, Judgment, European Court of Human Rights, 9 December 1994; *Guerra and Others v. Italy*, Application No. 116/1996/735/532, Judgment, European Court of Human Rights, 19 February 1998; *Fadeyeva v. Russia*, Application No. 55723/00, Judgment, European Court of Human Rights, 9 June 2005; *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Federal Republic of Nigeria*, African Commission on Human and Peoples’ Rights, Communication No. 155/96 (2002), paras. 64–66, available at <https://www.escri-net.org/sites/default/files/serac.pdf> (accessed on 22 July 2022). See also footnotes 769–771 below. See further R. Pavoni, “Environmental jurisprudence of the European and Inter-American Courts of Human Rights: comparative insights”, in B. Boer, *Environmental Law Dimensions of Human Rights* (Oxford, Oxford University Press, 2015), pp. 69–106.

⁴⁸⁴ See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, Reparations, 9 February 2022, General List No. 116, paras. 95 and 364, in which the Court distinguishes the responsibility of Uganda as an Occupying Power for all acts of looting, plundering and exploitation of natural resources in Ituri, which resulted from its failure to exercise its duty of vigilance, from its responsibility outside Ituri, which was limited to acts attributable to it. See also para. 78 (“As an Occupying Power, Uganda had a duty of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account”). See further *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda, Judgment, I.C.J. Reports 2005*, p. 168, at pp. 253 and 280–281, paras. 250 and 345 (4), and Eritrea-Ethiopia Claims Commission, Partial Award: Central Front – Eritrea’s Claims 2,4,6,7,8, and 22, 28 April 2004, *Reports of International Arbitral Awards*, vol. XXVI, pp. 115–153, at para. 67.

⁴⁸⁵ Security Council resolution 692 (1991) of 20 May 1991.

⁴⁸⁶ Security Council resolution 687 (1991) of 3 April 1991, para. 16.

point of reference beyond armed conflicts.⁴⁸⁷ One example is related to how environmental damage can be quantified. UNCC did not attempt to define the concepts of “direct environmental damage” and “depletion of natural resources” in Security Council resolution 687 (1991) but accepted claims for a non-exhaustive list of losses or expenses resulting from:

(a) Abatement and prevention of environmental damage, including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters;

(b) Reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment;

(c) Reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment;

(d) Reasonable monitoring of public health and performing medical screenings for the purposes of investigation and combating increased health risks as a result of the environmental damage; and

(e) Depletion of or damage to natural resources.⁴⁸⁸

(7) Paragraph 1 of draft principle 9 reaffirms the compensability under international law of damage to the environment *per se*. This statement is in line with the Commission’s previous work on State responsibility⁴⁸⁹ as well as on the allocation of loss in the case of transboundary harm arising out of hazardous activities.⁴⁹⁰ Reference can also be made to the statement of UNCC that “there is no justification for the contention that general international law precludes compensation for pure environmental damage”.⁴⁹¹ Paragraph 1 of the draft principle is furthermore inspired by the judgment of the International Court of Justice in the *Certain Activities (Costa Rica v. Nicaragua)* case, in which the Court found that “it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, in and of itself”.⁴⁹²

⁴⁸⁷ D.D. Caron, “The profound significance of the UNCC for the environment”, in C.R. Payne and P.H. Sand (eds.), *Gulf War Reparations and the UN Compensation Commission Environmental Liability* (Oxford, Oxford University Press, 2011), pp. 265–275; P. Gautier, “Environmental damage and the United Nations Claims Commission: new directions for future international environmental cases?”, in T.M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law, and Settlement of Disputes. Liber Amicorum Judge Thomas A. Mensah* (Leiden, Martinus Nijhoff, 2007), pp. 177–214; P.H. Sand, “Compensation for environmental damage from the 1991 Gulf War”, *Environmental Policy and Law*, vol. 35 (2005), pp. 244–249. J.-C. Martin, “La pratique de la Commission d’indemnisation des Nations Unies pour l’Irak en matière de réclamations environnementales”, *Le droit international face aux enjeux environnementaux*, Colloque d’Aix-en-Provence, Société Française pour le Droit International (Paris, Pedone, 2010).

⁴⁸⁸ Decision taken by the Governing Council of the United Nations Compensation Commission during its third session, at the 18th meeting, held on 28 November 1991, as revised at the 24th meeting held on 16 March 1992 (S/AC.26/1991/7/Rev.1), para. 35.

⁴⁸⁹ Para. (15) of the commentary to art. 36 of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at p. 101: “environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (biodiversity, amenity, etc. – sometimes referred to as ‘non-use values’) is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify”.

⁴⁹⁰ Para. (6) of the commentary to principle 3 of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II (Part Two), paras. 66–67, at p. 73: “it is important to emphasize that damage to environment *per se* could constitute damage subject to prompt and adequate compensation”.

⁴⁹¹ United Nations Compensation Commission, Governing Council, Report and recommendations made by the Panel of Commissioners concerning the fifth instalment of “F4” claims (S/AC.26/2005/10), para. 58.

⁴⁹² *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Compensation, Judgment*, International Court of Justice, *I.C.J. Reports 2018*, p. 15, at p. 28, para. 41. See also *Armed Activities*, Reparations (footnote 484 above), para. 348.

(8) The notion of “damage to the environment in and of itself” has been explained to refer to “pure environmental damage”.⁴⁹³ The latter term was used by UNCC in the above citation. Both concepts, as well as the notion of “harm to the environment *per se*” that the Commission used in the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, have the same meaning. They refer to harm to the environment that does not, or not only, cause material damage, but that leads to the impairment or loss of the ability of the environment to provide ecosystem services, such as sequestration of carbon from the atmosphere, air quality services and biodiversity.⁴⁹⁴

(9) The reference to “full reparation” in paragraph 1 is to be understood in accordance with the articles on responsibility of States for internationally wrongful acts as taking the form of restitution, compensation, and satisfaction, either singly or in combination, as required by the circumstances.⁴⁹⁵ As pointed out above, damage to environmental values (such as biodiversity) is, as a matter of principle, no less real and compensable than damage to property.⁴⁹⁶ While the form of reparation for environmental damage has typically been limited to compensation,⁴⁹⁷ restoration measures and other distinct forms of reparation complementary to compensation are in no way excluded.⁴⁹⁸

(10) Paragraph 2 of draft principle 9 clarifies that the draft principles are without prejudice to the rules on the responsibility of States or of international organizations for internationally wrongful acts. The purpose of the saving clause is to make it clear that the draft principles do not deviate from the rules of State responsibility as codified by the Commission’s articles on responsibility of States for internationally wrongful acts. A need for such clarification could arise in relation to an individual draft principle⁴⁹⁹ or in relation to the articles on responsibility of States for internationally wrongful acts regarding questions not dealt with in the current draft principle or commentary.⁵⁰⁰ Taking into account that the responsibility for internationally wrongful acts not only of States but also of international organizations is the object of previous work by the Commission,⁵⁰¹ both bodies of law are addressed in the same paragraph.

⁴⁹³ *Certain Activities, Compensation, Judgment* (see previous footnote), Separate Opinion of Judge Donoghue, para. 3: “Damage to the environment can include not only damage to physical goods, such as plants and minerals, but also to the ‘services’ that they provide to other natural resources (for example, habitat) and to society. Reparation is due for such damage, if established, even though the damaged goods and services were not being traded in a market or otherwise placed in economic use. Costa Rica is therefore entitled to seek compensation for ‘pure’ environmental damage, which the Court calls ‘damage caused to the environment, in and of itself.’”

⁴⁹⁴ See J.B. Ruhl and J. Salzman, “The law and policy beginnings of ecosystem services”, *Journal of Land Use and Environmental Law*, vol. 22 (2007), pp. 157–172. See also *Certain Activities, Compensation Judgment* (footnote 492 above), para. 75.

⁴⁹⁵ Art. 34 of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76.

⁴⁹⁶ Para. (15) of the commentary to art. 36, *ibid.*, at p. 101.

⁴⁹⁷ See reparations awarded by the United Nations Compensation Commission, Governing Council, Report and recommendations made by the Panel of Commissioners concerning the fifth instalment of “F4” claims (see footnote 491 above); compensation sought by Ethiopia before the Claims Commission in the Eritrea-Ethiopia dispute, see Eritrea-Ethiopia Claims Commission, Damages Claim, Final Award – Ethiopia’s Claims, 17 August 2009, UNRIAA, vol. XXVI, pp. 631–770, at p. 754, para. 421. See also *Certain Activities, Compensation, Judgment* (footnote 492 above), p. 37, para 80.

⁴⁹⁸ *Certain Activities, Compensation, Judgment* (footnote 492 above), Separate opinion of Judge Cançado Trindade, para. 2. See also Committee against Torture, general comment No. 3 (2012) on the implementation of article 14 for a detailed discussion of the forms of reparation, i.e. restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (Report of the Committee against Torture, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 44 (A/68/44)*, annex X).

⁴⁹⁹ See para. (1) of the commentary to draft principle 25, below.

⁵⁰⁰ See, for instance, art. 39 of the articles on responsibility of States for internationally wrongful acts on contribution to injury, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76.

⁵⁰¹ Articles on the responsibility of international organizations, *Yearbook ... 2011*, vol. II (Part Two), pp. 39–105, paras. 87–88 and General Assembly resolution 66/100 of 9 December 2011, annex.

(11) Paragraph 3 contains another saving clause providing that the present draft principles are also without prejudice to (a) the rules on the responsibility of non-State armed groups; and (b) the rules on individual criminal responsibility. The paragraph is closely linked to the mention of international organizations in paragraph 2. Mentioning the three additional areas of international responsibility serves to indicate that the substantive focus of the current draft principle on the responsibility of States is not intended to downplay the role other actors may have in causing or contributing to environmental damage in the context of an armed conflict. Their role has also been acknowledged in several other draft principles that address not only States but “parties to an armed conflict”, international organizations, or “other relevant actors”.

(12) The responsibility of non-State armed groups and individual criminal responsibility are addressed separately in order to distinguish between two different areas of international law. Individual criminal responsibility for environmental damage during an armed conflict is recognized in the Rome Statute⁵⁰² and was highlighted in a 2016 policy paper of the Office of the Prosecutor.⁵⁰³ The 2020 ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict include a rule concerning the repression of war crimes that concern the natural environment.⁵⁰⁴ A proposal has been made in the Assembly of States Parties of the International Criminal Court to include “ecocide” as the fifth category of crimes in the Rome Statute,⁵⁰⁵ and an international panel appointed by the Stop Ecocide campaign has issued a draft definition of the crime of ecocide.⁵⁰⁶ The international responsibility of non-State armed groups is still a less settled area in international law.⁵⁰⁷ No difference has been indicated in the text of subparagraphs (a) and (b), as the applicable rules may evolve over time.

(13) Draft principle 9 is located in Part Two containing draft principles related to the phase before armed conflict, and draft principles that are applicable to more than one phase, including provisions of general applicability. Draft principle 9 belongs to the latter category.

Principle 10

Due diligence by business enterprises

States should take appropriate measures aimed at ensuring that business enterprises operating in or from their territories, or territories under their jurisdiction, exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area affected by an armed conflict. Such measures include those aimed at ensuring that natural resources are purchased or otherwise obtained in an environmentally sustainable manner.

Commentary

(1) Draft principle 10 recommends that States take appropriate measures to ensure that business enterprises operating in or from their territories, or territories under their jurisdiction, exercise due diligence with respect to the protection of the environment, including in relation to human health, in areas affected by an armed conflict. The second sentence of draft principle 10 specifies that such measures include those aimed at ensuring that natural resources are

⁵⁰² Rome Statute, art. 8, para. 2 (b) (iv).

⁵⁰³ International Criminal Court, Office of the Prosecutor, “Policy paper on case selection and prioritization”, 15 September 2016, para. 41.

⁵⁰⁴ ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), Rule 28.

⁵⁰⁵ At the eighteenth session of the International Criminal Court Assembly of States Parties, on 2–7 December 2019, Maldives and Vanuatu proposed that a new crime of ecocide be added to the Rome Statute: documents of the general debate available at https://asp.icc-pi.int/en_menus/asp/sessions/general%20debate/Pages/GeneralDebate_18th_session.aspx. For the statement of Vanuatu, see https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/GD.VAN.2.12.pdf. For the statement of the Maldives, see https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/GD.MDV.3.12.pdf (last accessed on 16 January 2022).

⁵⁰⁶ An independent expert panel convened by Stop Ecocide International issued a possible legal definition of the crime of ecocide in June 2021, see www.stopecocide.earth/legal-definition (last accessed on 16 January 2022).

⁵⁰⁷ See the second report of the Special Rapporteur, A/CN.4/728, paras. 51–56.

purchased or otherwise obtained in an environmentally sustainable manner. The draft principle does not reflect a generally binding legal obligation and has been phrased accordingly as a recommendation.

(2) The concept of “due diligence by business enterprises” refers to a wide network of normative frameworks that seek to promote responsible business practices, including respect for human rights and international environmental standards. Such frameworks include non-binding guidelines as well as binding regulations at the national or regional level, and extend to codes of conduct created by the businesses themselves. Draft principle 10 builds on and seeks to complement the existing regulatory frameworks which do not always display a clear environmental focus, or a focus on armed conflict and post-armed conflict situations.

(3) The United Nations Guiding Principles on Business and Human Rights⁵⁰⁸ are based on the obligations of States to respect, protect and fulfil human rights and fundamental freedoms, and their implementation largely relies on State action.⁵⁰⁹ The Guiding Principles propose a number of measures that States can take to ensure that business enterprises operating in conflict-affected areas are not involved with gross human rights abuses.⁵¹⁰ This includes “[e]nsuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses”.⁵¹¹

(4) The Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises⁵¹² expressly address environmental concerns, recommending that enterprises “take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development”.⁵¹³ The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas of 2016,⁵¹⁴ *inter alia*, encourages companies operating in or sourcing minerals from conflict-affected and high-risk areas to assess and avoid the risk of being involved in serious human rights violations.⁵¹⁵ Regulatory frameworks more specifically related to natural resources and areas of armed conflict also include the Certification Mechanism of the International Conference of the Great Lakes Region⁵¹⁶ and the Chinese Due Diligence Guidelines for Responsible Mineral Supply

⁵⁰⁸ Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (A/HRC/17/31, annex). The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

⁵⁰⁹ So far, 21 States have published national action plans on the implementation of the Guiding Principles, 23 are in the process of preparing such a plan or have committed to preparing one. In nine other States, either the national human rights institute or civil society has taken steps towards preparing a national action plan. Information available at www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx (accessed on 2 August 2022).

⁵¹⁰ Guiding Principles on Business and Human Rights (footnote 508 above), principle 7.

⁵¹¹ *Ibid.*, principle 7, para. (d).

⁵¹² OECD, *OECD Guidelines for Multinational Enterprises*. The updated guidelines and the related decision were adopted by the 42 Governments adhering thereto on 25 May 2011. Available at www.oecd.org/corporate/mne (accessed on 2 August 2022).

⁵¹³ *Ibid.*, chap. VI “Environment”, p. 42.

⁵¹⁴ OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 3rd ed. (Paris, 2016). Available at www.oecd.org/daf/inv/mne/mining.htm (accessed on 2 August 2022).

⁵¹⁵ *Ibid.*, p. 16.

⁵¹⁶ See *Manual of the Regional Certification Mechanism (RCM) of the International Conference on the Great Lakes Region (ICGLR)*, 2nd ed. (2019). Available at <https://alphaminresources.com/wp-content/uploads/2021/04/ICGLR-Regional-Certification-Mechanism-Manual-2nd-edition.pdf> (accessed on 2 August 2022).

Chains.⁵¹⁷ Due diligence frameworks have also been created for specific businesses, including extractive industries, in cooperation between States, businesses and civil society.⁵¹⁸

(5) In some cases, such initiatives have provided the impetus for States to incorporate similar standards into their national legislation, making them binding on corporations subject to their jurisdiction that operate in, or deal with, conflict-affected areas. Legally binding instruments have also been developed at the regional level. Examples of such legally binding frameworks, either at the regional or national level, include the US Dodd-Frank Act of 2010,⁵¹⁹ the Lusaka Protocol of the International Conference on the Great Lakes Region,⁵²⁰ the regulation of the European Union on conflict minerals⁵²¹ and the European Union timber regulation.⁵²²

(6) The wording of draft principle 10 builds on the existing frameworks of corporate due diligence, *inter alia* regarding how natural resources are purchased and obtained. At the same time, in accordance with the scope of the topic, it specifically focuses on the protection of the environment in areas affected by an armed conflict. The phrase has been inspired by the concept of “conflict-affected and high-risk areas” used in the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals,⁵²³ as well as in the conflict minerals regulation

⁵¹⁷ China, Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters, *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains*. The guidelines apply to all Chinese companies extracting and/or using mineral resources and their related products and come into play at any point in the supply chain of minerals. Available at <http://mneguidelines.oecd.org/chinese-due-diligence-guidelines-for-responsible-mineral-supply-chains.htm> (accessed on 2 August 2022).

⁵¹⁸ For Extractive Industries Transparency Initiative, which aims at increasing transparency in the management of oil, gas, and mining revenues, see <http://eiti.org>; for Voluntary Principles on Security and Human Rights for extractive industry companies, see at www.voluntaryprinciples.org; for the Equator Principles of the financial industry for determining, assessing and managing social and environmental risk in project financing, see www.equator-principles.com.

⁵¹⁹ An Act to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end “too big to fail”, to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes (Dodd-Frank Act), 11 July 2010, Pub.L.111–203, 124 Stat. 1376–2223. Section 1502 of the Dodd-Frank Act on conflict minerals originating from the Democratic Republic of the Congo requires that companies registered in the United States exercise due diligence on certain minerals originating from the Democratic Republic of the Congo.

⁵²⁰ Protocol against the Illegal Exploitation of Natural Resources of the International Conference on the Great Lakes Region (Nairobi, 30 November 2006), available at https://ungreatlakes.unmissions.org/sites/default/files/icglr_protocol_against_the_illegal_exploitation_of_natural_resources.pdf (accessed on 10 June 2022). Art. 17, para. 1, requires States parties to establish the liability of legal entities for participating in the illegal exploitation of natural resources.

⁵²¹ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, *Official Journal of the European Union*, L130, vol. 60, p. 1 (European Union conflict minerals regulation). The regulation entered into force on 1 January 2021. The regulation lays down supply chain due diligence obligations for European Union importers of certain minerals originating from conflict-affected and high-risk areas. See also the European Commission’s proposal for a Directive on Corporate Sustainability Due Diligence, 23 February 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145 (accessed on 2 August 2022).

⁵²² Regulation (EU) No. 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down obligations of operators who place timber and timber products on the market (12 November 2010), *Official Journal of the European Union*, L 295, p. 23. The timber regulation requires that operators exercise due diligence so as to minimize the risk of placing illegally harvested timber, or timber products containing illegally harvested timber, on the European Union market.

⁵²³ *OECD Due Diligence Guidance ...* (footnote 514 above), p. 13. The Guidance explains that “Armed conflict may take a variety of forms such as a conflict of international or non-international character, which may involve two or more States, or may consist of wars of liberation, or insurgencies, civil wars, etc. High-risk areas may include areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence. Such areas are often characterised by widespread human rights abuses and violations of national or international law.”

of the European Union.⁵²⁴ The scope of draft principle 10 does not extend to high-risk situations, as these may not always have a connection to an armed conflict. The phrase “area[s] affected by an armed conflict” should be understood in the sense of the concepts of “armed conflict”,⁵²⁵ including situations of occupation,⁵²⁶ and “post-armed conflict”⁵²⁷ as used in the draft principles.

(7) According to the first sentence of draft principle 10, States should take “appropriate measures”. This reference should be understood to encompass a variety of measures States can take, such as legislative, administrative and judicial. Reference can be made in this regard to draft principle 3, which contains an illustrative list of the most relevant types of measures that States can take to enhance the protection of the environment in relation to armed conflicts. The qualification “appropriate” also indicates that the measures taken at the national level may differ from one country to another. While seeking to ensure due diligence by business enterprises would usually require legislative action,⁵²⁸ this may not always be the case. Such measures should in any event be aimed at ensuring that business enterprises operating in or from the country in question, or in a territory under its jurisdiction, exercise due diligence with respect to the protection of the environment when acting in an area affected by an armed conflict.⁵²⁹

(8) There is no uniform practice on how to refer to business entities. The different regulatory frameworks use terms ranging from “transnational corporations and other business enterprises”⁵³⁰ to “multinational enterprises”,⁵³¹ “business enterprises”⁵³² or “companies”.⁵³³ The reference to “business enterprises” was chosen for the draft principle as a broad notion that is also used in the Guiding Principles on Business and Human Rights. How this notion is interpreted would primarily depend on the national law of each State. There are similarly several ways to describe the connection between a corporation or other business enterprise and a State.⁵³⁴ The reference to “operating in or from their territories” follows the standard phrase in the OECD Due Diligence Guidance.⁵³⁵ While the phrase may be interpreted to cover

⁵²⁴ European Union conflict minerals regulation (footnote 521 above), art. 2, para. (f), gives the following definition: “areas in a state of armed conflict or fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses”.

⁵²⁵ See para. (7) of the commentary to draft principle 13 below.

⁵²⁶ See paras. (1)–(5) of the Introduction to Part Four.

⁵²⁷ More frequently referred to as “after an armed conflict”. This phrase has not been defined. It is nevertheless clear that it cannot, for the purpose of the protection of the environment, be limited to the immediate aftermath of an armed conflict.

⁵²⁸ See, for instance, the French law on corporate duty of vigilance, Act No. 2017-399 of 27 March 2017 on the duty of care of parent and contracting companies [loi No. 2017-399 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre], available at www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte (accessed on 2 August 2022).

⁵²⁹ For instance, the measures taken may differ depending on whether a business enterprise is operating in or from the territory of a State. Where an armed conflict has occurred in a host State that lacks legislative and regulatory frameworks for the protection of the environment from hazardous materials, including radioactive material, adoption of relevant international safety standards, such as the International Atomic Energy Agency Safety Standards, may assist it in introducing appropriate regulation.

⁵³⁰ Human Rights Council resolution 26/9 of 26 June 2014 setting up a Working Group to elaborate a legally binding instrument on transnational corporations and other business entities.

⁵³¹ *OECD Guidelines for Multinational Enterprises* (footnote 512 above).

⁵³² Guiding Principles on Business and Human Rights (footnote 508 above).

⁵³³ *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains* (footnote 517 above).

⁵³⁴ For instance, the Guiding Principles on Business and Human Rights (footnote 508 above) use the notion “business enterprises domiciled in their territory and/or jurisdiction”, see e.g. principle 2.

⁵³⁵ *OECD Due Diligence Guidance* (footnote 514 above), p. 9; and Recommendation of the Council on the OECD Due Diligence Guidance for Responsible Business Conduct (2018), pp. 92–94, available at <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0443> (accessed on 8 July 2019). See also OECD, *Implementing the OECD Due Diligence Guidance, Executive Summary* (Paris, 28 May 2018), p. 6, para. 16. Available at https://tuac.org/wp-content/uploads/2018/05/140PS_E_10_duediligence.pdf (accessed on 31 May 2022); *OECD Due Diligence Guidance* (footnote 514 above), p. 8.

both territory and jurisdiction,⁵³⁶ the explicit reference to territories under the jurisdiction of the State in question takes into account that States may have obligations under international law to ensure the observance of certain rights of persons under their jurisdiction. The phrase is also consistent with the previous work of the Commission on other topics.⁵³⁷

(9) Draft principle 10 also applies to private military and security companies, understood as “private business entities that provide military and/or security services, irrespective of how they may describe themselves”.⁵³⁸ The services that private military and security companies provide range from logistic support, intelligence services, training of troops, and protection of personnel and military assets to protection of commercial shipping from piracy.⁵³⁹ In addition to States, international organizations in the context of peace operations, private corporations in the area of extractive industries and humanitarian organizations, for instance, commonly use the services of private military and security companies.⁵⁴⁰ In transitional phases and post-conflict situations, private contractors may furthermore be involved in different kinds of reconstruction work, including disposal of military waste and conflict debris.⁵⁴¹ The special features of such services, which have traditionally been provided by the military, or other public authorities of a State, require additional comments. Most notably, in a situation of an armed conflict, the personnel of a private military company may have obligations under the law of armed conflict that go beyond what is provided in the current draft principle. This is the case, for instance, when a private military company is empowered to exercise governmental authority and may act as a party to the conflict.⁵⁴² Furthermore, in addition to the home State of a private military and security company and the host State, the State or organization that has contracted that company has international legal obligations.⁵⁴³ Reference can be made, for instance, to the contracting State’s obligation to ensure respect for the law of armed conflict by the private military and security companies with whom they contract.⁵⁴⁴ When a contracting State is an Occupying Power, moreover, it has a general obligation to exercise vigilance in preventing violations of the law of armed conflict and international human rights law.⁵⁴⁵

(10) The notion of “due diligence” as used in the draft principle refers to due diligence expected of business entities when acting in areas affected by an armed conflict. This notion is not used differently from the due diligence frameworks referred to in paragraphs (2) to (4)

⁵³⁶ OECD, *The FATF Recommendations 2012* (2012, updated 2020), pp. 47, 54 and 119. Available at www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html (accessed on 2 August 2022). See also OECD, *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* (Paris, 2018), pp. 8 and 94, available at www.oecd-ilibrary.org/governance/oecd-due-diligence-guidance-for-responsible-supply-chains-in-the-garment-and-footwear-sector_9789264290587-en (accessed on 31 May 2022).

⁵³⁷ See, for instance, art. 2, subpara. (d), of the articles on the prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 97; art. 3, subpara. (b) of the articles on the protection of persons in the event of disasters, *Yearbook ... 2016*, vol. II (Part Two), para. 48.

⁵³⁸ *Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict* (Montreux, ICRC, 2008) (Montreux Document), p. 9.

⁵³⁹ C. Lehnardt, “Private military contractors”, in A. Nollkaemper and I. Plakokefalos (ed.), *The Practice of Shared Responsibility in International Law* (Cambridge, Cambridge University Press, 2017), pp. 761–780.

⁵⁴⁰ See L. Cameron, “Private military companies: their status under international humanitarian law and its impact on their regulation”, *International Review of the Red Cross*, vol. 88 (2006), pp. 573–598, pp. 575–577.

⁵⁴¹ O. Das and A. Kellay, “Private security companies and other private security providers (PSCs) and environmental protection *in jus post bellum*: policy and regulatory challenges”, in C. Stahn, J. Iverson, and J.S. Easterday (eds.), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (Oxford, Oxford University Press, 2017), pp. 299–325.

⁵⁴² Montreux Document, Part One, p. 12, para. 7. As for the responsibility of the contracting State, see art. 5 of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76.

⁵⁴³ Montreux Document, Part One, pp. 11–13, paras. 1–17.

⁵⁴⁴ Montreux Document, p. 11, para. 3.

⁵⁴⁵ See footnote 486 above.

above. As for its content, reference can be made to the parameters of “human rights due diligence” as explained in the Guiding Principles on Business and Human Rights:

Human rights due diligence:

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.⁵⁴⁶

The European Union conflict minerals regulation defines supply chain due diligence in similar terms as “an ongoing, proactive and reactive process through which economic operators monitor and administer their purchases and sales with a view to ensuring that they do not contribute to conflict or the adverse impacts thereof”.⁵⁴⁷ Furthermore, the OECD Guidelines for Multinational Enterprises and the related documentation include detailed guidance on international environmental standards.⁵⁴⁸

(11) The phrase “including in relation to human health” underlines the close link between environmental degradation and human health as affirmed by international environmental instruments,⁵⁴⁹ regional treaties and case law,⁵⁵⁰ the work of the Committee on Economic,

⁵⁴⁶ Guiding Principles on Business and Human Rights (footnote 508 above), principle 17.

⁵⁴⁷ See European Union conflict minerals regulation (footnote 521 above), eleventh preambular para. See also *OECD Due Diligence Guidance ...* (footnote 514 above), p. 13: “Due diligence is an on-going, proactive and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict”.

⁵⁴⁸ *OECD Guidelines for Multinational Enterprises* (footnote 512 above), part I, chap. VI “Environment”, pp. 42–46. See also OECD, “Environment and the OECD Guidelines for Multinational Enterprises. Corporate tools and approaches”. Available at <https://oecd.org/env/34992954.pdf> (accessed on 2 August 10 June 2022).

⁵⁴⁹ For instance, the following instruments refer to “human health and the environment”: Convention on Long-Range Transboundary Air Pollution (Geneva, 13 November 1979), United Nations, *Treaty Series*, vol. 1302, No. 21623, p. 217, art. 7 (d); Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985), *ibid.*, vol. 1513, No. 26164, p. 293, preamble and art. 2, para. 2 (a); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 22 March 1989), *ibid.*, vol. 1673, No. 28911, p. 57, preamble, art. 2, paras. 8 and 9, art. 4, paras. 2 (c), (d) and (f) and para. 11, art. 10, para. 2 (b), art. 13, paras. 1 and 3 (d), art. 15, para. 5 (a); Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal (Izmir, 1 October 1996), *ibid.*, vol. 2942, No. 16908, p. 155, art. 1 (j) and (k); Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam, 10 September 1998), *ibid.*, vol. 2244, No. 39973, p. 337, preamble, art. 1 and art. 15, para. 4; Stockholm Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001), *ibid.*, vol. 2256, No. 40214, p. 119, preamble, art. 1, art. 3, para. 2 (b) (iii) a, art. 6, para. 1, art. 11, para. 1 (d), art. 13, para. 4; Minamata Convention on Mercury (Kumamoto, 10 October 2013), *ibid.*, No. 54669 (volume number has yet to be determined), available from <https://treaties.un.org> (accessed on 2 August 2022), preamble, art. 1, art. 3, para. 6 (b) (i), art. 12, paras. 2 and 3 (c), art. 18, para. 1 (b), art. 19, para. 1 (c); Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú, 4 March 2018) (Escazú Agreement), *ibid.*, No. 56654 (volume number has yet to be determined), available from <https://treaties.un.org> (accessed on 2 August 2022), art. 6, para. 12.

⁵⁵⁰ For instance, the African Charter on Human and Peoples’ Rights incorporates both the right to health and the explicit right to a healthy environment. See African Charter on Human and Peoples’ Rights (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217, art. 16, para. 1 (the right to health), and art. 24 (“the right to a general satisfactory environment favourable to [each person’s] development”). These rights were resorted to in *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Federal Republic of Nigeria* (see footnote 483 above) and *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, Judgment No. ECW/CCJ/JUD/18/12, Community Court of Justice, Economic Community of West

Social and Cultural Rights,⁵⁵¹ as well as of the Special Rapporteur on human rights and the environment.⁵⁵² Reference can also be made to the broad recognition of the right to a safe, clean, healthy and sustainable environment both at the national⁵⁵³ and international⁵⁵⁴ levels. The phrase thus refers to “human health” in the context of the protection of the environment.

(12) According to the second sentence of draft principle 10, the measures to be taken include those aimed at ensuring that natural resources are purchased or otherwise obtained in an environmentally sustainable manner. The requirement of responsible sourcing is included in a number of documents referred to above. The OECD Guidance, for instance, recommends that States promote the observance of the Guidance by companies operating from their territories and sourcing minerals from conflict-affected and high-risk areas “with the aim of ensuring that they respect human rights, avoid contributing to conflict and successfully contribute to sustainable, equitable and effective development”.⁵⁵⁵ The Chinese guidelines require that companies identify and assess the risks of contributing to conflict and serious human rights abuses associated with extracting, trading, processing, and exporting resources from conflict-affected and high-risk areas,⁵⁵⁶ as well as risks associated with serious misconduct in environmental, social and ethical issues.⁵⁵⁷ The European Union conflict minerals regulation defines “supply chain due diligence” as meaning “the obligations of Union importers ... in relation to their management systems, risk management, independent third-party audits and disclosure of information with a view to identifying and addressing actual and potential risks linked to conflict-affected and high-risk areas to prevent or mitigate adverse impacts associated with their sourcing activities”.⁵⁵⁸

(13) Draft principle 10 refers to activities of business enterprises in areas affected by an armed conflict, but addresses what are essentially preventive measures. The draft principle is therefore located in Part Two which includes principles relating to the time before conflict, and principles that are applicable in more than one phase including general principles not tied to any particular phase.

Principle 11 **Liability of business enterprises**

States should take appropriate measures aimed at ensuring that business enterprises operating in or from their territories, or territories under their jurisdiction, can be held liable for harm caused by them to the environment, including in relation to human health, in an area affected by an armed conflict. Such measures should, as

African States, 14 December 2012. Similarly, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (San Salvador, 17 November 1988), Organization of American States, *Treaty Series*, No. 69, includes the right to health. The regional jurisprudence acknowledges that the right to health includes an element of environmental protection, such as a pollution-free environment. See Inter-American Commission on Human Rights, Annual Report 1984–1985, chap. V “Areas in which further steps are needed to give effect to the human rights set forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights”, OEA/Ser.L/V/II.66; see also Inter-American Commission on Human Rights, Report on the situation of human rights in Cuba, 4 October 1983, OEA/Ser.L/V/II.61, Doc. 29 rev. 1, chap. XIII “The right to health”, para. 41; Inter-American Commission on Human Rights, resolution No. 12/85 in Case No. 7615, 5 March 1985; Inter-American Court of Human Rights, *Indigenous Community Yakye Axa v. Paraguay*, para. 167.

⁵⁵¹ Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health (art. 12), *Official Records of the Economic and Social Council, 2001, Supplement No. 2 (E/2001/22-E/C.12/2000/21)*, annex IV, para. 30.

⁵⁵² See the Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (A/HRC/37/59).

⁵⁵³ UNEP, Environmental Rule of Law (see footnote 346 above), p. 10 (“150 countries have enshrined environmental protection or the right to a healthy environment in their constitutions”), p. viii.

⁵⁵⁴ See General Assembly resolution 76/300 of 28 July 2022 on the human right to a clean, healthy and sustainable environment. See also Human Rights Council resolution 48/13 of 8 October 2021.

⁵⁵⁵ *OECD Due Diligence Guidance* (footnote 514 above), recommendation, pp. 7–9.

⁵⁵⁶ *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains* (see footnote 517 above), sect. 5.1.

⁵⁵⁷ *Ibid.*, sect. 5.2.

⁵⁵⁸ European Union conflict minerals regulation (footnote 521 above), art. 2 (d).

appropriate, include those aimed at ensuring that a business enterprise can be held liable to the extent that such harm is caused by its subsidiary acting under its *de facto* control. To this end, as appropriate, States should provide adequate and effective procedures and remedies, in particular for the victims of such harm.

Commentary

(1) Draft principle 11 is closely related to draft principle 10 concerning due diligence by business enterprises. The purpose of draft principle 11 is to address situations in which harm has been caused by business enterprises to the environment, including in relation to human health, in areas affected by an armed conflict. States should take appropriate measures aimed at ensuring that business enterprises operating in or from the State's territory, or territory under its jurisdiction, can be held liable for having caused such harm. The concepts of "appropriate measures", "business enterprises", "the environment, including in relation to human health", "operating in or from their territories, or territories under their jurisdiction" and "in an area affected by an armed conflict" are to be interpreted in the same way as in draft principle 10.

(2) The notions of "harm" and "caused by them" are to be interpreted in accordance with the applicable law, which may be the law of the home State of the business enterprise, or the law of the State in which the harm has been caused. In this regard, reference can be made to the legal regime applicable in the European Union,⁵⁵⁹ which provides that the law applicable to a claim shall in general be that of the State in which the damage occurred.⁵⁶⁰

(3) The second sentence of draft principle 11 follows the wording of draft principle 10 in that it begins with a reference to the preceding sentence and adds a further consideration that is included within its remit. The phrase "as appropriate", which does not appear in draft principle 10, provides nuance as to how the elements of the provision are to be applied at the national level. The second sentence of draft principle 11 recommends measures aimed at ensuring that a business enterprise can, under certain circumstances, be held liable if its subsidiary has caused harm to the environment, including in relation to human health in an area affected by an armed conflict. More specifically, this should be possible when and to the extent that the subsidiary acts under the *de facto* control of the parent company. To illustrate the importance of such control, reference can be made to the statement of the United Kingdom Supreme Court in the *Vedanta v. Lungowe* case regarding the possible liability of the British multinational group Vedanta Resources for the release of toxic substances by its subsidiary to a watercourse in Zambia: "Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary."⁵⁶¹

(4) The concept of *de facto* control is to be interpreted in accordance with the requirements of each national jurisdiction. The OECD Guidelines for Multinational Enterprises point out in this regard that the companies or other entities forming a multinational enterprise may coordinate their operations in different ways. "While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another."⁵⁶²

(5) Reference can in this regard also be made to national judicial cases that have shed light on the relevant aspects of the relationship between the parent company and its subsidiary. For instance, U.S. courts are sometimes willing to hold a parent company accountable for the

⁵⁵⁹ As well as in Iceland, Norway and Switzerland.

⁵⁶⁰ Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July on the law applicable to non-contractual obligations (Rome II Regulation), *Official Journal of the European Union*, L 199, p. 40, art. 4, para. 1. See also Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano, 30 October 2007), *Official Journal of the European Union*, L 339, p. 3.

⁵⁶¹ *Vedanta Resources PLC and another v. Lungowe and others*, Judgment, 10 April 2019, [2019] UKSC 20, On appeal from [2017] EWCA Civ 1528.

⁵⁶² *OECD Guidelines for Multinational Enterprises* (footnote 512 above), chap. I, para. 4, p. 17.

actions of a foreign subsidiary on the basis of a principal-agent relationship. In the *In re Parmalat Securities Litigation* case,⁵⁶³ the United States District Court for the Southern District of New York explained that such an agency relationship exists if there is agreement between the parent and the subsidiary that the subsidiary will act for the parent, and the parent retains control over the subsidiary.⁵⁶⁴ In a further case,⁵⁶⁵ the same court stated that a parent may be held legally accountable for the actions of a foreign subsidiary if the corporate relationship between the two is sufficiently close.⁵⁶⁶ Relevant factors in determining whether this was the case included disregard of corporate formalities, intermingling of funds and overlap of ownership, officers, directors and personnel.⁵⁶⁷ In the *Chandler v. Cape* case, the England and Wales Court of Appeal concluded that, in appropriate circumstances, the parent company may have a duty of care in relation to the health and safety of the employees of its subsidiary. That may be the case, for instance, when the business of the parent and the subsidiary are in a relevant aspect the same and the parent has, or ought to have, superior knowledge of the relevant aspects of health and safety in the particular industry, as well as of the shortcomings in the subsidiary's system of work.⁵⁶⁸

(6) The third sentence of draft principle 11 concerns both the previous sentences. Its purpose is to recall that States should provide adequate and effective procedures and remedies for the victims of environmental and health-related harm caused by business enterprises or their subsidiaries in areas affected by an armed conflict. The sentence thus refers to situations, in which the host State may not be in the position to effectively enforce its legislation. Reference can in this regard also be made to the general comment of the Committee on Economic, Social and Cultural Rights which interprets the obligation to protect as extending to corporate wrongdoing abroad, “especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective”.⁵⁶⁹

(7) It may be recalled that the collapse of State and local institutions is a common consequence of armed conflict and one that often casts a long shadow in the aftermath of conflict, undermining law enforcement and the protection of rights as well as the integrity of justice. The important role that home States of business enterprises can play in such situations is illustrated by a reference to the *Katanga Mining* case,⁵⁷⁰ in which the dispute related to events in the Democratic Republic of the Congo. The company Katanga Mining Ltd. was

⁵⁶³ United States, District Court, Southern District New York, *In re Parmalat Securities Litigation*, 594 F. Supp. 2d 444 (S.D.N.Y. 2009).

⁵⁶⁴ *Ibid.*, pp. 451–453.

⁵⁶⁵ United States, District Court, Southern District New York, *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009). In this case, South African plaintiffs sued Daimler AG and Barclays National Bank Ltd. for aiding and abetting through their subsidiaries the Government of South Africa in its apartheid policy.

⁵⁶⁶ *Ibid.*, p. 271.

⁵⁶⁷ *Ibid.*, pp. 271–272.

⁵⁶⁸ *Chandler v. Cape PLC*, [2012] EWCA (Civ) 525 (Eng.), para. 80. It was furthermore required that the parent company knew or ought to have known that the subsidiary or its employees relied on it for protection. See also R. McCorquodale, “Waving not drowning: *Kiobel* outside the United States”, *American Journal of International Law*, vol. 107 (2013), pp. 846–51. See also *Lubbe and others v. Cape PLC Afrika and others v. Same*, 20 July 2000, 1 Lloyd's Rep. 139, as well as P. Muchlinski, “Corporations in international litigation: problems of jurisdiction and United Kingdom *Asbestos* cases”, *International and Comparative Law Quarterly*, vol. 50 (2001), pp. 1–25. See also *Akpan v. Royal Dutch Shell PLC*, The Hague District Court, case No. C/09/337050/HA ZA 09-1580 (ECLI:NL:RBDHA:2013:BY9854), 30 January 2013. See further Canada, Supreme Court of Canada, *Nevsun Resources Ltd. v. Araya et al.*, Judgment, 28 February 2020, SCC 5, para. 17. See further C. Bright, “Quelques réflexions à propos de l'affaire Shell aux Pays-Bas”, in *Société Française pour le Droit International, L'entreprise multinationale et le droit international* (Paris, Pedone, 2016), pp. 127–142.

⁵⁶⁹ Committee on Economic, Social and Cultural Rights, general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24), para. 30. The general comment links such measures to the obligation to protect Covenant rights.

⁵⁷⁰ *Alberta Inc. v. Katanga Mining Ltd.* [2008] EWHC 2679 (Comm), 5 November 2008 (Tomlinson J.).

incorporated in Bermuda and resident in Canada for tax purposes⁵⁷¹ and had all its actual business operations in the Democratic Republic of the Congo.⁵⁷² The parties had furthermore agreed in a previous contract that any disputes would be settled in the Tribunal de grande instance of Kolwezi (Democratic Republic of the Congo). The English Court nevertheless decided, in view of the situation in which “attempted interference with the integrity of justice” was “apparently widespread and endemic”,⁵⁷³ that the Democratic Republic of the Congo would not be “a forum in which the case may be tried suitably for the interests of all the parties and for the ends of justice”.⁵⁷⁴

(8) The human rights treaty bodies within the United Nations have also addressed the issue in their comments on the situation in individual States. The Human Rights Committee, for instance, has encouraged the relevant State party “to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations” and “to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad”.⁵⁷⁵ Similarly, the Committee on the Elimination of Racial Discrimination has drawn attention to instances where the rights of indigenous peoples to land, health, environment and an adequate standard of living have been adversely affected by the operations of transnational corporations. In that context, it has encouraged the relevant State party to “ensure that no obstacles are introduced in the law that prevent the holding of ... transnational corporations accountable in the State party’s courts when [violations of the Covenant] are committed outside the State party”.⁵⁷⁶

(9) Reference can furthermore be made to the Montreux Document which recalls the obligations that contracting States, as well as home States and host States, of private military and security companies have under the law of armed conflict and international human rights law.⁵⁷⁷ In particular, States are required to take measures to prevent, investigate and provide effective penal sanctions for persons committing grave breaches of the applicable law of armed conflict and to investigate and, as appropriate, prosecute persons suspected of other crimes under international law. To give effect to their human rights obligations, States “have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of [private military and security companies] and their personnel”.⁵⁷⁸ While the draft principle has been phrased as a recommendation, it is without prejudice to such obligations of States, which are not limited to private military and security companies. For instance, to the extent that a business

⁵⁷¹ *Ibid.*, para. 19.

⁵⁷² *Ibid.*, para. 20.

⁵⁷³ *Ibid.*, para. 34.

⁵⁷⁴ *Ibid.*, para. 33. Similarly, in the United States case of *In re Xe Services*, the District Court dismissed the private military company’s claim that Iraq would be an appropriate forum and held that it was not shown that an alternative forum existed. See *In re Xe Services Alien Tort Litigation*, 665 F. Supp. 2d 569, 602 (E.D. Va. 2009). See also Canada, *Nevsun Resources Ltd.* (footnote 568 above), para. 18, referring to “a real risk of an unfair trial occurring in Eritrea”.

⁵⁷⁵ Human Rights Committee, concluding observations on the report of Germany (CCPR/C/DEU/CO/6), para. 16.

⁵⁷⁶ Committee on the Elimination of Racial Discrimination, concluding observations on the report of the United Kingdom (CERD/C/GBR/CO/18-20), para. 29.

⁵⁷⁷ Montreux Document. Part One, paras. 5, 6, 10–12, 16, 17.

⁵⁷⁸ *Ibid.*, para. 15. See also Federal Department of Foreign Affairs of Switzerland and Geneva Centre for the Democratic Control of Armed Forces (DCAF), “Legislative guidance tool for States to regulate private military and security companies” (Geneva, 2016), which contains also examples of best practices, available at www.dcaf.ch/sites/default/files/publications/documents/Legislative-Guidance-Tool-EN_1.pdf (accessed on 8 July 2019). For national legislation, see also the Office of the United Nations High Commissioner for Human Rights (OHCHR) study, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/218/09/PDF/G1721809.pdf?OpenElement>. The following link can be referred to for the various parts of the study and other related documents – <https://www.ohchr.org/en/special-procedures/wg-mercenarys/annual-thematic-reports> (accessed on 2 August 2022). See also *Al-Quraishi et.al. v. Nahkla and L-3 Services*, 728 F Supp 2d 702 (D Md 2010) at 35–37, 29 July 2010. A settlement was reached in this case, after years of litigation, in 2012.

enterprise is engaged in illegal exploitation of natural resources that amounts to pillage, the law of armed conflict provides a basis for preventing and punishing such acts.⁵⁷⁹

(10) The term “victims” refers to persons whose health or livelihood has been harmed by the environmental damage referred to in draft principle 11. Environmental damage may also affect other human rights such as the right to life and the right to food.⁵⁸⁰ The phrase “in particular for the victims” indicates, in the first place, that the adequate and effective remedies should be available for the victims of the environmental harm. In the second place, the phrase acknowledges that such remedies may also be available on a broader basis depending on the national legislation. This may be a case of public interest litigation by environmental associations or groups of persons, who cannot allege a violation of their individual rights or interests.⁵⁸¹ In addition, environmental damage can also give rise to civil claims in which the term “victim” would not be normally used. Furthermore, in cases of pure environmental damage, compensation could be awarded to the affected communities.

(11) The words “adequate and effective procedures and remedies” are general in nature and, together with the phrase “as appropriate”, allow States a certain flexibility when applying this provision at the national level.

(12) Draft principle 11 is located in Part Two as a provision of general application for the same reasons as draft principle 10.

Part Three **Principles applicable during armed conflict**

Commentary

(1) Part Three contains draft principles applicable during armed conflict, irrespective of classification. This includes international armed conflicts, understood in the traditional sense of an armed conflict fought between two or more States, including situations of occupation, armed conflicts in which peoples are fighting against colonial domination, alien occupation and racist régimes in the exercise of their right of self-determination, and non-international armed conflicts, which are fought either between a State and organized armed group(s) or between organized armed groups within the territory of a State.⁵⁸²

(2) While the focus of Part Three is on principles and rules of international law that are only applicable in armed conflict, there are a few exceptions. Paragraph 1 of draft principle 13 applies to all three phases to the extent that the law of armed conflict is applicable. Draft principle 17 on environmental modification techniques is based on the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques,⁵⁸³ the scope of which is not limited to armed conflicts. The primary context in which States would engage in military or any other hostile use of such techniques “as a means

⁵⁷⁹ See draft principle 16 below.

⁵⁸⁰ See footnotes 756 and 758 below.

⁵⁸¹ See L. Rajamani, “Public interest environmental litigation in India: exploring issues of access, participation, equity, effectiveness and sustainability”, *Journal of Environmental Law*, vol. 19 (2007), pp. 293–321. Available at www.researchgate.net/publication/316876795_Public_Interest_Environmental_Litigation_in_India_Exploring_Issues_of_Access_Participation_Equity_Effectiveness_and_Sustainability (accessed on 8 July 2019). See also India Environmental Portal, Public Interest Litigation, at www.indiaenvironmentportal.org.in/category/1255/thesaurus/public-interest-litigation-pil (accessed on 8 July 2019). See also the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) (Aarhus, Denmark, 25 June 1998), United Nations, *Treaty Series*, vol. 2161, No. 37770, p. 447, art. 6, as well as Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

⁵⁸² First Geneva Convention; Second Geneva Convention; Third Geneva Convention; Fourth Geneva Convention, common articles 2 and 3; Additional Protocol I, art. 1; and Additional Protocol II, art. 1.

⁵⁸³ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976), United Nations, *Treaty Series*, vol. 1108, No. 17119, p. 151.

of destruction, damage or injury to another State”⁵⁸⁴ is nevertheless an armed conflict. While the Martens Clause, too, has mainly been codified in the law of armed conflict,⁵⁸⁵ in particular the environmental Martens Clause may be regarded as being applicable also in peacetime.⁵⁸⁶

(3) Part Three contains draft principles that reflect some of the most relevant rules and principles of the law of armed conflict providing protection to the environment. Other provisions that are relevant to the protection of the environment in relation to armed conflicts have been referred to in the commentaries to several draft principles. They include, for instance, that “in any armed conflict, the right of the Parties to choose methods and means of warfare is not unlimited”,⁵⁸⁷ the prohibitions regarding objects indispensable to the survival of the civilian population,⁵⁸⁸ the prohibitions regarding works and installations containing dangerous forces,⁵⁸⁹ and the prohibition of the destruction of property not justified by military necessity.⁵⁹⁰ A comprehensive compilation of the principles and rules of the law of armed conflict providing protection to the environment is contained in the 2020 ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict.⁵⁹¹

(4) The focus on the law of armed conflict in Part Three does not indicate that, in the Commission’s view, other rules of international law would have no role to play. The general applicability of international human rights law⁵⁹² and international environmental law⁵⁹³ in armed conflicts has provided an obvious point of departure for the Commission’s work on the topic. It is furthermore recognized that the law of armed conflict, where it constitutes *lex specialis*, prevails when there is a conflict with another applicable rule of international law. Where there is no such conflict, other relevant rules of international law, such as international environmental law and international human rights law, may apply concurrently.

(5) Unlike the treaty provisions that they reflect, draft principles 13, 14 and 15 use the term “environment” rather than the term “natural environment”. The draft principles refer consistently to the “environment”, in line with the established terminology of international environmental law. This change should not be understood as altering the scope of the existing conventional and customary law of armed conflict, or to expand the scope of the notion of “natural environment” in that law.

Principle 12

Martens Clause with respect to the protection of the environment in relation to armed conflicts

In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

⁵⁸⁴ *Report of the Conference of the Committee on Disarmament*, vol. I, *Official records of the General Assembly, Thirty-first session, Supplement No. 27 (A/31/27)*, annex, Understanding relating to article II, p. 92.

⁵⁸⁵ See footnotes 642 and 643 below. The Martens Clause has nevertheless also been included in the Convention on Certain Conventional Weapons, fifth preambular paragraph, as well as in the Convention on Cluster Munitions (Dublin, 30 May 2008), United Nations, *Treaty Series*, vol. 2688, p. 39, eleventh preambular paragraph.

⁵⁸⁶ See para. (6) of the commentary to draft principle 12 below. See also D. Shelton and A. Kiss, “Martens Clause for environmental protection”, *Environmental Policy and Law*, vol. 30 (2000), pp. 285–286, at p. 286.

⁵⁸⁷ Additional Protocol I, art. 35, para. 1.

⁵⁸⁸ Additional Protocol I, art. 54, and Additional Protocol II, art. 14.

⁵⁸⁹ Additional Protocol I, art. 56, and Additional Protocol II, art. 15.

⁵⁹⁰ Hague Regulations, art. 23 (g); Fourth Geneva Convention, art. 147.

⁵⁹¹ ICRC, Guidelines on the Protection of the Environment in Armed Conflict (footnote 345 above).

⁵⁹² *Legal Consequences of the Construction of a Wall* (see footnote 351 above), p. 178, para. 106;

Legality of the Threat or Use of Nuclear Weapons (see footnote 340 above), p. 240, para. 25.

⁵⁹³ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), p. 243, para. 33; draft articles on the effects of armed conflicts on treaties, *Yearbook ... 2011*, vol. II (Part Two), pp. 106–130, paras. 100–101, commentary to the annex, para. (55), at p. 127.

Commentary

(1) Draft principle 12 is inspired by the Martens Clause, which originally appeared in the preamble to the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land,⁵⁹⁴ and has been restated in several later treaties.⁵⁹⁵ The Martens Clause provides, in essence, that even in cases not covered by specific international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.⁵⁹⁶ The International Court of Justice has stated that the clause forms part of customary international law.⁵⁹⁷ While originally conceived in the context of belligerent occupation, the clause has today a broader application, covering all areas of the law of armed conflict.⁵⁹⁸

(2) The function of the Martens Clause is generally seen as providing residual protection in cases not covered by a specific rule.⁵⁹⁹ The International Court of Justice referred to the Martens Clause in its Advisory Opinion on the *Legality of Nuclear Weapons* to strengthen the argument about the applicability of international humanitarian law to the threat or use of nuclear weapons.⁶⁰⁰ Similarly, the ICRC commentary to the First Geneva Convention mentioned, as a dynamic aspect of the clause, that it confirms “the application of the principles and rules of humanitarian law to new situations or to developments in technology, also when those are not, or not specifically, addressed in treaty law”.⁶⁰¹ The clause thus precludes the argument that any means or methods of warfare that are not explicitly prohibited by the relevant treaties⁶⁰² are permitted, or, in a more general manner, that acts of

⁵⁹⁴ Convention (II) with Respect to the Laws and Customs of War on Land (The Hague, 29 July 1899), J.B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*. The 1899 Martens Clause reads: “Until a more complete code of the laws of war is issued, the high contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.” For a general overview, see memorandum by the Secretariat on the effect of armed conflicts on treaties: an examination of practice and doctrine (A/CN.4/550), paras. 140–142.

⁵⁹⁵ See First Geneva Convention, art. 63; Second Geneva Convention, art. 62; Third Geneva Convention, art. 142; Fourth Geneva Convention, art. 158. Additional Protocol I, art. 1, para. 2, and Additional Protocol II, preamble, para. 4.

⁵⁹⁶ Additional Protocol I, art. 1, para. 2.

⁵⁹⁷ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), p. 259, para. 84.

⁵⁹⁸ T. Meron, “The Martens Clause, principles of humanity, and dictates of public conscience”, *American Journal of International Law*, vol. 94 (2000), pp. 78–89, at p. 87.

⁵⁹⁹ Para. (3) of the commentary to art. 29 of the articles on the law of the non-navigational uses of international watercourses with commentaries and resolution on transboundary confined groundwater, *Yearbook ... 1994*, vol. II (Part Two), at p. 131; para. (3) of the commentary to draft art. 18 of the draft articles on the law of transboundary aquifers, *Yearbook... 2008*, vol. II (Part Two), para. 54, at p. 43: “In cases not covered by a specific rule, certain fundamental protections are afforded by the ‘Martens clause’”.

⁶⁰⁰ “Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons”, *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), p. 260, para. 87.

⁶⁰¹ ICRC commentary (2016) to the First Geneva Convention, art. 63, para. 3298. See also C. Greenwood, “Historical developments and legal basis”, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford, Oxford University Press, 2008), pp. 33–34, at p. 34: “as new weapons and launch systems continue to be developed, incorporating ever more sophisticated robotic and computer technology, the venerable Martens Clause will ensure that the technology will not outpace the law.”

⁶⁰² ICRC commentary (1987) to Additional Protocol I, art. 1, para. 2, para. 55; ICRC commentary to the First Geneva Convention (2016), para. 3297.

war not expressly addressed by treaties or general international law are *ipso facto* permissible.⁶⁰³

(3) Beyond that, however, views differ as to the legal consequences of the Martens Clause. It has been seen as a reminder of the role of customary international law in the absence of applicable treaty law, and of the continued validity of customary international law alongside treaty law.⁶⁰⁴ The Martens Clause has also been seen to offer additional interpretative guidance “whenever the legal regulation provided by a treaty or customary rule is doubtful, uncertain or lacking in clarity”.⁶⁰⁵ A further interpretation links the Martens Clause to a method of identifying customary international law in which particular emphasis is given to *opinio juris*.⁶⁰⁶ The inclusion of the present draft principle in the set of draft principles does not mean, or imply, that the Commission is taking a position on the various views regarding the legal consequences of the Martens Clause.

(4) Draft principle 12 is entitled “Martens Clause with respect to the protection of the environment in relation to armed conflicts”. The title draws attention to the environmental focus of the draft principle, the purpose of which is to provide subsidiary protection to the environment in relation to armed conflicts.

(5) This is not the first time the Martens Clause has been invoked in the context of the protection of the environment in armed conflict.⁶⁰⁷ The ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Armed Conflict of 1994 include a provision stating the following: “In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience.”⁶⁰⁸ In 1994, the General Assembly invited all States to disseminate the ICRC guidelines widely and to “give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel”.⁶⁰⁹ The 2020 ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict retain the same formulation.⁶¹⁰

⁶⁰³ According to the German Military Manual, “[i]f an act of war is not expressly prohibited by international agreements or customary law, this does not necessarily mean that it is actually permissible”. See Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts – Manual*, para. 129 (ZDv 15/2, 1992).

⁶⁰⁴ Greenwood, “Historical developments and legal basis” (footnote 601 above), p. 34. See also the ICRC commentary (2016) to the First Geneva Convention, art. 63, para. 3296, which characterizes this as the minimum content of the clause.

⁶⁰⁵ A. Cassese, “The Martens Clause: half a loaf or simply pie in the sky?”, *European Journal of International Law*, vol. 11 (2000), pp. 187–216, at pp. 212–213; G. Distefano and E. Henry, “Final provisions, including the Martens Clause”, in A. Clapham, P. Gaeta and M. Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015), pp. 155–188, at pp. 185–186. See also *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment, 14 January 2000, paras. 525 and 527.

⁶⁰⁶ Cassese, “The Martens Clause: half a loaf or simply pie in the sky?” (see previous footnote), p. 214; Meron, “The Martens Clause, principles of humanity, and dictates of public conscience” (see footnote 598 above), p. 88.

⁶⁰⁷ See P. Sands *et al.*, *Principles of International Environmental Law*, 4th ed. (Cambridge, Cambridge University Press, 2018), p. 832: “In modern international law, there is no reason why [the dictates of public conscience] should not encompass environmental protection”. Similarly M. Bothe *et al.*, “International law protecting the environment during armed conflict: gaps and opportunities”, *International Review of the Red Cross*, vol. 92 (2010), pp. 569–592, at pp. 588–589; Droegge and Tougas, “The protection of the natural environment in armed conflict ...” (footnote 376 above), pp. 39–40; M. Tignino, “Water during and after armed conflicts: what protection in international law?”, *Brill Research Perspectives in International Water Law*, vol. 1.4 (2016), pp. 1–111, at pp. 26, 28 and 41.

⁶⁰⁸ ICRC, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (A/49/323, annex), guideline 7.

⁶⁰⁹ General Assembly resolution 49/50 of 9 December 1994, para. 11.

⁶¹⁰ ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), Rule 16.

(6) The second IUCN World Conservation Congress, furthermore, in 2000 urged Member States of the United Nations to endorse a policy reading as follows:

Until a more complete international code of environmental protection has been adopted, in cases not covered by international agreements and regulations, the biosphere and all its constituent elements and processes remain under the protection and authority of the principles of international law derived from established custom, from dictates of the public conscience, and from the principles and fundamental values of humanity acting as steward for present and future generations.⁶¹¹

The recommendation was adopted by consensus⁶¹² and was meant to apply during peacetime as well as during armed conflicts.⁶¹³

(7) The present draft principle follows the wording of the Martens Clause in Additional Protocol I to the Geneva Conventions (art. 1, para. 2), which states: “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.” In particular, the reference to “the dictates of public conscience”, as a general notion not intrinsically limited to one specific meaning, justifies the application of the Martens Clause to the environment.⁶¹⁴ In this regard, reference can be made to the importance, as generally recognized, of environmental protection, as well as to the growth and consolidation of international environmental law. More specifically, the understanding of the environmental impacts of conflict has developed considerably since the adoption of the treaties codifying the law of armed conflict. The term “public conscience” can furthermore be seen to encompass the notion of intergenerational equity as an important part of the ethical basis of international environmental law.

(8) Another essential component of the Martens Clause, the reference to “the principles of humanity”, displays a more indirect relationship to the protection of the environment. It may even be asked whether the environment can remain under the protection of “the principles of humanity”, given that the function of such principles is to specifically serve human beings. It should be recalled in this regard that humanitarian and environmental concerns are not mutually exclusive, as pointed out by the International Court of Justice: “The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn”.⁶¹⁵ The intrinsic link between the survival of people and the environment in which they live has also been recognized in other authoritative statements.⁶¹⁶ Similarly, modern definitions of the environment as an object of protection do not draw a strict dividing line between the environment and human activities but encourage definitions that include components of both.⁶¹⁷ The mention of the principles of humanity is moreover an integral part of the Martens Clause.

⁶¹¹ World Conservation Congress, resolution 2.97, entitled “A Martens Clause for environmental protection” (Amman, 4–11 October 2000).

⁶¹² The United States and United States agency members did not join the consensus.

⁶¹³ Shelton and Kiss, “Martens Clause for environmental protection” (footnote 586 above) p. 286.

⁶¹⁴ Similarly, ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), para. 201, and footnotes 455 and 456.

⁶¹⁵ See *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), p. 241, para. 29.

⁶¹⁶ The World Charter for Nature stated that “[m]ankind is a part of nature and life depends on the uninterrupted functioning of natural systems”. General Assembly resolution 37/7 of 28 October 1982, annex, preamble. The Special Rapporteur on human rights and the environment has furthermore linked human dignity with the environment as a “minimum standard of human dignity”: “Without a healthy environment, we are unable to fulfil our aspirations or even live at a level commensurate with minimum standards of human dignity.” See, OHCHR, “Introduction”, available at www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx (accessed on 2 August 2022). ICRC has also recognized this intrinsic link, see ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), para. 201.

⁶¹⁷ See Sands, *Principles of International Environmental Law* (footnote 607 above), p. 14: The concept of the environment, however, encompasses “both the features and the products of the natural world and those of human civilisation.” See also C.R. Payne, “Defining the environment: environmental

(9) The term “the principles of humanity” is distinct from “the principle of humanity” as one of the two cardinal principles of the law of armed conflict, together with military necessity. The reference to “the principles of humanity” in the Martens Clause is broader and can be connected to the concept of “elementary considerations of humanity”, which, according to the International Court of Justice, are “even more exacting in peace than in war”.⁶¹⁸ In practice, the two terms are often used interchangeably.⁶¹⁹ Reference can also be made to “fundamental minimum standards of humanity” recognized, *inter alia*, in the practice of the International Criminal Tribunal for the former Yugoslavia⁶²⁰ and the Commission on Human Rights.⁶²¹ The term “the principles of humanity” can therefore also be taken to refer more generally to humanitarian standards that are found not only in international humanitarian law but also in international human rights law,⁶²² which provides important protections to the environment.⁶²³

(10) Draft principle 12 is located in Part Three containing draft principles applicable during an armed conflict, including in situations of occupation.

Principle 13

General protection of the environment during armed conflict

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

integrity”, in Stahn, Iverson and Easterday (eds.), *Environmental Protection and Transitions from Conflict to Peace ...* (footnote 541 above), pp. 40–70, at p. 69, calling for a consideration of “how human activities and environment function as an interactive system”, not focusing exclusively on one element.

⁶¹⁸ *Corfu Channel case, Judgment of April 9th, 1949, I.C.J. Reports 1949*, p. 4, at p. 22. See also ICRC commentary (2016) to the First Geneva Convention, art. 63, para. 3291. See also *La Nostra Signora de la Piedad* (1801), 25 Merlin, Jurisprudence, Prise Maritime, sect. 3, art. 1.3, which established that the capture of such vessels was contrary to “the principles of humanity, and the maxims of international law”. See further *The Paquete Habana v. United States*, 175 U.S. 677 (1900), pp. 695 and 708, in which the United States Supreme Court recognized that customary international law prohibited the capture of coastal fishing vessels engaged in sustaining the civilian population, and cited with approval the *La Nostra Signora de la Piedad* case.

⁶¹⁹ Together with such other concepts as “laws of humanity”, “humaneness” and “spirit of humanity”; see K.M. Larsen *et al.* (eds.), *Searching for a ‘Principle of Humanity’ in International Humanitarian Law* (Cambridge, Cambridge University Press 2012), pp. 4 and p. 6. The link of these concepts with human rights has been recognized both in practice and in doctrine. See, for instance, International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zejnir Delalic, Zdravko Mucic (aka “Pavo”), Hazim Delic and Esad Landžo (aka “Zenga”) (“Celebici case”)* Case No. IT-96-3-A, Judgment, 20 February 2001, para. 149; International Tribunal for the Law of the Sea, *M/V Saiga (No. 2), St Vincent and the Grenadines v. Guinea, Judgment, ITLOS Reports 1999*, p. 10, at para. 155; I. Brownlie, *Principles of Public International Law* (Oxford, Clarendon Press), 1998, p. 575.

⁶²⁰ *Celebici case* (see previous footnote), para. 149.

⁶²¹ Commission on Human Rights, Promotion and Protection of Human Rights: fundamental standards of humanity, Report of the Secretary-General (E/CN.4/2006/87).

⁶²² Cassese, “The Martens Clause: half a loaf or simply pie in the sky?” (footnote 605 above), p. 212, refers to “general standards of humanity” as deduced from international human rights standards. See also P.-M. Dupuy, “Les considérations élémentaires d’humanité dans la jurisprudence de la Cour internationale de Justice”, in L.-A. Sicilianos and R.-J. Dupuy (eds.), *Mélanges en l’honneur de Nicolas Valticos: Droit et justice* (Paris, Pedone, 1998), pp. 117–130.

⁶²³ Several courts and tribunals have explicitly recognized the interdependence between human beings and the environment by affirming that environmental harm affects the right to life. *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, Judgment No. ECW/CCJ/JUD/18/12, Community Court of Justice, Economic Community of West African States, 14 December 2012; *Öneryildiz v. Turkey*, Application No. 48939/99, Judgment, European Court of Human Rights, 30 November 2004, ECHR 2004-XII, para. 71. As the most recent such ruling, the advisory opinion of the Inter-American Court of Human Rights *Medio Ambiente y Derechos Humanos* established that there is an inalienable relationship between human rights and environmental protection. Inter-American Court of Human Rights, Advisory Opinion No. OC 23-17, *Medio Ambiente y Derechos Humanos* [The environment and human rights], 15 November 2017, Series A, No. 23. See also the resolution of the Inter-American Commission on Human Rights in *Yanomami v. Brazil*, resolution No. 12/85, Case No. 7615, 5 March 1985.

2. Subject to applicable international law:
 - (a) care shall be taken to protect the environment against widespread, long-term and severe damage;
 - (b) the use of methods and means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the environment is prohibited.
3. No part of the environment may be attacked, unless it has become a military objective.

Commentary

(1) Draft principle 13 comprises three paragraphs which broadly provide for the protection of the environment during armed conflict, whether international or non-international. It reflects the obligation to respect and protect the environment, the duty of care and the prohibition of the use of certain methods and means of warfare, as well as the prohibition of attacks against any part of the environment, unless it has become a military objective.

(2) Paragraph 1 sets out the general position that in relation to armed conflict, the environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.

(3) The words “respected” and “protected” were chosen for the present draft principle as they have been used in several legal instruments in the law of armed conflict, international environmental law and international human rights law.⁶²⁴ The International Court of Justice in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* held that “respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principle of necessity”.⁶²⁵

(4) As far as the term “applicable international law” is concerned, the words “in particular, the law of armed conflict” reflect the fact that it is this set of rules that has been specifically designed for armed conflicts. At the same time, other rules of international law providing environmental protection, such as international environmental law and international human rights law, retain their relevance.⁶²⁶ Paragraph 1 of draft principle 13 is applicable during all three phases (before, during and after an armed conflict) to the extent that the law of armed conflict applies.

(5) Paragraph 2 is inspired by article 55, paragraph 1, and article 35, paragraph 3, of Additional Protocol I to the Geneva Conventions. Subparagraph (a) provides the rule that care shall be taken in warfare to protect the environment against widespread, long term and severe damage. Subparagraph (b) provides that the use of methods and means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the environment is prohibited. The *chapeau* “subject to applicable international law” applies to both subparagraphs.

(6) The *chapeau* recognizes that there are still different views regarding the customary status of both the duty of care and the prohibition as enshrined in Additional Protocol I.⁶²⁷ Paragraph 2 does not seek to extend the treaty obligations to States not parties to Additional

⁶²⁴ A considerable number of instruments on the law of armed conflict, environmental law and human rights law contain the terms “respect” and “protect”. Of most relevance is the World Charter of Nature, General Assembly resolution 37/7 of 28 October 1982, in particular the preamble and principle 1, and Additional Protocol I, art. 48, para. 1, which provides that civilian objects shall be respected and protected. See also, for example, the International Covenant on Civil and Political Rights (New York, 16 December 1964), United Nations, *Treaty Series*, vol. 999, p. 171, art. 2; Additional Protocol I, art. 55, and the Rio Declaration (footnote 335 above), principle 10.

⁶²⁵ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), para. 30.

⁶²⁶ *Ibid.*, pp. 240–242, paras. 25 and 27–30.

⁶²⁷ See Protection of the environment in relation to armed conflicts: comments and observations received from governments, international organizations and others (A/CN.4/749): comments on draft principle 13 of Canada, France, Israel, Switzerland, the United Kingdom, the United States and ICRC.

Protocol I. It also takes into account that some States Parties to Additional Protocol I have made declarations or reservations concerning the scope of application of Additional Protocol I.⁶²⁸

(7) Regarding subparagraph (a), article 55, paragraph 1, of Additional Protocol I provides that care shall be taken to protect the environment against widespread, long-term and severe damage in international armed conflicts.⁶²⁹ The term “care shall be taken” indicates that there is a duty on the parties to an armed conflict to be vigilant of the potential impact that military activities can have on the environment.⁶³⁰ The considerations to be taken into account for this purpose are related both to the foreseeable effect of the methods and means of warfare used, and to the characteristics of the terrain in which military activities take place, such as the importance of ecologically rich environmental areas, or vulnerable or fragile ecosystems. The duty of care is also related to the obligation to take “constant care ... to spare ... civilians and civilian objects”⁶³¹ and the principle of precautions.⁶³²

(8) Like article 55, paragraph 1, and article 35, paragraph 3, subparagraphs (a) and (b) of draft principle 13 include a triple cumulative standard: “widespread, long-term and severe”. These terms are not defined in Additional Protocol I. While the same terms are used in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which also provides clarification on how they should be understood,⁶³³ the ICRC commentary to article 35, paragraph 1, indicates that the two instruments do not give the same meaning to the three terms.⁶³⁴ It is also obvious that, by opting for the conjunctive “and” instead of the disjunctive “or” used in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, the States participating in the negotiations on Additional Protocol I wished to set a high threshold.

(9) At the same time, the interpretation of this standard should not rely solely on how the concept of “environmental damage” was understood in the 1970s⁶³⁵ but must take into account current scientific knowledge of ecological processes. In this regard, risk of damage should not be conceptualized only in terms of harm to a specific object but should also take into account the possibility of affecting a fragile interdependent system of both living and

⁶²⁸ The declarations regarding articles 35, paragraph 3, and 55 are available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 (accessed on 2 August 2022).

⁶²⁹ Article 55 – Protection of the natural environment 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.”

⁶³⁰ Pilloud and Pictet, “Article 55: Protection of the natural environment” (see footnote 353 above), p. 663, para. 2133. See also K. Hulme, “Taking care to protect the environment against damage: a meaningless obligation?” in *International Review of the Red Cross*, vol. 92 (2010), pp. 675–691.

⁶³¹ Additional Protocol I, art. 57, para. 1.

⁶³² See para. (8) of the commentary to draft principle 14 below.

⁶³³ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, art. 2. In the understanding relating to article I thereof, the terms “widespread”, “long-term” and “severe” are understood as follows: “‘widespread’: encompassing an area on the scale of several hundred square kilometers”; “‘long-lasting’: lasting for a period of months, or approximately a season”; “‘severe’: involving serious or significant disruption or harm to human life, natural and economic resources or other assets” (*Report of the Conference of the Committee on Disarmament, Official Records of the General Assembly, Thirty-first Session, Supplement No. 27 (A/31/27)*, vol. I, pp. 91–92).

⁶³⁴ ICRC Commentary (1987) to Additional Protocol I, art. 35, para. 1452.

⁶³⁵ It should also be taken into account, as Bothe notes, that at the time of the negotiations of Additional Protocol I (1974–1977), the participants had limited experience and expertise in relation to environmental damage in general and wartime environmental damage in particular. See M. Bothe, “The protection of the environment in times of armed conflict: legal rules, uncertainty, deficiencies and possible developments”, *German Yearbook on International Law*, vol. 34 (1991), pp. 54–62, at p. 56.

non-living components.⁶³⁶ ICRC has similarly noted: “[w]hat is certain is that in assessing the degree to which damage meets the threshold, current knowledge, including on the connectedness and interrelationships of different parts of the natural environment as well as on the effects of the harm caused, must be considered”.⁶³⁷

(10) Paragraph 3 of draft principle 13 is based on the fundamental rule under the law of armed conflict that a distinction must be made between military objectives and civilian objects.⁶³⁸ It underlines the inherently civilian nature of the environment. Paragraph 3 of draft principle 13 is to be read with article 52, paragraph 2, of Additional Protocol I, which defines the term “military objective” as:

... [T]hose objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁶³⁹

The term “civilian object” is defined as “all objects which are not military objectives”.⁶⁴⁰ In terms of the law of armed conflict, attacks may only be directed against military objectives, and not civilian objects.⁶⁴¹ There are several binding and non-binding instruments which indicate that this rule is applicable to parts of the environment.⁶⁴²

(11) Paragraph 3 is, however, temporally qualified with the words “has become”, which emphasize that this rule is not absolute: the environment may become a military objective in

⁶³⁶ “Ecosystem” is defined in the Convention on Biological Diversity, art. 2, as a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit. See also ICRC commentary (1987) to Additional Protocol I, art. 35, para. 1462, according to which the standard was meant to be applicable to “ecological warfare”. See further L.-A. Duvic-Paoli, *The Prevention Principle in International Environmental Law* (Cambridge, Cambridge University Press, 2018), p. 75, and B. Sjöstedt, *The Role of Multilateral Environmental Agreements: A Reconciliatory Approach to Environmental Protection in Armed Conflict* (Oxford, Hart Publishing, 2020), pp. 43–47.

⁶³⁷ A/CN.4/749, comments of ICRC on draft principle 13, summarizing ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), para. 54. As for the meaning of the three terms, see *ibid.*, paras. 56–72.

⁶³⁸ See, in general, Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 347 above), rule 7 and rule 43, pp. 25–29 and 143, respectively.

⁶³⁹ Additional Protocol I, art. 52, para. 2. A similar definition is provided in Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices annexed to the Convention on Certain Conventional Weapons (Geneva, 10 October 1980) hereinafter (Protocol II to the Convention on Certain Conventional Weapons), United Nations, *Treaty Series*, vol. 1342, No. 22495, p. 137, at p. 168; amended Protocol II to the Convention on Certain Conventional Weapons and Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, 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 III to the Convention on Certain Conventional Weapons), *ibid.*, vol. 1342, No. 22495, p. 171 as well as the 1999 Second Protocol.

⁶⁴⁰ See art. 52, para. 1, of Additional Protocol I, as well as art. 2, para. 5 of the Protocol II to the Convention on Certain Conventional Weapons; art. 2, para. 7, of the amended Protocol II to the Convention on Certain Conventional Weapons; and art. 1, para. 4, of the Protocol III to the Convention on Certain Conventional Weapons.

⁶⁴¹ See, in general, Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 347 above), rule 7, pp. 25–29. The principle of distinction is codified, *inter alia*, in article 48 and 52, paragraph 2, of Additional Protocol I, as well as the amended Protocol II and Protocol III to the Convention on Certain Conventional Weapons. It is recognized as a rule of customary international humanitarian law in both international and non-international armed conflict.

⁶⁴² The following instruments have been cited, *inter alia*: art. 2, para. 4, of Protocol III to the Convention on Certain Conventional Weapons, ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (footnote 608 above), the ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), the Final Declaration adopted by the International Conference for the Protection of War Victims, General Assembly resolutions 49/50 and 51/157, annex, the military manuals of Australia and the United States, as well as national laws of Nicaragua and Spain. See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 347 above), rule 43, pp. 143–144.

certain instances, and could thus be lawfully targeted.⁶⁴³ In this regard, it should be pointed out that paragraph 3 must be read together with draft principle 14, which specifically references the application of the law of armed conflict, rules and principles of distinction, proportionality and precautions.

Principle 14

Application of the law of armed conflict to the environment

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

Commentary

(1) Draft principle 14 is entitled “Application of the law of armed conflict to the environment” and deals with the application of principles and rules of the law of armed conflict to the environment with a view to its protection.

(2) Draft principle 14 mentions the principles and rules on distinction, proportionality and precautions. The draft principle itself is of a general character and does not elaborate on how these well-established principles and rules under the law of armed conflict should be interpreted. They are included in draft principle 14 because they have been identified as being the most relevant principles and rules of the law of armed conflict relating to the protection of the environment.⁶⁴⁴ However, this reference should not be interpreted as indicating a closed list, as all other rules of the law of armed conflict which relate to the protection of the environment in relation to armed conflict remain applicable and cannot be disregarded.⁶⁴⁵

(3) One of the cornerstones of the law of armed conflict⁶⁴⁶ is the principle of distinction which obliges parties to an armed conflict to distinguish between civilian objects and military objectives at all times, and that attacks may only be directed against military objectives.⁶⁴⁷ It is considered a rule under customary international law, applicable in both international and non-international armed conflict.⁶⁴⁸ As explained in the commentary to draft principle 13, the environment is inherently civilian in nature and therefore benefits from the rules governing

⁶⁴³ See e.g. Bothe *et al.*, “International law protecting the environment during armed conflict: gaps and opportunities” (footnote 607 above); R. Rayfuse, “Rethinking international law and the protection of the environment in relation to armed conflict” in *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict*, R. Rayfuse (ed.) (Leiden, Brill Nijhoff, 2015), p. 6; see also C. Droegge and M.-L. Tougas, “The protection of the natural environment in armed conflict ...” (footnote 376 above), pp. 17–19; D. Fleck, “The protection of the environment in armed conflict: legal obligations in the absence of specific rules”, *ibid.*, pp. 47–52; E. Koppe, “The principle of ambiguity and the prohibition against excessive collateral damage to the environment during armed conflict”, *ibid.*, pp. 76–82; and M. Bothe, “The ethics, principles and objectives of protection of the environment in times of armed conflict”, *ibid.*, p. 99.

⁶⁴⁴ See R. Rayfuse, “Rethinking international law and the protection of the environment in relation to armed conflict” (footnote 643 above), p. 6; United Nations Environment Programme, *Protecting the Environment During Armed Conflict ...* (footnote 369 above), pp. 12–13.

⁶⁴⁵ See ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above) as a comprehensive collection of the existing rules of the law of armed conflict protecting the environment. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law...* (footnote 347 above), rules 43 and 44.

⁶⁴⁶ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), p. 257, para. 78; M.N. Schmitt, “Military necessity and humanity in international humanitarian law: preserving the delicate balance”, *Virginia Journal of International Law*, vol. 50 (2010), pp. 795–839, at p. 803.

⁶⁴⁷ The principle of distinction is now codified in arts. 48, 51, para. 2, and 52, para. 2, of Additional Protocol I; art. 13, para. 2, of Additional Protocol II; amended Protocol II to the Convention on Certain Conventional Weapons; Protocol III to the Convention on Certain Conventional Weapons; and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997), United Nations, *Treaty Series*, vol. 2056, No. 35597, p. 211.

⁶⁴⁸ See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 347 above), rule 7, p. 25.

civilian objects. However, there are certain circumstances in which parts of the environment may become a military objective, in which case such parts may be lawfully targeted.

(4) The principle of proportionality establishes that an attack against a legitimate military target is prohibited if it may be expected to cause incidental damage to civilians or civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.⁶⁴⁹ The principle of proportionality is codified in several instruments of the law of armed conflict, and the International Court of Justice has also recognized its applicability in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*.⁶⁵⁰ It is considered a rule of customary international law, applicable in both international and non-international armed conflict.⁶⁵¹

(5) When the rules relating to proportionality are applied in relation to the protection of the environment, an attack against a legitimate military objective must not be undertaken if it would cause incidental environmental damage that would be excessive in relation to the concrete and direct military advantage anticipated.⁶⁵² At the same time, it has been concluded that “if the target is sufficiently important, a greater degree of risk to the environment may be justified”.⁶⁵³ This standard therefore accepts that “collateral damage” to the environment may be lawful in certain instances.

(6) As the environment is often indirectly rather than directly affected by armed conflict, rules relating to proportionality are of particular importance in relation to the protection of the environment in armed conflict.⁶⁵⁴ Their importance in this regard has been emphasized by the International Court of Justice, which has held that: “States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that goes into assessing whether an action is in conformity with the principles of necessity and proportionality”.⁶⁵⁵

(7) Since knowledge of the environment and its ecosystems is constantly increasing, better understood and more widely accessible, environmental considerations cannot remain static over time but should develop as understanding of the environment develops.

⁶⁴⁹ Art. 51, para. 5 (b), of Additional Protocol I. See also Y. Dinstein, “Protection of the environment in international armed conflict” *Max Planck Yearbook of United Nations Law*, vol. 5 (2001), pp. 523–549, at pp. 524–525. See also L. Doswald-Beck, “International humanitarian law and the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons”, *International Review of the Red Cross*, vol. 37 (1997), pp. 35–55, at p. 52.

⁶⁵⁰ Additional Protocol I, arts. 51 and 57, Additional Protocol II, and amended Protocol II to the Convention on Certain Conventional Weapons as well as the Statute of the International Criminal Court, art. 8, para. 2 (b) (iv). See also *Legality of the Threat or Use of Nuclear Weapons* (footnote 340 above), p. 242, para. 30.

⁶⁵¹ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 347 above), rule 14, p. 46.

⁶⁵² See also Dinstein, “Protection of the environment ...” (footnote 649 above), pp. 524–525; Doswald-Beck, “International humanitarian law and the advisory opinion of the International Court of Justice ...” (footnote 649 above); United Nations Environment Programme, *Protecting the Environment During Armed Conflict ...* (footnote 369 above), p. 13; Rayfuse, “Rethinking international law and the protection of the environment in relation to armed conflict” (footnote 643 above), p. 6; Droegge and Tougas, “The protection of the natural environment in armed conflict ...” (footnote 376 above), pp. 19–23.

⁶⁵³ International Criminal Tribunal for the Former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, para. 19. Available from www.icty.org/x/file/Press/nato061300.pdf (accessed on 8 July 2019). See also Dinstein, “Protection of the environment ...” (footnote 649 above), pp. 524–525.

⁶⁵⁴ *Ibid.*, rule 44, p. 150; Droegge and Tougas, “The protection of the natural environment in armed conflict ...” (footnote 376 above), p. 19; see also United Nations Environment Programme, *Desk Study on the Environment in Liberia* (footnote 443 above) and United Nations Environment Programme, *Environmental Considerations of Human Displacement in Liberia ...* (footnote 475 above).

⁶⁵⁵ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), p. 242, para. 30.

(8) The principle of precautions lays out that constant care must be taken to spare the civilian population, civilians and civilian objects from harm during military operations.⁶⁵⁶ In addition to this general principle, which applies to all military operations, the rule concerning precautions in attack requires that all feasible precautions must be taken with a view to avoiding and in any event minimizing incidental loss of civilian life, injury to civilians, as well as damage to civilian objects, that may occur.⁶⁵⁷ The rule is codified in several instruments of the law of armed conflict⁶⁵⁸ and is also considered to be a rule of customary international law in both international and non-international armed conflict.⁶⁵⁹ Parties to the conflict must furthermore take all feasible precautions to protect civilian objects under their control against the effects of attacks.⁶⁶⁰ These so-called passive precautions may also be taken in peacetime and apply, for instance, to decisions concerning the siting of fixed military installations.⁶⁶¹

(9) The phrase “shall be applied to the environment, with a view to its protection” is consistent with the purpose of the draft principles and introduces an objective which those involved in armed conflict or military operations should strive towards.

Principle 15 **Prohibition of reprisals**

Attacks against the environment by way of reprisals are prohibited.

Commentary

(1) Draft principle 15, entitled “Prohibition of reprisals”, is based on paragraph 2 of article 55 of Additional Protocol I, which states that “attacks against the natural environment by way of reprisals are prohibited”.

(2) As a treaty provision, the prohibition of attacks against the natural environment by way of reprisals is a binding rule for the 174 States parties to Additional Protocol I.⁶⁶² Certain States have included the prohibition in their military manuals.⁶⁶³

⁶⁵⁶ For the obligation of constant care, see Additional Protocol I, art. 57, para. 1. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 347 above), rule 15, first sentence, p. 51.

⁶⁵⁷ Additional Protocol I, art. 57. See also ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict* (footnote 345 above), rule 8.

⁶⁵⁸ The principle of precautions is codified in art. 2, para. 3, of the Convention (IX) of 1907 concerning Bombardment by Naval Forces in Time of War (The Hague, 18 October 1907), J. B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907* (see footnote 481 above); art. 57, para. 1, of Additional Protocol I, as well as art. 3, para. 10 of amended Protocol II to the Convention on Certain Conventional Weapons.

⁶⁵⁹ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 347 above), rule 15, p. 51.

⁶⁶⁰ Additional Protocol I, art. 58 (c).

⁶⁶¹ See ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict* (footnote 345 above), rule 9 and commentary.

⁶⁶² See the ICRC website (www.icrc.org/ihl/INTRO/470 (accessed on 12 June 2022)).

⁶⁶³ See S.-E. Pantazopoulos, “Reflections on the legality of attacks against the natural environment by way of reprisals”, *Goettingen Journal of International Law*, vol. 10 (2020), pp. 47–66, at p. 59, footnote 49; Australia, *The Manual of the Law of Armed Conflict* (2006), ADDP 06.4, para. 5.50 (“[a]ttacks against the environment by way of reprisal are prohibited”); Canada, National Defence, *Law of Armed Conflict at the Operational and Tactical Levels* (2001), B-GJ-005-104/FP-021, sect. 1507, para. 4 (i); Denmark, Ministry of Defence and Defence Command Denmark, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations* (2016), p. 425, sect. 2.16; Germany, Federal Ministry of Defence, *Joint Service Regulation (ZDv) 15/2: Law of Armed Conflict: Manual* (2013), para. 434; New Zealand, Defence Force, *Manual of Armed Forces Law*, vol. 4, *Law of Armed Conflict* (2008), para. 17.10.4 (e); Spain, Ministry of Defence, *Orientaciones: El Derecho de los Conflictos Armados*, vol. I (2007) [*Guidance: The Law of Armed Conflict*], para. 3.3.c.(5); United Kingdom, Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, Joint Service Publication 383 (2004), paras. 16.19.1 and 16.19.2. The ICRC study on customary international humanitarian law further references the following: Croatia, Ministry of

(3) Even though Additional Protocol I is widely ratified, it has not yet reached universal status, and the customary nature of the prohibition of attacks against the environment by way of reprisals is not settled. State practice in this area is sparse, but some States parties have made their legal positions known through reservations or declarations to Additional Protocol I. The extent to which these declarations or reservations are relevant to the application of paragraph 2 of article 55 must be evaluated on a case-by-case basis, since only a few States have made an explicit reference to this provision.⁶⁶⁴ The ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict contain the following statement: “While, under treaty law, the vast majority of States have now specifically committed not to take reprisal action against such objects [including the natural environment], the ICRC Study on Customary International Humanitarian Law did not find these prohibitions to be established as rules of customary international law”.⁶⁶⁵

(4) At the same time, it should be recalled that the environment is protected by other rules – beyond article 55, paragraph 2, of Additional Protocol I – that contain prohibitions regarding the use of reprisals. In particular, draft principle 15 is also related to article 51, paragraph 6, of Additional Protocol I, which prohibits attacks against the civilian population or civilians by way of reprisals, and article 52, paragraph 1, which states that civilian objects shall not be the object of reprisals. The 1949 Geneva Conventions also prohibit the use of reprisals against, *inter alia*, civilians and civilian objects.⁶⁶⁶ These customary prohibitions apply to reprisals against the environment as a civilian object, where it has not become a military objective.

Defence, Law of Armed Conflicts Compendium (1991), p. 19; Hungary, Military Manual (1992), p. 35; Italy, Military Appeals Court, *Hass and Priebke* case, Judgment, 7 March 1998; Kenya, Law of Armed Conflict Manual, 1997, Précis No. 4, p. 4; Netherlands, Military Manual (1993), p. IV-6. See J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. II, *Practice* (Cambridge, Cambridge University Press, 2005), pp. 3473–3474, paras. 1090, 1095–1097 and 1099. See, however, United States of America, Department of Defense, *Law of War Manual* (Office of General Counsel, Washington D.C., 2015, updated 2016), pp. 1115–1117, paras. 18.18.3.4 and 18.18.4.

⁶⁶⁴ For declarations and reservations made by States in connection with art. 55, para. 2, of Additional Protocol I, see Henckaerts and Doswald-Beck (eds.), *Customary International Humanitarian Law* (see previous footnote), practice related to Rule 147, sect. D (Reprisals against protected objects), Natural environment, p. 3471. All declarations and reservations concerning Additional Protocol I are available at the ICRC database <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=0A9E03F0F2EE757CC1256402003FB6D2> (accessed on 2 August 2022). Most clearly related to art. 55 para. 2, is the reservation of the United Kingdom: “The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise there to and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.” The conditions under which belligerent reprisals against the environment may be taken are partly described in United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, Oxford University Press, 2004), paras. 16.18–16.19.1.

⁶⁶⁵ ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), para. 93.

⁶⁶⁶ First Geneva Convention, art. 46; Second Geneva Convention, art. 47; Third Geneva Convention, art. 13; Fourth Geneva Convention, art. 33.

(5) Additional Protocol I further prohibits the use of reprisals against cultural property⁶⁶⁷ and objects indispensable to the survival of the civilian population.⁶⁶⁸ The 1954 Hague Convention also protects cultural property from reprisals.⁶⁶⁹ These prohibitions apply to reprisals against the environment when the relevant protected objects are part of the environment. In addition, the rules protecting works or installations containing dangerous forces from reprisals⁶⁷⁰ have particular importance in protecting, for instance nuclear power plants, an attack on which would lead to severe environmental consequences.

(6) As a treaty provision, article 55, paragraph 2, applies only to international armed conflicts. There is no corresponding rule in either common article 3 to the four Geneva Conventions or Additional Protocol II, which would explicitly prohibit reprisals in non-international armed conflicts (including against civilians, the civilian population, or civilian objects).

(7) In light of the drafting history of Additional Protocol II, it can nevertheless be questioned, whether a right to resort to reprisals in non-international armed conflicts has ever emerged. Some States in the diplomatic conference were of the view that reprisals of any kind are prohibited under all circumstances in non-international armed conflicts. At the same time, several States voted against the prohibition because they thought that the concept of reprisals had no place in non-international armed conflicts.⁶⁷¹ According to the ICRC study on customary international humanitarian law, there is “insufficient evidence that the very concept of lawful reprisal in non-international armed conflict has ever materialized in international law”. It furthermore notes that the relevant practice that has formed the rules on reprisals refers exclusively to inter-State relations.⁶⁷² Recent practice of non-international armed conflicts has not changed the situation but has rather stressed the importance of the protection of civilians, respect for human rights and diplomatic means to stop violations.⁶⁷³

(8) The ICRC study on customary international humanitarian law found that parties to non-international armed conflicts do not have the right to resort to belligerent reprisals.⁶⁷⁴ The International Criminal Tribunal for the Former Yugoslavia has also considered that the prohibition against reprisals against civilian populations constitutes a customary international law rule “in armed conflicts of any kind”.⁶⁷⁵ The present draft principle is intended to apply in all armed conflicts irrespective of classification.

(9) The current draft principle follows the wording of Additional Protocol I without any additions as it was considered that any other formulation could be interpreted as weakening the existing rule under the law of armed conflict. This would be an undesirable result, given the fundamental importance of the existing rules of the law of armed conflict concerning reprisals.

⁶⁶⁷ Additional Protocol I, art. 53 (c).

⁶⁶⁸ *Ibid.*, art. 54, para. 4.

⁶⁶⁹ 1954 Hague Convention, art. 4.

⁶⁷⁰ Additional Protocol I, art. 56, para. 4.

⁶⁷¹ See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva, 1974–1977) vol. IX, available from www.loc.gov/tr/frd/Military_Law/RC-dipl-conference-records.html (accessed on 2 August 2022). See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 347 above), rule 148, p. 526, and related practice, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule148 (accessed on 2 August 2022).

⁶⁷² Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 347 above), rule 148, pp. 527–528.

⁶⁷³ *Ibid.* Reference is furthermore made to the military manuals of several States, which define reprisals as an enforcement measure against another State.

⁶⁷⁴ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (footnote 347 above), Rule 148, p. 526, and related practice. See also ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict* (footnote 345 above), para. 94.

⁶⁷⁵ *Prosecutor v. Duško Tadić*, case No. IT-94-1-A72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, of 2 October 1995, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1994–1995*, vol. I, p. 353, at pp. 475–478, paras. 111–112. See also in general Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 347 above), pp. 526–529.

(10) While draft principle 15 reflects binding law in international armed conflicts for the wide majority of States, and seems to be consistent with *lex lata* in non-international armed conflicts, there is, at present, uncertainty concerning its customary status. There is thus reason to state that the principle is not intended to qualify or alter the scope and meaning of existing rules on reprisals under either conventional or customary international law.

Principle 16
Prohibition of pillage

Pillage of natural resources is prohibited.

Commentary

(1) The purpose of draft principle 16 is to restate the prohibition of pillage as well as its applicability to natural resources. Illegal exploitation of natural resources has been a driving force for many, in particular non-international, armed conflicts in recent decades,⁶⁷⁶ and has caused severe environmental strain in the affected areas.⁶⁷⁷ In this context, the prohibition of pillage was identified as one of the rules of the law of armed conflict that provide protection to the environment.

(2) Pillage is an established violation of the law of armed conflict and a war crime. The Fourth Geneva Convention contains an absolute prohibition of pillage, both in the territory of a party to an armed conflict, and in an occupied territory.⁶⁷⁸ Additional Protocol II to the Geneva Conventions confirms the applicability of this general prohibition in non-international armed conflicts meeting the criteria set out in the Protocol and, in that context, “at any time and in any place whatsoever”.⁶⁷⁹ The prohibition has been widely incorporated into national legislation as well as in military manuals.⁶⁸⁰ There is considerable case law from both post-Second World War and modern international criminal tribunals confirming the criminal nature of pillage.⁶⁸¹ The war crime of pillaging is also prosecutable under the Rome

⁶⁷⁶ According to the United Nations Environment Programme, 40 per cent of internal armed conflicts over the past 60 years were related to natural resources, and since 1990, at least 18 armed conflicts have been fuelled directly by natural resources. See *Renewable Resources and Conflict: Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflicts* (New York, United Nations Interagency Framework Team for Preventive Action, 2012), p. 14. Available at www.un.org/en/land-natural-resources-conflict/renewable-resources.shtml (accessed on 2 August 2022).

⁶⁷⁷ Interim report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (S/2002/565), para. 52. See also United Nations Environment Programme, *The Democratic Republic of the Congo: Post-Conflict Environmental Assessment. Synthesis Report for Policy Makers* (Nairobi, United Nations Environment Programme, 2011), pp. 26–28, available at <http://wedocs.unep.org/handle/20.500.11822/22069> (accessed on 2 August 2022); Report of the Panel of Experts pursuant to paragraph 25 of Security Council resolution 1478 (2003) concerning Liberia (S/2003/779), para. 14; United Nations Environment Programme, *Desk Study on the Environment in Liberia* (footnote 443 above), pp. 16–18 and 42–51; C. Nellemann et al. (eds.), *The Rise of Environmental Crime – A Growing Threat to Natural Resources Peace, Development and Security* (United Nations Environment Programme-INTERPOL, 2016), p. 69.

⁶⁷⁸ The Hague Regulations, art. 28 and art. 47; Fourth Geneva Convention, art. 33, para. 2. See also the First Geneva Convention, art. 15, first para., according to which “At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage”. See also African Charter on Human and Peoples’ Rights, art. 21, para. 2: “In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation”. Furthermore, the Lusaka Protocol of the International Conference on the Great Lakes Region reproduces the same provision. See Protocol Against the Illegal Exploitation of Natural Resources of the International Conference on the Great Lakes Region art. 3, para. 2.

⁶⁷⁹ Additional Protocol II, art. 4, para. 2 (g).

⁶⁸⁰ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 347 above), rule 52, “Pillage is prohibited”, pp. 182–185.

⁶⁸¹ See, e.g., *In re Krupp and Others*, Judgment of 30 June 1948, *Trials of War Criminals before the Nürnberg Military Tribunals*, Vol. IX, p. 1337–1372; *U.S.A. v. von Weizsäcker et al. (Ministries*

Statute, in both international and non-international armed conflicts.⁶⁸² The prohibition of pillage has been found to constitute a rule of customary international law in both types of conflicts.⁶⁸³

(3) According to the ICRC commentary to Additional Protocol II, the prohibition applies to all categories of property, whether public or private.⁶⁸⁴ The scope of the present draft principle is limited to the pillage of natural resources, which is a common phenomenon in armed conflicts, and one that leads to severe environmental impacts. While pillage only applies to natural resources that can be subject to ownership and constitute “property”, this requirement is easily met where natural resources offer the potential for significant enrichment. The prohibition covers pillage of natural resources, whether owned by the State, communities or private persons.⁶⁸⁵ The applicability of the prohibition of pillage to natural resources has been confirmed by the International Court of Justice, which found in the *Armed Activities* judgment, that Uganda was internationally responsible “for acts of looting, plundering and exploitation of the [Democratic Republic of the Congo]’s natural resources” committed by members of the Ugandan Armed Forces in the territory of the Democratic Republic of the Congo.⁶⁸⁶

(4) Pillage is a broad term that applies to any appropriation or obtention of property in armed conflict that violates the law of armed conflict. According to the ICRC commentary to Additional Protocol II, the prohibition of pillage covers both organized pillage and individual acts,⁶⁸⁷ whether committed by civilians or military personnel.⁶⁸⁸ Acts of pillage do not necessarily involve the use of force or violence.⁶⁸⁹ At the same time, the law of armed

case), *Trials of War Criminals before the Nürnberg Military Tribunals*, vol. XIV, p. 741; *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, Judgment, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, 14 December 1999; *The Prosecutor v. Zejnil Delalić, Zdravko Mucić a/k/a “Pavo”, Hazim Delić and Esad Landžo a/k/a “Zenga”*, Case No. IT-96-21-T, Judgment, International Criminal Tribunal for the Former Yugoslavia, 16 November 1998, and Sentencing Judgement, International Criminal Tribunal for the Former Yugoslavia, 9 October 2001; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement (with Declaration of Judge Shahabuddeen), Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, 3 March 2000, *Judicial Reports 2000*; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgement, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, 26 February 2001; *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T-1234, Judgment, Trial Chamber, Special Court for Sierra Leone, 2 March 2009; *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-1-T, Judgment, 18 May 2012 (*Taylor Trial Judgment*); *Prosecutor against Charles Ghankay Taylor*, Case No. SCSL-03-01-A, Judgment, Appeals Chamber, Special Court for Sierra Leone, 26 September 2013.

⁶⁸² Rome Statute, art. 8, para. 2 (b) (xvi) and (e) (v).

⁶⁸³ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 347 above) rule 52, pp. 182–185.

⁶⁸⁴ ICRC commentary (1987) on Additional Protocol II, art. 4, para. 2 (g), para. 4542 of the commentary. See also ICRC commentary (1958) to the Fourth Geneva Convention, art. 33, para. 2. See also ICRC, *Guidelines on the Protection of the Natural Environment* (footnote 345 above), para. 182, which recognize that the prohibition of pillage also applies to “components of the natural environment [which] can be subject to ownership such that they are ‘property’”.

⁶⁸⁵ Property rules have also been widely used at the national level “for settling disputes concerning access, use and control of resources” and constitute therefore “a critical mechanism for environmental protection”. T. Hardman Reis, *Compensation for Environmental Damage under International Law. The Role of the International Judge* (Alphen aan den Rijn, Wolters Kluwer, 2011), p. 13.

⁶⁸⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Judgment ... 2005* (see footnote 484 above), p. 253, para. 250.

⁶⁸⁷ ICRC commentary (1987) on Additional Protocol II, art. 4, para. 2 (g), para. 4542 of the commentary. See also ICRC commentary (1958) to the Fourth Geneva Convention, art. 33, para. 2.

⁶⁸⁸ ICRC commentary (2016) to the First Geneva Convention, art. 15, para. 1495. See also International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, para. 590, pointing out that the prohibition of pillage “extends both to acts of looting committed by individual soldiers for their private gain, and to organized seizure of property undertaken within the framework of a systemic economic exploitation of occupied territory”.

⁶⁸⁹ *Ibid.*, para. 1494.

conflict provides a number of exceptions under which appropriation or destruction of property may be lawful.⁶⁹⁰

(5) The terminology used for illegal appropriation of property, including natural resources, in armed conflict has not been consistent. The International Court of Justice, in the *Armed Activities* judgment, referred to “looting, plundering and exploitation”,⁶⁹¹ the Statute of the International Criminal Tribunal for the Former Yugoslavia referred to “plunder”,⁶⁹² while the African Charter uses the term “spoliation”.⁶⁹³ Research shows, however, that the terms “pillage”, “plunder”, “spoliation” and “looting” have a common legal meaning and been used interchangeably by international courts and tribunals.⁶⁹⁴ The Nürnberg Judgment thus used “pillage” and “plunder” as synonyms.⁶⁹⁵ While the post-Second World War jurisprudence preferred the term “spoliation”, it confirmed that the term was synonymous with “plunder”, which was the term used in Control Council Law No. 10.⁶⁹⁶ The jurisprudence of the modern international criminal courts and tribunals has further confirmed that “pillage”, “plunder” and “looting” all signify unlawful appropriation of public or private property in armed conflict.⁶⁹⁷

(6) The term “pillage” has been used in the Hague Regulations⁶⁹⁸ and the Fourth Geneva Convention,⁶⁹⁹ Additional Protocol II⁷⁰⁰ and the Rome Statute.⁷⁰¹ The Nürnberg Charter⁷⁰² used the term “plunder”. The concept of pillage has been defined in the ICRC commentaries to the Geneva Conventions and Additional Protocol II, as well as in the jurisprudence of the international criminal tribunals. It has therefore been deemed appropriate to use the term “pillage” in the present draft principle.

(7) Pillage of natural resources is part of the broader context of illegal exploitation of natural resources that thrives in armed conflict and post-armed conflict situations. The Security Council and the General Assembly have drawn attention in this regard to the connections between transnational criminal networks, terrorist groups and armed conflicts,

⁶⁹⁰ For capture of an adversary’s movable public property that can be used for military purposes, see First Geneva Convention, art. 50. Adversary’s property can also be lawfully destroyed or appropriated if required by imperative military necessity; see the Hague Regulations (1907), art. 23 (g). See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 347 above), rule 50, pp. 175–177. For the lawful use under the law of armed conflict by an Occupying Power of the resources of the occupied territory for the maintenance and needs of the army of occupation, see commentary to draft principle 21 below.

⁶⁹¹ *Armed Activities on the Territory of the Congo, Judgment ... 2005* (see footnote 484 above), para. 248.

⁶⁹² Art. 3 (e). Originally adopted by Security Council resolution 827 (1993) on 25 May 1993. The updated Statute is available at www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (accessed on 8 July 2019).

⁶⁹³ African Charter on Human and Peoples’ Rights, art. 21, para. 2.

⁶⁹⁴ J.G. Stewart, *Corporate War Crimes. Prosecuting the Pillage of Natural Resources* (Open Society Foundations, 2011), pp. 15–17.

⁶⁹⁵ *Trial of the Major War Criminals before the International Military Tribunal*, vol. I (Washington D.C., Nürnberg Military Tribunals, 1945), p. 228.

⁶⁹⁶ See *United States v. Krauch et al.* in *Trials of War Criminals before the Nuernberg Military Tribunals (The I.G. Farben Case)*, vols. VII–VIII (Washington D.C., Nürnberg Military Tribunals, 1952), p. 1081, at p. 1133.

⁶⁹⁷ *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998 (see footnote 681 above), para. 591: “the offence of the unlawful appropriation of public and private property in armed conflict has varyingly been termed ‘pillage’, ‘plunder’ and ‘spoliation’. ... The Trial Chamber reaches this conclusion on the basis of its view that [plunder], as incorporated in the Statute of the International Criminal Tribunal, should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as ‘pillage’”. See also *Prosecutor v. Alex Tamba Brima et al.*, Case No. SCSL-04-16-T, Judgment, Special Court for Sierra Leone, 20 June 2007, para. 751; and *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-T, Judgment, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, 17 October 2003, para. 98.

⁶⁹⁸ Arts. 28 and 47 of the 1907 Hague Regulations.

⁶⁹⁹ Art. 33, para. 2, of the Fourth Geneva Convention.

⁷⁰⁰ Art. 4, para. 2 (g), of Additional Protocol II.

⁷⁰¹ Rome Statute, art. 8, para. 2 (b) (xvi), and art. 8, para. 2 (e) (v), referring to “pillaging”.

⁷⁰² Nürnberg Charter, art. 6 (b).

including in relation to illicit trade in natural resources.⁷⁰³ Frequently characterized by poor governance, widespread corruption and weak protection of resource rights, post-armed conflict situations are vulnerable to exploitation through transnational environmental crime.⁷⁰⁴ “Illegal exploitation of natural resources”, as used in the relevant Security Council resolutions,⁷⁰⁵ is a general notion that may cover the activities of States, non-State armed groups, or other non-State actors, including private individuals. Accordingly, the notion may refer to illegality under international or national law. While the notion of “illegal exploitation of natural resources” is partly overlapping with the concept of pillage, it has not been defined in many instruments⁷⁰⁶ and may also refer to environmental crime, whether in times of armed conflict or in times of peace. This broader context underscores the application of the prohibition of pillage to natural resources.

(8) Draft principle 16 is located in Part Three containing draft principles applicable during an armed conflict, including in situations of occupation.

Principle 17 **Environmental modification techniques**

In accordance with their international obligations, States shall not engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State.

Commentary

(1) Draft principle 17 has been modelled on article 1, paragraph 1, of the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. The Convention prohibits military or any other hostile use of environmental

⁷⁰³ Security Council resolution 2195 (2014) of 19 December 2014, para. 3; General Assembly resolution 69/314 of 30 July 2015, paras. 2–5. See also Security Council resolutions 2134 (2014) of 28 January 2014 and 2136 (2014) of 30 January 2014 on the Security Council’s sanctions against persons and entities involved in wildlife poaching and trade. See also United Nations Environmental Assembly resolution 2/15 (see footnote 342 above), para. 4, and resolution 3/1 of 6 December 2017 on “Pollution mitigation and control in areas affected by armed conflict or terrorism” (UNEP/EA.3/Res.1), paras. 2–3.

⁷⁰⁴ Corruption has been identified as the most important enabling factor behind illegal trade in wildlife and timber. See Nellemann *et al.*, *The Rise of Environmental Crime ...* (footnote 677 above), p. 25: transnational environmental crime thrives in permissive environments. See also C. Cheng and D. Zaum, “Corruption and the role of natural resources in post-conflict transitions”, in C. Bruch, C. Muffett, and S.S. Nichols (eds.), *Governance, Natural Resources, and Post-Conflict Peacebuilding* (Abingdon, Earthscan from Routledge, 2016), pp. 461–480.

⁷⁰⁵ See, e.g., Security Council resolution 1457 (2003) of 24 January 2003, para. 2, in which the Council “[s]trongly condemns the illegal exploitation of the natural resources of the Democratic Republic of the Congo”.

⁷⁰⁶ The term “illegal exploitation of natural resources” appears in the Lusaka Protocol of the International Conference on the Great Lakes Region, art. 17, para. 1, but has not been defined. See, however, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo, 27 June 2014), art. 28L Bis, which defines the term “illicit exploitation of natural resources” as meaning “any of the following acts if they are of a serious nature affecting the stability of a state, region or the Union: a) Concluding an agreement to exploit resources, in violation of the principle of peoples’ sovereignty over their natural resources; b) Concluding with state authorities an agreement to exploit natural resources, in violation of the legal and regulatory procedures of the State concerned; c) Concluding an agreement to exploit natural resources through corrupt practices; d) Concluding an agreement to exploit natural resources that is clearly one-sided; e) Exploiting natural resources without any agreement with the State concerned; f) Exploiting natural resources without complying with norms relating to the protection of the environment and the security of the people and the staff; and g) Violating the norms and standards established by the relevant natural resource certification mechanism”. For a discussion of the crime, see D. Dam de Jong and J.G. Stewart, “Illicit Exploitation of Natural Resources”, in C.C. Jalloh, K.M. Clarke, and V.O. Nmehielle (eds.), *The African Court of Justice and Human and Peoples’ Rights in Context: Development and Challenges* (New York, Cambridge, 2019), pp. 519–618.

modification techniques having widespread, long-lasting or severe effects.⁷⁰⁷ Environmental modification techniques are defined in the convention as “any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space”.⁷⁰⁸ The present draft principle uses the concept of environmental modification technique in the same sense.

(2) The mention of international obligations in the draft principle refers to the treaty obligations of States parties to the Convention and to any related customary obligation that prohibits the use of the environment as a weapon. According to the ICRC study on customary international humanitarian law, “there is sufficiently widespread, representative and uniform practice to conclude that the destruction of the natural environment may not be used as a weapon”, and this irrespective of whether the provisions of the Convention are themselves customary.⁷⁰⁹ The ICRC Guidelines for Military Manuals and Instructions for the Protection of the Environment in Times of Armed Conflict reiterate this obligation.⁷¹⁰ The 2020 ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict also contain a rule based on articles I and II of the Convention.⁷¹¹

(3) The Convention does not spell out clearly whether the prohibition of the use of environmental modification techniques could be applicable in a non-international armed conflict. The formulation of paragraph 1 of article I only prohibits environmental modification that causes damage to another State party to the Convention. It has been argued that this condition could nevertheless also be fulfilled in a non-international armed conflict provided that a hostile use of an environmental modification technique by a State in the context of such a conflict causes environmental or other damage in the territory of another State party.⁷¹² The environmental modification techniques addressed in the Convention – capable of causing “earthquakes, tsunamis, an upset in the ecological balance of a region, changes in weather patterns (clouds, precipitation, cyclones of various types and tornadic storms); changes in climate patterns; changes in ocean currents; changes in the state of the ozone layer, and changes in the state of the ionosphere”⁷¹³ – could well be expected to produce transboundary effects.

(4) The Convention only addresses the hostile or military use of environmental modification techniques by States, excluding hostile use of such techniques by non-State actors. The ICRC study on customary international humanitarian law concludes that the prohibition of the destruction of the natural environment as a weapon is a rule of customary

⁷⁰⁷ Art. I, para. 1.

⁷⁰⁸ Art. II.

⁷⁰⁹ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (see footnote 347 above), p. 156.

⁷¹⁰ ICRC, *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict* (see footnote 608 above), guideline 12.

⁷¹¹ ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict* (see footnote 345 above), rule 3.B.

⁷¹² Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (see footnote 347 above) rule 44, commentary, p. 148: “it can be argued that the obligation to pay due regard to the environment also applies in non-international armed conflicts if there are effects in another State.” See also Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (see footnote 332 above), p. 243, referring to cross-border damage caused by environmental modification techniques. See also T. Meron, “Comment: protection of the environment during non-international armed conflicts”, in J.R. Grunawalt, J.E. King and R.S. McClain (eds.), *International Law Studies*, vol. 69, *Protection of the Environment during Armed Conflicts* (Newport, Rhode Island, Naval War College, 1996), pp. 353–358, stating, at p. 354, that the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques “is applicable in all circumstances”.

⁷¹³ Understanding relating to article II, *Official Records of the General Assembly, Thirty-first Session, Supplement No. 27 (A/31/27)*, p. 92.

international law “applicable in international armed conflicts and arguably also in non-international armed conflicts”.⁷¹⁴

(5) Draft principle 17 is located in Part Three, which contains draft principles applicable during armed conflict. This location reflects the most likely situations in which the Convention would be applied, even though the prohibition of the Convention is broader, and also covers other hostile uses of environmental modification techniques.

(6) The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques deserves particular attention in the context of the present draft principles as the first and, so far, the only international treaty to specifically address means and methods of environmental warfare. The inclusion of draft principle 17 in the set of draft principles is without prejudice to the existing conventional or customary rules of international law regarding specific weapons that have serious effects on the environment.

Principle 18 **Protected zones**

An area of environmental importance, including where that area is of cultural importance, designated by agreement as a protected zone shall be protected against any attack, except insofar as it contains a military objective. Such protected zone shall benefit from any additional agreed protections.

Commentary

(1) This draft principle corresponds to draft principle 4. It provides that an area of environmental importance designated by agreement as a protected zone shall be protected against any attack, except insofar as it contains a military objective. An area of environmental importance is also often important from a cultural point of view.

(2) Unlike draft principle 4, the current provision only covers areas that are designated by agreement because it entails undertakings by more than one party. There has to be an express agreement on the designation. Such an agreement may be concluded in peacetime or during armed conflict. The term “agreement” should be understood in its broadest sense as including mutual as well as unilateral declarations accepted by the other party, treaties and other types of agreements, as well as agreements with non-State actors. By virtue of their civilian character, such zones are protected from attack during armed conflict. The phrase “except insofar as it contains a military objective” is intended to denote that it may be the entire zone, only parts thereof, or objects located within the zone that become military objectives and lose the protection from attack.

(3) The conditional protection is an attempt to strike a balance between military, humanitarian and environmental concerns. This balance reflects the mechanism for demilitarized zones as foreseen in article 60 of Additional Protocol I to the Geneva Conventions. Article 60 prohibits parties to an armed conflict from extending their military operations to such zones. If a party to an armed conflict uses a protected area for specified military purposes, the protected status is revoked.

(4) Under the 1954 Hague Convention, State parties are similarly under the obligation not to destroy property that has been identified as cultural property in accordance with article 4 of the Convention. However, the protection can only be granted as long as the cultural property is not used for military purposes.

(5) The legal implications of designating an area as a protected area will depend on the origin and contents, as well as the form, of the protection. By virtue of their civilian character, all such zones are protected from attack unless and to the extent that they contain a military objective. A special undertaking to designate an environmentally important zone as protected from attack during an armed conflict should be accompanied with measures that reduce the

⁷¹⁴ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 347 above), explanation of rule 45, p. 151. See also Part 2 of the ICRC Customary International Humanitarian Law Study (available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule45) and related practice (accessed on 2 August 2022).

likelihood that the zone would be affected by military operations. For instance, the agreement may contain provisions prohibiting siting of military installations within the protected area, or extending any military activities therein. The agreement may also contain provisions on the management and operation of the zone. Regarding the form of protection, it is obvious that the *pacta tertiis* rule will limit the application of a treaty to the parties. As a minimum, the designation of an area as a protected zone could serve to inform the planning of parties to an armed conflict such that they do not conduct military operations within the zone, and alert them to take the protected zone into account when applying the principle of proportionality or the principle of precautions in attack in the vicinity of the zone. In addition, preventive and remedial measures may need to be tailored so as to take the special status of the area into account.

(6) The last sentence, according to which “[s]uch protected zone shall benefit from any additional agreed protections” serves two purposes. First, it aims to clarify the relationship between the current draft principle and other applicable draft principles, in particular draft principles 4 and 13, so that it could not be interpreted to lower the general level of protection. Second, it refers to other relevant international obligations, such as those contained in multilateral environmental agreements that establish protected zones. Reference can be made in this regard, for instance, to the 1972 World Heritage Convention,⁷¹⁵ the Convention on Biological Diversity,⁷¹⁶ the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat, and the United Nations Convention on the Law of the Sea.

Part Four **Principles applicable in situations of occupation**

Commentary

(1) The three draft principles applicable in situations of occupation are placed in a separate Part Four. This category of draft principles is not intended as a departure from the temporal approach chosen for the topic, but as a practical solution reflecting the great variety of circumstances that may qualify as a situation of occupation. While military occupation under the law of armed conflict is a specific form of international armed conflict,⁷¹⁷ situations of occupation differ from armed conflicts in many respects. Most notably, occupations are not always characterized by active hostilities and can even take place in situations in which the invading armed forces meet no armed resistance.⁷¹⁸ A stable occupation shares some characteristics with a post-conflict situation and may with time even come to “approximating peacetime” conditions⁷¹⁹ in certain respects, in spite of the continued reality of military dominion of the Occupying Power. Occupations can nevertheless also be volatile and conflict-prone. The Occupying Power may confront armed resistance during the occupation and even temporarily lose control of part of the occupied territory without this affecting the overall characterization of the situation as one of occupation.⁷²⁰ Furthermore, the beginning of an occupation does not necessarily coincide with the beginning of an armed conflict, nor

⁷¹⁵ Art. 6, para. 3, obligates States to refrain from “any deliberate measures which might damage directly or indirectly the cultural and natural heritage ... situated on the territory of other States Parties” to the Convention.

⁷¹⁶ Convention on Biological Diversity, art. 22 para. 1 (“The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity”).

⁷¹⁷ It is worth recalling in this context that the end of an international armed conflict is determined by the general close of military operations or, in the case of occupation, the termination of the occupation. See Fourth Geneva Convention, art. 6, and Additional Protocol I, art. 3 (b). See also United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 664 above), p. 277, para. 11.8, and R. Kolb and S. Vité, *Le droit de l'occupation militaire. Perspectives historiques et enjeux juridiques actuels* (Brussels, Bruylant, 2009), p. 166.

⁷¹⁸ Fourth Geneva Convention, art. 2.

⁷¹⁹ A. Roberts, “Prolonged military occupation: the Israeli-occupied territories since 1967”, *American Journal of International Law*, vol. 84 (1990), pp. 44–103, p. 47.

⁷²⁰ ICRC commentary (2016) to the First Geneva Convention, art. 2, para. 302. See, similarly, United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 664 above), p. 277, para. 11.7.1.

is there any necessary concurrence between the cessation of active hostilities and the termination of an occupation.

(2) In spite of this variety, all occupations display certain common characteristics, namely that the effective authority over a certain territory is transferred from the territorial State, without its consent, to the Occupying Power. The established understanding of the concept of occupation is based on article 42 of the Hague Regulations,⁷²¹ which stipulates that a territory is considered occupied “when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority is established and can be exercised.” According to the 2005 judgment in *Armed Activities on the Territory of the Congo* case, it was necessary “that the Ugandan armed forces in the [Democratic Republic of the Congo] were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government”.⁷²² Authority in this context is a fact-based concept: occupation “does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty”.⁷²³

(3) Once established in the territory of an occupied State, at least when the whole territory is occupied, the temporary authority of an Occupying Power extends to the adjacent maritime areas under the territorial State’s sovereignty. Similarly, the authority of the Occupying Power may extend to the airspace over the occupied territory and over the territorial sea. Such authority underscores the obligation of the Occupying Power to take appropriate steps to prevent marine pollution and transboundary environmental harm.⁷²⁴

(4) The status of a territory as occupied is often disputed, including when the Occupying Power relies on a local surrogate, transitional government or rebel group for the purposes of exercising control over the occupied territory.⁷²⁵ It is widely acknowledged that the law of occupation applies to such cases provided that the local surrogate acting on behalf of a State exercises effective control over the occupied territory.⁷²⁶ The possibility of such an “indirect occupation” has been acknowledged by the International Criminal Tribunal for the Former

⁷²¹ Hague Regulations, art. 42. The definition contained in art. 42 has been confirmed by the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia, which have referred to it as the exclusive standard for determining the existence of a situation of occupation under the law of armed conflict. See, respectively, *Legal Consequences of the Construction of a Wall* (see footnote 351 above), p. 167, para. 78, and *Prosecutor v. Mladen Naletilić, aka “TUTA” and Vinko Martinović, aka “ŠTELA”*, Case No. IT-98-34-T, Judgment of 31 March 2003, Trial Chamber, para. 215. See also ICRC commentary (2016) to the First Geneva Convention, art. 2, para. 298.

⁷²² *Armed Activities on the Territory of the Congo, Judgment ... 2005* (see footnote 484 above), para. 173; see also United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 664 above), p. 275, para. 11.3.

⁷²³ United States, Department of Defense, *Law of War Manual* (see footnote 663 above), sect. 11.4, pp. 772–774. See also H.-P. Gasser and K. Dörmann, “Protection of the civilian population”, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (footnote 600 above), pp. 231–320, at p. 274, para. 529.

⁷²⁴ *Manual of the Laws of Naval War* (Oxford, 9 August 1913), sect. VI, art. 88. Available from <https://ihl-databases.icrc.org/ihl/INTRO/265?OpenDocument> (accessed on 8 July 2019). See also Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, 2009), p. 47; E. Benvenisti, *The International Law of Occupation*, 2nd ed. (Oxford University Press, 2012), p. 55, referring to the practice of several occupants, and M. Sassòli, “The concept and the beginning of occupation”, in A. Clapham, P. Gaeta and M. Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press, 2015), pp. 1389–1419, at p. 1396.

⁷²⁵ Roberts, “Prolonged military occupation ...” (see footnote 719 above), p. 95; Gasser and Dörmann, “Protection of the civilian population” (see footnote 723 above), p. 272.

⁷²⁶ Benvenisti, *The International Law of Occupation* (see footnote 724 above), pp. 61–62. Similarly, ICRC, “Occupation and other forms of administration of foreign territory”, Report of an expert meeting (2012), pp. 10 and 23 (the theory of “indirect effective control” was met with approval). See also United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 664 above), p. 276, para. 11.3.1 (“likely to be applicable”). See also Kolb and Vitè, *Le droit de l’occupation militaire ...* (footnote 717 above), p. 181, as well as ICRC commentary (2016) to the First Geneva Convention, art. 2, paras. 328–332.

Yugoslavia,⁷²⁷ the International Court of Justice,⁷²⁸ and the European Court of Human Rights.⁷²⁹

(5) The law of occupation is applicable to situations that fulfil the factual requirements of effective control of a foreign territory irrespective of whether the Occupying Power invokes the legal regime of occupation.⁷³⁰ It also extends to territories with unclear status that are placed under foreign rule.⁷³¹ Similarly, and in accordance with the fundamental distinction between *jus ad bellum* and *jus in bello*, the law of occupation applies equally to all occupations, whether or not they result from a use of force that is lawful in the sense of *jus ad bellum*.⁷³² The law of occupation may also be applicable to territorial administration by an international organization, provided that the situation meets the criteria of article 42 of the Hague Regulations.⁷³³ The term “Occupying Power” as used in the present draft principles is sufficiently broad to cover such cases. Even where this is not the case, as in operations relying on the consent of the territorial State, the law of occupation, albeit not legally applicable, may provide guidance and inspiration for international territorial administration entailing the exercise of functions and powers over a territory that are comparable to those of an Occupying Power under the law of armed conflict.⁷³⁴

⁷²⁷ See *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Trial Judgment, 7 May 1997, *Judicial Reports 1997*, para. 584, which refers to circumstances, in which “the foreign Power ‘occupies’ or operates in certain territory solely through the acts of local de facto organs or agents”. See also *Prosecutor v. Tihomir Blaskić*, Case No. IT-95-14-T, Judgment, 3 March 2000, *Judicial Reports 2000*, paras. 149–150.

⁷²⁸ The Court seems to have accepted in the *Armed Activities* case that Uganda would have been an occupying power in the areas controlled and administered by Congolese rebel movements, had these non-State armed groups been “under the control” of Uganda. See *Armed Activities on the Territory of the Congo, Judgment ... 2005* (see footnote 484 above), p. 231, para. 177. See also the separate opinion of Judge Kooijmans, *ibid.*, p. 317, para. 41.

⁷²⁹ The European Court of Human Rights has confirmed that the obligation of a State party to the European Convention on Human Rights to secure the rights and freedoms set out in the Convention in an area outside its national territory, over which it exercises effective control, “derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration”, see *Loizidou v. Turkey*, Judgment (Merits), 18 December 1996, *Reports of Judgments and Decisions 1996-VI*, para. 52. See also *Ilaşcu v. Moldova and Russia* [GC], application No. 48787/99, Judgment, 8 July 2004, para. 314, and *Chiragov and others v. Armenia* [GC], application No. 13216/05, Judgment (Merits), ECHR 2015, para. 152.

⁷³⁰ *The Hostages Trial: Trial of Wilhelm List and Others*, Case No. 47, United States Military Tribunal at Nuremberg, *Law Reports of Trial of War Criminals*, vol. VIII (London, United Nations War Crimes Commission, 1949, London), p. 55: “[w]hether an invasion has developed into an occupation is a question of fact”. See also *Armed Activities on the Territory of the Congo, Judgment ... 2005* (see footnote 484 above), p. 230, para. 173; *Naletilić and Martinović* (footnote 721 above), para. 211; and ICRC commentary (2016) to the First Geneva Convention, art. 2, para. 300.

⁷³¹ *Legal Consequences of the Construction of a Wall* (see footnote 351 above), pp. 174–175, para. 95.

⁷³² See ICRC, “Occupation and other forms of administration of foreign territory” (footnote 726 above), Foreword by K. Dörmann, p. 4. Similarly, the war crime trials after the Second World War relied on and interpreted the Hague Regulations and customary law.

⁷³³ M. Sassòli, “Legislation and maintenance of public order and civil life by Occupying Powers”, *European Journal of International Law*, vol. 16 (2005), pp. 661–694, at p. 688; T. Ferraro, “The applicability of the law of occupation to peace forces”, ICRC and International Institute of Humanitarian Law, *International Humanitarian Law, Human Rights and Peace Operations*, G.L. Beruto (ed.), 31st Round Table on Current Problems of International Humanitarian Law, San Remo, 4–6 September 2008, *Proceedings*, pp. 133–156; D. Shraga, “The applicability of international humanitarian law to peace operations, from rejection to acceptance”, *ibid.* pp. 90–99; S. Wills, “Occupation law and multi-national operations: problems and perspectives”, *British Yearbook of International Law*, vol. 77 (2006), pp. 256–332; Benvenisti, *The International Law of Occupation* (see footnote 724 above), p. 66; See also ICRC, “Occupation and other forms of administration of foreign territory” (footnote 726 above), pp. 33–34. See, however, also Dinstein, *The International Law of Belligerent Occupation* (footnote 724 above), p. 37 for a more reserved view.

⁷³⁴ Gasser and Dörmann, “Protection of the civilian population” (see footnote 723 above), p. 267; Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law and its Interaction with International Human Rights Law* (Leiden, Martinus Nijhoff, 2009), p. 605;

(6) While the nature and duration of occupation do not affect the applicability of the law of occupation, the obligations of the Occupying Power under the law of occupation are, to a certain extent, context specific. As pointed out in the ICRC commentary to common article 2 of the Geneva Conventions, negative obligations – mostly prohibitions – under the law of occupation apply immediately, whereas the implementation of positive obligations depends on “the level of control exerted, the constraints prevailing in the initial phases of the occupation, and the resources available to the foreign forces”.⁷³⁵ A certain flexibility is thus recognized in the implementation of the law of occupation until the situation has stabilized and the Occupying Power is placed in a position to fully exercise its authority. Moreover, the exact scope of the respective obligations depends on the nature and duration of the occupation. In other words, the responsibilities falling on the Occupying Power are “commensurate with the duration of the occupation”.⁷³⁶ Furthermore, while protracted occupations remain governed by the law of occupation, other bodies of law, such as human rights law and international environmental law, gain more importance as time goes by and may complement or inform the applicable rules of the law of occupation. In protracted occupations, changes necessitated by economic and social development require the participation of the protected population.

(7) The draft principles in Parts One, Two, Three and Five apply *mutatis mutandis* to situations of occupation, having regard to the variety of different situations of occupation. For instance, the draft principles in Part Two, which cover measures to be taken with a view to enhancing the protection of the environment in the event of an armed conflict, remain relevant. To the extent that periods of intense hostilities during an occupation are governed by the rules concerning the conduct of hostilities, the draft principles on the conduct of hostilities in Part Three are directly relevant to the protection of the environment in occupation. Additionally, the environment of an occupied territory continues to enjoy the protection afforded to the environment during an armed conflict in accordance with applicable international law and as reflected in draft principle 13, in particular. The draft principles in Part Five addressing post-armed conflict situations would primarily have relevance for situations of prolonged occupation. For each part, the draft principles may require some adjustment, hence the phrase *mutatis mutandis*.

Principle 19

General environmental 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, including harm that is likely to prejudice the health and well-being of protected persons of the occupied territory or otherwise violate their rights.
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.

Commentary

(1) Paragraph 1 of draft principle 19 sets forth the general obligation of an Occupying Power to respect and protect the environment of the occupied territory and to take environmental considerations into account in the administration of such territory. The provision is based on the Occupying Power’s obligation to take care of the welfare of the occupied population, derived from article 43 of the Hague Regulations, which requires the Occupying Power to re-establish and insure, as far as possible, public order and security in

M. Zwanenburg, “Substantial relevance of the law of occupation for peace operations”, ICRC and International Institute of Humanitarian Law, *International Humanitarian Law, Human Rights and Peace Operations* (see previous footnote), pp. 157–167.

⁷³⁵ ICRC commentary (2016) to the First Geneva Convention, art. 2, para. 322.

⁷³⁶ *Ibid.*: “If the occupation lasts, more and more responsibilities fall on the Occupying Power.”

the occupied territory.⁷³⁷ The obligation to ensure that the occupied population lives as normal a life as possible in the prevailing circumstances⁷³⁸ entails environmental protection as a widely recognized public function of the modern State. Moreover, environmental concerns relate to an essential interest of the territorial sovereign,⁷³⁹ which the occupying State as a temporary authority must respect.

(2) The law of occupation is a part of the law of armed conflict, and draft principle 19 shall be read in the context of draft principle 13, which provides that the “environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict”. Both draft principles refer to the obligation to “respect and protect” the environment in accordance with applicable international law, although draft principle 19 does so in the more specific context of occupation.⁷⁴⁰

(3) The term “applicable international law” refers, in particular, to the law of armed conflict, but also to international environmental law and international human rights law. Concurrent application of human rights law is of particular relevance in situations of occupation. The International Court of Justice has notably interpreted respect for the applicable rules of international human rights law as part of the obligations of the Occupying Power under article 43 of the Hague Regulations.⁷⁴¹ Where both the law of occupation and

⁷³⁷ Hague Regulations, art. 43: “The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” The authentic French text of article 43 uses the expression “*l’ordre et la vie publics*”, and the provision has been accordingly interpreted to refer not only to physical safety but also to the “social functions and ordinary transactions which constitute daily life”, in other words, to the entire social and economic life of the occupied region”, see M. S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order: the Legal Regulation of International Coercion* (New Haven, Yale University, 1961), p. 746. See also Dinstein, *The International Law of Belligerent Occupation* (footnote 724 above), p. 89, and Sassòli, “Legislation and maintenance of public order ...” (footnote 733 above). This interpretation is also supported by the *travaux préparatoires*: in the Brussels Conference of 1874, the term “vie publique” was interpreted as referring to “des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours”. See Belgium, Ministry of Foreign Affairs, *Actes de la Conférence de Bruxelles de 1874 sur le projet d’une convention internationale concernant la guerre*, p. 23. Available from <https://babel.hathitrust.org/> (accessed on 2 August 2022).

⁷³⁸ T. Ferraro, “The law of occupation and human rights law: some selected issues”, in R. Kolb and G. Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham, Edward Elgar, 2013), pp. 273–293, p. 279.

⁷³⁹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (see footnote 337 above), p. 7, para. 53.

⁷⁴⁰ Reference can furthermore be made to the Rio Declaration, which states that “[t]he environment and natural resources of people under oppression, domination and occupation shall be protected”. See the Rio Declaration, principle 23.

⁷⁴¹ *Armed Activities on the Territory of the Congo, Judgment ... 2005* (see footnote 484 above), p. 231, para. 178. See also p. 243, para. 216, in which the Court confirms that international human rights agreements are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, “particularly in occupied territories”. See also *Legal Consequences of the Construction of a Wall* (footnote 351 above), pp. 177–181, paras. 102–113. The International Criminal Tribunal for the Former Yugoslavia, likewise, has stated that the distinction between a phase of hostilities and a situation of occupation “imposes more onerous duties on an occupying power than on a party to an international armed conflict”, see *Naletilić and Martinović*, para. 214. See also the European Court of Human Rights: *Loizidou v. Turkey* (Preliminary Objections), Judgment, 23 March 1995, Series A, No. 310, para. 62, and Judgment (Merits), 18 December 1996 (footnote 729 above), para. 52; and *Al-Skeini and others v. United Kingdom* [Grand Chamber], Application No. 55721/07, *Reports of Judgments and Decisions 2011*, para. 94, in which reference was made to the Inter-American Court of Human Rights case *Mapiripán Massacre v. Colombia*, Judgment, 15 September 2005, Series C, No. 134, in support of the duty to investigate alleged violations of the right to life in situations of armed conflict and occupation. The applicability of human rights during occupation has been further recognized by the Human Rights Committee, see, general comment No. 26 (1997) on continuity of obligations, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 40*, vol. I (A/53/40 (Vol. I)), annex VII, para. 4; general comment No. 29 (2001) on derogation during a state of emergency, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40 (Vol. I)), annex VI, para. 3; general comment No. 31 (2004) on

international human rights law regulate the same subject matter and share the same objective, it may be possible to draw on one branch of law to enrich and deepen the rules of the other. Sometimes human rights law may provide clearer and more detailed regulation, which can still be adapted to the realities at hand.⁷⁴² Human rights law may, for instance, provide specifications for the interpretation of the notion of “civil life”, or a more exact formulation of the obligations of States with regard to ensuring “public health”. This may also include environmental questions, which have an impact on the welfare of the population.⁷⁴³

(4) As for the application of international environmental law, reference can be made to the 1996 Advisory Opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons*, which provides important support to the claim that customary international environmental law and treaties on the protection of the environment continue to apply in situations of armed conflict.⁷⁴⁴ Similarly, the Commission’s articles on the effects of armed conflicts on treaties indicate that treaties relating to the international protection of the environment, treaties relating to international watercourses or aquifers, and multilateral law-making treaties may continue in operation during armed conflict.⁷⁴⁵ Furthermore, to the extent that multilateral environmental agreements address environmental problems that have a transboundary nature, or a global scope, and the treaties have been widely ratified, it may be difficult to conceive of suspension only between the parties to a conflict.⁷⁴⁶ Obligations established under such treaties protect a collective interest and are owed to a wider group of States than the ones involved in the conflict or occupation.⁷⁴⁷

the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 10. See also Committee on Economic, Social and Cultural Rights, concluding observations: Israel, E/C.12/1/Add.69, 31 August 2001; and concluding observation: Israel, E/C.12/ISR/CO/3, 16 December 2011, as well as the report on the situation of human rights in Kuwait under Iraqi occupation, prepared by Mr. Walter Kälin, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1991/67, E/CN.4/1992/26, 16 June 1992. Such applicability has also been widely endorsed in scholarly writings: see, for example, Dinstein, *The International Law of Belligerent Occupation* (footnote 724 above), pp. 69–71; Kolb and Vité, *Le droit de l’occupation militaire ...* (footnote 717 above), pp. 299–332; A. Roberts, “Transformative military occupation: applying the laws of war and human rights”, *American Journal of International Law*, vol. 100 (2006), pp. 580–622; J. Cerone, “Human dignity in the line of fire: the application of international human rights law during armed conflict, occupation, and peace operations”, *Vanderbilt Journal of Transnational Law*, vol. 39 (2006), pp. 1447–1510; Benvenisti, *The International Law of Occupation* (see footnote 724 above), pp. 12–16; Arai-Takahashi, *The Law of Occupation ...* (footnote 734 above); N. Lubell, “Human rights obligations in military occupation”, *International Review of the Red Cross*, vol. 94 (2012), pp. 317–337; Ferraro, “The law of occupation and human rights law ...” (footnote 738 above), pp. 273–293; and M. Bothe, “The administration of occupied territory”, in Clapham, Gaeta and Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (see footnote 724 above), pp. 1455–1484. For a different view, see M.J. Dennis, “Application of human rights treaties extraterritorially in times of armed conflict and military occupation”, *American Journal of International Law*, vol. 99 (2005), pp. 119–141.

⁷⁴² ICRC, “Occupation and other forms of administration of foreign territory” (footnote 726 above), p. 8, suggesting that international human rights law can be used to complement the law of occupation in matters in which the latter is silent, vague or unclear.

⁷⁴³ See also ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict* (footnote 345 above), para. 40.

⁷⁴⁴ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), pp. 241–243, paras. 27–33.

⁷⁴⁵ Articles on the effects of armed conflicts on treaties, *Yearbook ... 2011*, vol. II (Part Two), pp. 106–130, paras. 100–101. See also ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict* (footnote 345 above), paras. 33–36.

⁷⁴⁶ K. Bannelier-Christakis, “International Law Commission and protection of the environment in times of armed conflict: a possibility for adjudication?”, *Journal of International Cooperation Studies*, vol. 20 (2013), pp. 129–145, at pp. 140–141; D. Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (Cambridge, Cambridge University Press, 2015), pp. 110–111.

⁷⁴⁷ In the sense of art. 48, para. 1 (a), of the articles on responsibility of States for internationally wrongful acts, the relevant commentary, para. (7), mentions environmental treaties in this context. See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, pp. 26–143, at p. 126.

(5) The reference to environmental considerations is drawn from and inspired by the Advisory Opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons*. The Court held that “the existing international law relating to the protection and safeguarding of the environment ... indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict”.⁷⁴⁸ An Arbitral Tribunal, furthermore, has stated that “where a State exercises a right under international law within the territory of another State, considerations of environmental protection also apply”.⁷⁴⁹ As a generic notion, the term “environmental considerations” as used in paragraph 1 is comparable to the terms “environmental factors” or “considerations of environmental protection” in that it has a general content.⁷⁵⁰ Furthermore, environmental considerations are context dependent⁷⁵¹ and evolving.⁷⁵² The notion is also understood to refer to post-occupation environmental effects of the occupation.⁷⁵³

(6) Paragraph 2 provides that an Occupying Power shall take appropriate measures to prevent significant harm to the environment of the occupied territory. This includes harm that is likely to prejudice the health and well-being of protected persons of the occupied territory or otherwise violate their rights. The notion of “health and well-being” refers to the common objectives of economic, social and cultural rights, such as the right to health, on the one hand, and the law of occupation, on the other, such as the well-being of the population. The notion of “health and well-being” is furthermore consistently used by the World Health Organization, which recalls that health and well-being affect both the society at present and future generations and are dependent on a healthy environment.⁷⁵⁴ Reference can also be made to

⁷⁴⁸ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above) p. 243, para. 33.

⁷⁴⁹ Award in the Arbitration regarding the *Iron Rhine (“Ijzeren Rijn”) Railway* between the Kingdom of Belgium and the Kingdom of the Netherlands, 24 May 2005, *Reports of International Arbitral Awards* (UNRIAA), vol. XXVII, pp. 35–131 (*Iron Rhine*), at paras. 222–223. See also Final Award regarding the *Indus Waters Kishenganga* Arbitration between Pakistan and India, 20 December 2013, UNRIAA, vol. XXXI, pp. 1–358, e.g. at paras. 101, 104 and 105. Available at <https://pca-cpa.org/en/cases/20/> (accessed on 2 August 2022).

⁷⁵⁰ See, however, United States, Department of Defense, *Dictionary of Military and Associated Terms* (2021), p. 75: “Environmental considerations: The spectrum of environmental media, resources, or programs that may affect the planning and execution of military operations.” Available from <https://irp.fas.org/doddir/dod/dictionary.pdf> (accessed on 2 August 2022).

⁷⁵¹ For practical examples of environmental considerations in the context of an armed conflict, see D.E. Mosher *et al.*, *Green Warriors: Army Environmental Considerations for Contingency Operations from Planning Through Post-Conflict* (RAND Corporation, 2008), pp. 71–72: “given the importance placed on military expedience during combat, a unit’s environmental responsibilities are fairly limited. Experience in recent contingency operations has shown that environmental considerations are significantly more important in other areas, including base camps, stability and reconstruction, and the movement of forces and materiel”; p. 75: “The movement of forces and materiel ... can involve significant environmental considerations”; p. 121: “Balancing environmental considerations with other factors that contribute to mission success is a constant undertaking and requires better awareness, training, information, doctrine, and guidelines”; p. 126: “For example, experience in Iraq ... points to the need for high-quality information about environmental conditions and infrastructure before an operation is initiated”. See also *UNHCR Environmental Guidelines* (footnote 442 above), p. 5: “Environmental considerations need to be taken into account in almost all aspects of UNHCR’s work with refugees and returnees.” See furthermore European Commission, “Integrating environmental considerations into other policy areas – a stocktaking of the Cardiff process”, document COM(2004) 394 final.

⁷⁵² See para. (7) of the commentary to draft principle 14 above.

⁷⁵³ See Benvenisti, *The International Law of Occupation* (see footnote 724 above), p. 87: “These considerations imply that already during occupation the occupant must take into account the post-occupation period and make the necessary provisions in anticipation of the termination of its control”. See also Y. Ronen, “Post-occupation law” in C. Stahn, J.S. Easterday and J. Iverson, *Jus Post Bellum: Mapping the Normative Foundations* (Oxford, Oxford University Press, 2014), pp. 428–446.

⁷⁵⁴ According to the Constitution of the World Health Organization, “[h]ealth is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”. The Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, and has been amended in 1977, 1984, 1994 and 2005, the consolidated text is available at www.who.int/governance/eb/who_constitution_en.pdf (accessed on 2 August 2022).

the Stockholm Declaration, which reaffirms “the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”.⁷⁵⁵ Paragraph 2 should be read in the context of the general obligation in paragraph 1. The purpose of paragraph 2 is to indicate that significant harm to the environment of an occupied territory may have adverse consequences for the population of the occupied territory, in particular with respect to the enjoyment of certain human rights, such as the right to life,⁷⁵⁶ the right to health,⁷⁵⁷ or the right to food.⁷⁵⁸ There is in general a

⁷⁵⁵ Stockholm Declaration, principle 1. See also *UNHCR Environmental Guidelines* (footnote 442 above), p. 5: “The state of the environment ... will have a direct bearing on the welfare and well-being of people living in that vicinity”.

⁷⁵⁶ See International Covenant on Civil and Political Rights, art. 6, para. 1. See also Human Rights Committee, general comment No. 36 (2018), para. 26 (CCPR/C/GC/36), in which the Committee lists “degradation of the environment” among general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. See also Human Rights Committee, concluding observations: Israel (CCPR/C/ISR/CO/3), para. 18. See also Convention on the Rights of the Child (New York, 20 November 1989), United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3, art. 6, para. 1, which provides that “States Parties recognize that every child has the inherent right to life”. In general comment No. 16, the Committee on the Rights of the Child has related the child’s right to life with environmental degradation and contamination resulting from business activities, see general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights (CRC/C/GC/16), para. 19. See further African Charter on Human and Peoples’ Rights (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217, art. 4 which stipulates i.e. that human beings are entitled to respect for their life. In *SERAP v. Nigeria* case, the Community Court of Justice of the Economic Community of West African States affirmed that that “[t]he quality of human life depends on the quality of the environment”. See *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, Judgment No. ECW/CCJ/JUD/18/12, 14 December 2012, para. 100. See also American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, 2 May 1948, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OAS/Ser.L/V/I.4 Rev. 9 (2003), art. 1; American Convention on Human Rights (San José, 22 November 1969), United Nations, *Treaty Series*, vol. 1144, No. 17955, art. 4, para. 1, as well as *Yanomami v. Brazil*, Case No. 7615, Inter-American Commission on Human Rights, resolution No. 12/85, 5 March 1985, which acknowledged that a healthy environment and the right to life are interlinked. See also Inter-American Court of Human Rights, *Medio Ambiente y Derechos Humanos* (footnote 623 above), paras. 55 and 59.

⁷⁵⁷ See Universal Declaration of Human Rights, art. 25, para. 1; International Covenant on Economic, Social and Cultural Rights, art. 12. See also Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health (art. 12), *Official Records of the Economic and Social Council, 2001, Supplement No. 2 (E/2001/22-E/C.12/2000/21)*, annex IV, para. 4. See also Committee on the Rights of the Child, general comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (CRC/C/GC/15), paras. 49–50. Similarly, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador) includes the right to health, and the regional jurisprudence acknowledges the connection between the right to health and environmental protection in the context of the universal periodic reviews. See Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights and Office of the United Nations High Commissioner for Human Rights, “Mapping human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: individual report on the General Assembly and the Human Rights Council, including the universal periodic review process”, Report No. 6, December 2013, part III C. See also the Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (A/HRC/37/59).

⁷⁵⁸ See *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Federal Republic of Nigeria* (see footnote 483 above), paras. 64–66. International Covenant on Economic, Social and Cultural Rights, art. 11. See also Committee on Economic, Social and Cultural Rights, general comment No. 12 (1999) on the right to adequate food (art. 11), *Official Records of the Economic and Social Council, 2001, Supplement No. 2 (E/C.12/2000/22-E/C.12/1999/11)*, annex V, para. 7, which determines that the concept of adequacy is interlinked with the notion of sustainability, meaning that food must also be available for the future generations. See also paras. 8 and 10, which require that available food must be free from adverse substances. Moreover, the right to food has been related to the depletion of natural resources traditionally possessed by indigenous communities. *Official Records of the Economic and Social Council, 2001,*

close link between key human rights, on the one hand, and the protection of the quality of the soil and water, as well as biodiversity to ensure viable and healthy ecosystems, on the other.⁷⁵⁹ The reference to rights also encompasses the rights of protected persons under the law of occupation.

(7) “Significant harm” in paragraph 2 is a widely used standard in international environmental law.⁷⁶⁰ The need for a certain threshold of environmental harm,⁷⁶¹ such as “significant harm”,⁷⁶² in order for the relevant rights to be violated, has also been recognized in regional human rights jurisprudence. As for its content, reference can be made to the Commission’s previous work on the prevention of transboundary harm from hazardous activities⁷⁶³ and the allocation of loss in the case of such harm.⁷⁶⁴ “Significant harm” is thus “something more than ‘detectable’ but need not be at the level of ‘serious’ or ‘substantial’”.⁷⁶⁵ Such harm must lead to real detrimental effects on the environment. At the same time, “the determination of ‘significant damage’ involves both factual considerations and objective criteria, and a value determination”, which is dependent on the circumstances of the particular case.⁷⁶⁶ In the context of paragraph 2, harm that is likely to prejudice the health and well-being of the population of the occupied territory would amount to “significant harm”.

(8) Paragraph 2 refers to “protected persons of the occupied territory” in general terms. This reference is consistent with the definition given in article 4 of the Fourth Geneva Convention and encompasses “‘the whole population’ of occupied territories (excluding nationals of the Occupying Power)”.⁷⁶⁷ The ICRC Commentary points out that the other

Supplement No. 2 (E/2000/22-E/C.12/1999/11), para. 337; *ibid.*, 2010, *Supplement No. 2 (E/2010/22-E/C.12/2009/3)*, para. 372; *ibid.*, 2012, *Supplement No. 2 (E/2012/22-E/C.12/2011/3)*, para. 268; *ibid.*, 2008, *Supplement No. 2 (E/2008/22-E/C.12/2007/3)*, para. 436. See further Human Rights Council resolution 7/14 on the right to food, 27 March 2008, and Report of the Special Rapporteur on the issues of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (A/76/179).

⁷⁵⁹ See, for example, World Health Organization, “Our planet, our health, our future: human health and the Rio Conventions: Biological Diversity, Climate Change and Desertification”, discussion paper, 2012, p. 2, acknowledging the role of biodiversity as the “foundation for human health”. Available at www.who.int/globalchange/publications/reports/health_rioconventions.pdf (accessed on 2 August 2022).

⁷⁶⁰ See paras. (2) and (6) of the commentary to draft principle 21, below, and footnotes 797 and 807.

⁷⁶¹ The European Court of Human Rights, see e.g. *Fadeyeva* (footnote 483 above), paras. 68 and 70; *Kyrtatos v. Greece*, No. 41666/98, 22 May 2003, ECHR 2003-VI (extracts), para. 52.

⁷⁶² Inter-American Court of Human Rights, *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: interpretation and scope of articles 4 (1) and 5 (1) in relation to articles 1 (1) and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-23/17, 15 November 2017, pp. 55–57.

⁷⁶³ Paras. (1)–(7) of the commentary to art. 2 of articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 98, at pp. 152–153.

⁷⁶⁴ Paras. (1)–(3) of the commentary to principle 2 of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities *Yearbook ... 2006*, vol. II (Part Two), para. 67, at pp. 64–65.

⁷⁶⁵ Para. (4) of the commentary to art. 2 of the articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 98, at p. 152 (emphasis removed).

⁷⁶⁶ Para. (3) of the commentary to principle 2 of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II (Part Two), para. 67, at p. 65. In the context of the Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997), *Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49)*, vol. III, resolution 51/229, annex, “significant harm” has been similarly defined as “the real impairment of a use, established by objective evidence. For harm to be qualified as significant it must not be trivial in nature but it need not rise to the level of being substantial; this is to be determined on a case by case basis”. See “No significant harm rule”, User’s Guide Fact Sheet, No. 5. Available at www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule.pdf (accessed on 2 August 2022).

⁷⁶⁷ ICRC commentary (1958) to the Fourth Geneva Convention, art. 4, p. 46.

distinctions and exceptions contained in article 4 may extend or restrict these limits, but they do not do so “to any appreciable extent”.⁷⁶⁸

(9) Paragraph 3 of draft principle 19 provides that 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.⁷⁶⁹ The term “law and institutions” is intended to also cover the international obligations of the occupied State.⁷⁷⁰ The paragraph is based on the last phrase of article 43 of the Hague Regulations, “while respecting, unless absolutely prevented, the laws in force in the country”, as well as on article 64 of the Fourth Geneva Convention.⁷⁷¹ These provisions embody the so-called conservationist principle, which underlines the temporary nature of occupation and the need for maintaining the *status quo ante*.

(10) In spite of their strict wording, the two provisions have been interpreted to allow the Occupying Power the competence to legislate when necessary for the maintenance of public order and civil life and to change legislation that is contrary to established human rights standards.⁷⁷² The ICRC commentary to article 47 of the Fourth Geneva Convention points out that some changes to the institutions “might conceivably be necessary and even an improvement” and explains that the object of the text in question was “to safeguard human beings and not to protect the political institutions and government machinery of the State as such”.⁷⁷³ It is furthermore evident that “civil life” and “orderly government” are evolving concepts, comparable to the notions of “well-being and development”, or “sacred trust” which the International Court of Justice described in the *Namibia* Advisory Opinion as “by

⁷⁶⁸ *Ibid.*

⁷⁶⁹ Environmental rights have been recognized at the national level in the constitutions of more than a hundred States. There are nevertheless considerable variations in how the respective rights and duties are conceived. See P. Sands, *Principles of International Environmental Law* (footnote 607 above), p. 816. A list of relevant constitutions is available in Earthjustice, *Environmental Rights Report 2008*, at <http://earthjustice.org/sites/default/files/library/reports/2008-environmental-rights-report.pdf>, Appendix (accessed on 2 August 2022).

⁷⁷⁰ Major multilateral environmental agreements have attracted a high number of ratifications. See <https://research.un.org/en/docs/environment/treaties> (accessed on 2 August 2022).

⁷⁷¹ Art. 64 of the Fourth Geneva Convention reads as follows:

“The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

“The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.” The ICRC commentary points out that, in spite of the reference to penal law, occupation authorities are bound to respect the whole of the law in the occupied territory, see ICRC commentary (1958) to the Fourth Geneva Convention, art. 64, p. 335; see also Sassòli, *Legislation and maintenance of public order ...* (footnote 733 above), p. 669; similarly, Dinstein, *The International Law of Belligerent Occupation* (footnote 724 above), p. 111; Benvenisti, *The International Law of Occupation* (footnote 724 above), p. 101; Kolb and Vité, *Le droit de l'occupation militaire ...* (footnote 717 above), pp. 192–194. See also P. Fauchille, *Traité de droit international public*, vol. II, 8th ed. (Rousseau, Paris, 1921), p. 228 (“Comme la situation de l'occupant est éminemment provisoire, il ne doit pas bouleverser les institutions du pays.” [“As the situation of the occupier is eminently temporary, he should not disrupt the country's institutions”]).

⁷⁷² Sassòli, “Legislation and maintenance of public order ...” (see footnote 733 above), p. 663. See also United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 664 above), p. 284, para. 11.25, acknowledging that new legislation may be necessitated by the exigencies of armed conflict, the maintenance of order, or the welfare of the population. Similarly, McDougal and Feliciano, *Law and Minimum World Public Order ...* (footnote 737 above), p. 757.

⁷⁷³ ICRC commentary (1958) to the Fourth Geneva Convention, art. 47, p. 274.

definition evolutionary”.⁷⁷⁴ The longer the occupation lasts, the more evident is the need for proactive action and to allow the Occupying Power to fulfil its duties under the law of occupation, including for the benefit of the population of the occupied territory.⁷⁷⁵ At the same time, the Occupying Power is not supposed to take over the role of a sovereign legislator.

(11) Paragraph 3 takes into account that armed conflict may have caused significant stress on the environment of the occupied State and resulted in institutional collapse, which is a common feature of many armed conflicts,⁷⁷⁶ and recognizes that an Occupying Power may have to take proactive measures to address immediate environmental problems. The more protracted the occupation, the more diversified measures are likely to be necessary for the protection of the environment. As part of the maintenance of public order and civil life of the occupied territory, which requires taking care of the welfare of the occupied population, such proactive action should entail engagement of the population of the occupied territory in decision-making.⁷⁷⁷

⁷⁷⁴ *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. 31, para. 53. Similarly *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at p. 32, para. 77, in which the Court stated that the meaning of certain generic terms was “intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time”. See also World Trade Organization, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Appellate Body Report), 6 November 1998, *Dispute Settlement Reports*, vol. VII (1998), p. 2755, at para. 129, according to which the expression “exhaustible natural resources” had to be interpreted in light of contemporary concerns about the protection and conservation of the environment. Available at <https://docs.wto.org> (accessed on 2 August 2022); Permanent Court of Arbitration, Award in the Arbitration regarding the *Iron Rhine* (footnote 749 above), at paras. 79–81. See also the Commission’s work on subsequent agreements and subsequent practice, commentary to conclusion 3 (Interpretation of treaty terms as capable of evolving over time), *Official Records of the General Assembly, Sixty-eighth session, Supplement No. 10 (A/68/10)*, para. 39, at pp. 24–30.

⁷⁷⁵ E.H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Washington, D.C., Carnegie Endowment for International Peace, 1942), p. 49, who pointed to the need to modify tax legislation in an occupation that lasts through several years, noting that “[a] complete disregard of these realities may well interfere with the welfare of the country and ultimately with ‘public order and safety’ as understood in Article 43”. Similarly, McDougal and Feliciano, *Law and Minimum World Public Order ...* (footnote 737 above), p. 746. See also ICRC, “Occupation and other forms of administration of foreign territory” (footnote 726 above), p. 58, stressing the ability of the occupant to legislate to fulfil its obligations under the Fourth Geneva Convention or to enhance civil life in the occupied territory. Sassòli, “Legislation and maintenance of public order...” (see footnote 733 above), p. 676, nevertheless holds that the occupant should “introduce only as many changes as is absolutely necessary under its human rights obligations”.

⁷⁷⁶ See Jensen and Lonergan, “Natural resources and post-conflict assessment, remediation, restoration and reconstruction: lessons and emerging issues” (footnote 450 above), p. 415. See also K. Conca and J. Wallace, “Environment and peacebuilding in war-torn societies: lessons from the UN Environment Programme’s experience with post-conflict assessment” in *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding* (footnote 450 above), pp. 63–84.

⁷⁷⁷ See ICRC, “Occupation and other forms of administration of foreign territory” (footnote 726 above), pp. 75–76. Ensuring public participation may also be required as part of the respect for the law of the occupied territory given that participatory rights are widely granted at the national level by domestic legal systems in most regions of the world. See J. Razzaque, “Information, public participation and access to justice in environmental matters” in S. Alam and others (eds.), *Routledge Handbook on International Environmental Law* (Abingdon, Routledge, 2014), pp. 137–153, at p. 139. See also the Rio Declaration, principle 10: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” See further Framework principles on human rights and the environment (A/HRC/37/59, annex), principle 9: “States should provide for and facilitate public participation in decision-making related to the environment and take the views of the public into account in the decision-making process.”

(12) While some active interference in the law and institutions concerning the environment of the occupied territory may thus be required, the Occupying Power may not introduce permanent changes in fundamental institutions of the country and shall be guided by a limited set of considerations: the concern for public order, civil life, and welfare in the occupied territory.⁷⁷⁸ The phrase “within the limits provided by the law of armed conflict” in paragraph 3 also refers to article 64 of the Fourth Geneva Convention. According to this provision, local laws may be changed when it is essential: (a) to enable the Occupying Power to fulfil its obligations under the Convention; (b) to maintain the orderly government of the territory; or (c) to ensure the security of occupying forces or administration.⁷⁷⁹

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 protected 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 harm to the environment.

Commentary

(1) The purpose of draft principle 20 is to set forth the obligations of an Occupying Power with respect to the sustainable use of natural resources. As indicated in the first part of the sentence, the draft principle applies “[t]o the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory”. The phrase refers to the various rules and limitations set forth by the law of armed conflict and other international law to the exploitation of the wealth and natural resources of the occupied territory.

(2) The provision is based on article 55 of the Hague Regulations, under which the Occupying Power is regarded “only as administrator and usufructuary” of immovable public property in the occupied territory.⁷⁸⁰ This description is interpreted to forbid “wasteful or negligent destruction of the capital value, whether by excessive cutting or mining or other abusive exploitation”.⁷⁸¹ A similar limitation deriving from the nature of occupation as temporary administration of the territory prevents the Occupying Power from using the

⁷⁷⁸ Feilchenfeld, *The International Economic Law of Belligerent Occupation* (footnote 775 above), p. 89. See also Ferraro, “The law of occupation and human rights law ...” (footnote 738 above), pp. 273–293; see similarly the Supreme Court of Israel: H.C. 351/80, *The Jerusalem District Electricity Company Ltd. v. (a) Minister of Energy and Infrastructure, (b) Commander of the Judea and Samaria Region* 35(23), Piskei Din 673, partly reprinted in *Israel Yearbook on Human Rights* (1981), pp. 354–358.

⁷⁷⁹ Fourth Geneva Convention, art. 64.

⁷⁸⁰ See Hague Regulations, art. 55: “The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.” Natural resources typically constitute immovable property. In particular, natural resources that are not extracted (*in situ*) constitute immovable property.

⁷⁸¹ J. Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes- and War-Law* (London, Stevens and Sons Limited, 1954), p. 714. See also G. von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis, University of Minnesota Press, 1957), p. 177, who emphasizes that the Occupying Power “is not permitted to exploit immovable property beyond normal use, and may not cut more timber than was done in pre-occupation days” and L. Oppenheim, *International Law: A Treatise*, vol. II, *War and Neutrality*, 2nd ed. (London, Longmans, Green and Co., 1912), p. 175, pointing out that the Occupying Power “is ... prohibited from exercising his right in a wasteful or negligent way that would decrease the value of the stock and plant” and “must not cut down a whole forest unless the necessities of war compel him”. See also ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict* (footnote 345 above), para. 194: “Jurisprudence has recognized that exploitation of natural resources in occupied territories that goes beyond the rules of usufruct, i.e. by way of excessive consumption of resources including when the local economy is not considered, is prohibited”.

resources of the occupied country or territory for its own domestic purposes.⁷⁸² Any exploitation of property is permitted only to the extent required to cover the expenses of the occupation, and “these should not be greater than the economy of the country can reasonably be expected to bear”.⁷⁸³

(3) The second sentence of the draft principle mentions explicitly that the Occupying Power’s administration and use of natural resources in the occupied territory may only be “for the benefit of the protected population of the occupied territory and for other lawful purposes under the law of armed conflict”.⁷⁸⁴ The reference to “the protected population of the occupied territory” is to be understood in this context in the sense of article 4 of the Fourth Geneva Convention, which defines protected persons.⁷⁸⁵ Unlike for draft principle 19, the word “population” was chosen as the present draft principle does not focus on individual rights but more collectively on the benefit from the use of natural resources. The terms “protected persons” and “protected population” can be used interchangeably. The words “of the occupied territory” underline this meaning.

(4) A further provision that provides protection to the natural resources and certain other components of the environment of the occupied territory is contained in the general prohibition of destruction or seizure of property, whether public or private, movable or immovable, in the occupied territory unless such destruction or seizure is rendered absolutely necessary by military operations.⁷⁸⁶ The prohibition of pillage of natural resources is furthermore applicable in situations of occupation.⁷⁸⁷ An “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” is also defined as a grave breach in article 147 of the Fourth Geneva Convention and as the war crime of “pillaging” in the Rome Statute of the International Criminal Court.⁷⁸⁸

(5) The principle of permanent sovereignty over natural resources also has a bearing on the interpretation of article 55 of the Hague Regulations. According to this principle, as enshrined in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.⁷⁸⁹ The International Court of Justice has confirmed the customary nature of

⁷⁸² Singapore, Court of Appeal, *N.V. de Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission*, 13 April 1956, Reports: 1956 Singapore Law Reports, p. 65; reprint in *International Law Reports*, vol. 23 (1960), pp. 810–849, p. 822 (*Singapore Oil Stocks case*); *In re Krupp and Others*, Judgment of 30 June 1948, *Trials of War Criminals before the Nürnberg Military Tribunals*, vol. IX, p. 1340.

⁷⁸³ *The United States of America and Others v. Goering and Others*, Judgment of 1 October 1946, in *Trial of the Major War Criminals before the International Military Tribunal*, vol. I (Nuremberg, 1947), p. 239.

⁷⁸⁴ As summarized by the Institute of International Law, “the occupying power can only dispose of the resources of the occupied territory to the extent necessary for the current administration of the territory and to meet the essential needs of the population”. See Institute of International Law, *Yearbook*, vol. 70, Part II, Session of Bruges (2003), pp. 285 *et seq.*; available from www.idi-iil.org, Declarations, at p. 288.

⁷⁸⁵ Fourth Geneva Convention, art. 4. See also ICRC commentary (1958) to the Fourth Geneva Convention, art. 4, p. 45, according to which there are two main classes of civilians whose “protection against arbitrary action on the part of the enemy was essential in time of war – on the one hand, persons of enemy nationality living in the territory of a belligerent State, and on the other, the inhabitants of occupied territories.”

⁷⁸⁶ Art. 23 (g) and art. 53 of the Hague Regulations.

⁷⁸⁷ See draft principle 18 and the commentary thereto above.

⁷⁸⁸ Rome Statute, art. 8, para. 2 (a) (iv) and (b) (xiii).

⁷⁸⁹ International Covenant on Civil and Political Rights, art. 1, para. 2; International Covenant on Economic, Social and Cultural Rights, art. 1, para. 2. See also General Assembly resolutions 1803 (XVII) of 14 December 1962; 3201 (S-VI) of 1 May 1974 (Declaration on the Establishment of a New International Economic Order); 3281 (XXIX) of 12 December 1974 (Charter of Economic Rights and Duties of States).

the principle.⁷⁹⁰ Similarly, the principle of self-determination may be invoked in relation to the exploitation of natural resources in territories under occupation, particularly in the case of territories that are not part of any established State.⁷⁹¹

(6) While the right of usufruct has traditionally been regarded as applicable to the exploitation of all kinds of natural resources, including non-renewable ones,⁷⁹² the various limitations outlined above serve to curtail the Occupying Power's rights to exploit the natural resources of the occupied territory. These limitations are also reflected in the use of "permitted".

(7) The last sentence of draft principle 20 addresses situations in which an Occupying Power is permitted to administer and use the natural resources in an occupied territory. It sets forth an obligation to do so in a way that ensures the sustainable use of such resources and minimizes environmental harm. This requirement is based on the Occupying Power's duty under article 55 of the Hague Regulations to safeguard the capital of public immovable property, which has for a long time been interpreted to entail certain obligations with regard to the protection of the natural resources in the occupied territory. In light of the development of the international legal framework for the exploitation and conservation of natural resources, environmental considerations and sustainability are to be seen as integral elements of the duty to safeguard the capital. Reference can in this respect be made to the *Gabčíkovo-Nagymaros* judgment, in which the International Court of Justice, in interpreting a treaty that predated certain recent norms of environmental law, accepted that "the Treaty is not static, and is open to adapt to emerging norms of international law".⁷⁹³ A court of arbitration has furthermore stated that principles of international environmental law must be taken into account even when interpreting treaties concluded before the development of that body of law.⁷⁹⁴

⁷⁹⁰ *Armed Activities on the Territory of the Congo, Judgment ... 2005* (see footnote 484 above), at p. 251, para. 244.

⁷⁹¹ In the *Wall* Advisory Opinion, the International Court of Justice stated that the construction of the wall, as well as other measures by the occupying State, "severely impedes the exercise by the Palestinian people of its right to self-determination": *Legal Consequences of the Construction of a Wall* (see footnote 351 above), at p. 184, para. 122. The right to self-determination was also referred to in the *Namibia, Advisory Opinion* (see footnote 774 above), p. 31, paras. 52–53, in *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at pp. 32–33, paras. 56–59, as well as in the *East Timor* case, in which the Court affirmed the *erga omnes* nature of the principle, see *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 102, para. 29.

⁷⁹² Feilchenfeld, *The International Economic Law of Belligerent Occupation* (see footnote 775 above), p. 55. See also Oppenheim, *International Law ...* (footnote 781 above), p. 175, and Von Glahn, *The Occupation of Enemy Territory ...* (footnote 781 above), p. 177. Similarly, United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 664 above), p. 303, para. 11.86. See, however, N. Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (Cambridge, Cambridge University Press 1997), p. 268.

⁷⁹³ *Gabčíkovo-Nagymaros* (see footnote 337 above), pp. 67–68, para. 112. See also p. 78, para. 140, in which the Court rules that, whenever necessary for the application of a treaty, "new norms have to be taken into consideration, and ... new standards given proper weight." Further, see Permanent Court of Arbitration, Award in the Arbitration regarding the *Iron Rhine* (footnote 749 above), in which the Court applied concepts of customary international environmental law to treaties dating back to the mid-nineteenth century.

⁷⁹⁴ *Indus Waters Kishenganga* (see footnote 749 above), para. 452, in which the Court held that: "It is established that principles of international environmental law must be taken into account even when ... interpreting treaties concluded before the development of that body of law ... It is therefore incumbent upon this Court to interpret and apply this 1960 Treaty in light of the customary international principles for the protection of the environment in force today". Furthermore, the International Law Association has suggested that treaties and rules of customary international law should be interpreted in light of the principles of sustainable development unless doing so would conflict with a clear treaty provision or be otherwise inappropriate: "[I]nterpretations which might seem to undermine the goal of sustainable development should only take precedence where to do otherwise would be to undermine ... fundamental aspects of the global legal order, would otherwise infringe the express wording of a treaty or would breach a rule of *jus cogens*." See International Law Association, Committee on International Law on Sustainable Development, Resolution No. 7 (2012), annex (Sofia Guiding Statement), para. 2.

(8) The notion of sustainable use of natural resources can in this regard be seen as the modern equivalent of the concept of “usufruct”, which is in essence a standard of good housekeeping, according to which the Occupying Power “must not exceed what is necessary or usual”⁷⁹⁵ when exploiting the relevant resource. This entails that the Occupying Power shall exercise caution in the exploitation of non-renewable resources, not exceeding pre-occupation levels of production, and exploit renewable resources in a way that ensures their long-term use and capacity for regeneration.

(9) The notion of minimization of environmental harm follows from the purpose of the draft principles. Draft principle 2 notably states that the draft principles are aimed at enhancing the protection of the environment in relation to armed conflicts, including through measures to prevent, mitigate and remediate harm to the environment. Preventive measures are understood to aim at avoiding, or in any event minimizing, damage to the environment. While the obligation to ensure the sustainable use of natural resources is most relevant in a long-term perspective, the use of natural resources, and the need to minimize environmental harm, is relevant both in short-term and more protracted occupations.

Principle 21 **Prevention of transboundary harm**

An Occupying Power shall take appropriate measures to ensure that activities in the occupied territory do not cause significant harm to the environment of other States or areas beyond national jurisdiction, or any area of the occupied State beyond the occupied territory.

Commentary

(1) Draft principle 21 contains the established principle that each State has an obligation not to allow significant harm to be caused from its territory or jurisdiction to the environment of other States or to areas beyond national jurisdiction. The International Court of Justice referred to this principle in the *Legality of the Threat or Use of Nuclear Weapons* case and confirmed its customary nature, stating that the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States and of areas beyond national control constitutes “part of the corpus of international law relating to the environment”.⁷⁹⁶

(2) The obligation to prevent significant harm to the environment of other States has an established status in a transboundary context and has been particularly relevant with regard to shared natural resources, such as international watercourses and transboundary aquifers. This obligation is explicitly contained in the Convention on the Law of the Non-navigational Uses of International Watercourses and in the Convention on the Protection and Use of Transboundary Watercourses and International Lakes as well as in the United Nations Framework Convention on Climate Change.⁷⁹⁷ Numerous regional treaties establish

⁷⁹⁵ *The Law of War on Land Being Part III of the Manual of Military Law* (Great Britain, War Office, 1958), sect. 610. Similarly, United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 664 above), p. 303, para. 11.86.

⁷⁹⁶ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), pp. 241–242, para. 29. See also *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment*, *I.C.J. Reports 2010*, p. 14, para. 101; the *Construction of a Road (Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, *Judgment*, *I.C.J. Reports 2015*, p. 665, paras. 153 and 156. See furthermore Sands, *Principles of International Environmental Law* (footnote 607 above), p. 206, as well as U. Beyerlin, “Different types of norms in international environmental law: policies, principles and rules”, in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press, 2008), pp. 425–448, p. 439. See also A. Boyle and C. Redgwell, *Birnie, Boyle, and Redgwell’s International Law and the Environment*, 4th ed. (Oxford, Oxford University Press, 2021), p. 211.

⁷⁹⁷ Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997), text available from <https://treaties.un.org> (Status of Multilateral Treaties Deposited with the Secretary-General, chap. XXVII), art.7; Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992), United Nations, *Treaty Series*, vol.

corresponding obligations of prevention, cooperation, notification or compensation with regard to damage caused to rivers or lakes.⁷⁹⁸ The principle has also been confirmed and clarified in international and regional jurisprudence.⁷⁹⁹

(3) The Commission has included this principle in its articles on prevention of transboundary harm from hazardous activities.⁸⁰⁰ According to the commentary thereto, the obligation of due diligence can be deduced from a number of international conventions as the standard basis for the protection of the environment from harm.⁸⁰¹

(4) As regards the applicability of this principle in the specific context of occupation, reference can be made to the International Court of Justice's *Namibia* Advisory Opinion, in which the Court underlined the international obligations and responsibilities of South Africa towards other States while exercising its powers in relation to the occupied territory, stating that "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States".⁸⁰² Furthermore, the Court has referred to the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control in its judgment concerning the *Pulp Mills on the River Uruguay* case,⁸⁰³ as well as in the joint cases of *Certain Activities* and *Construction of a Road*.⁸⁰⁴

(5) The Commission's articles on prevention of transboundary harm from hazardous activities state that this obligation applies to activities carried out within the territory or otherwise under the jurisdiction or control of a State.⁸⁰⁵ It should be recalled that the Commission has consistently used this formulation to refer not only to the territory of a State but also to activities carried out in other territories under the State's control. As explained in the commentary to article 1, "it covers situations in which a State is exercising *de facto* jurisdiction, even though it lacks jurisdiction *de jure*, such as in cases of unlawful intervention, occupation and unlawful annexation".⁸⁰⁶

(6) Draft principle 21 reflects the obligation of prevention in customary international environmental law, which only applies to harm above a certain threshold, most often

1936, No. 33207, p. 269, art. 2; United Nations Framework Convention on Climate Change, art. 1, para. 1. See also Convention for the Protection of the Ozone Layer, art. 1, para. 2; Convention on the Regulation of Antarctic Mineral Resource Activities (Wellington, 2 June 1988), *International Legal Materials*, vol. 27 (1988), p. 868, art. 4, para. 2; Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), United Nations, *Treaty Series*, vol. 1989, No. 34028, p. 309, art. 1, para. 2.

⁷⁹⁸ See, e.g., Convention on the Protection of the Rhine (1999), Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System (1987); Agreement on Co-operation for the Sustainable Development of the Mekong River Basin (1995), all available at www.ecolex.org (accessed on 2 August 2022). Revised Great Lakes Water Quality Agreement (United States, Canada, 2012), available at <https://ijc.org> (accessed on 2 August 2022).

⁷⁹⁹ Several of the cases in which the International Court of Justice has clarified environmental obligations have been related to the use and protection of water resources such as wetlands or river; e.g., the joint cases *Construction of a Road/Certain Activities Carried Out by Nicaragua in the Border Area* (see footnote 796 above) and the *Pulp Mills* case (see footnote 796 above) as well as the case of *Gabčíkovo-Nagymaros* (see footnote 337 above). See also *Indus Waters Kishenganga* (see footnote 749 above), paras. 449–450. Regional jurisprudence is widely available at www.ecolex.org (accessed on 2 August 2022).

⁸⁰⁰ Art. 3 of the articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98, at p. 146: "The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof".

⁸⁰¹ Para. (8) of the commentary to art. 3, *ibid.*, at p. 154.

⁸⁰² *Namibia, Advisory Opinion* (see footnote 774 above), p. 54, para. 118.

⁸⁰³ *Pulp Mills* (see footnote 796 above), pp. 55–56, para. 101.

⁸⁰⁴ See footnote 799 above.

⁸⁰⁵ Para. (10) of the commentary to art. 2 (use of terms) of the articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98, at p. 153.

⁸⁰⁶ Para. (12) of the commentary to art. 1, *ibid.*, at p. 151.

indicated as “significant harm”.⁸⁰⁷ At the same time, certain treaties incorporate the prevention obligation without the threshold of significant harm.⁸⁰⁸ The obligation of prevention is an obligation of conduct that requires in situations of occupation that the Occupying Power takes all measures it can reasonably be expected to take.⁸⁰⁹ The content of the notion of significant harm is the same as referred to above in the commentary to draft principle 19.⁸¹⁰

(7) The wording of draft principle 21 follows the established precedents but adds a reference to “any area of the occupied State beyond the occupied territory”. The consideration behind this formulation is related to situations in which the occupied territory extends to only a part of the territory of a State and not its entirety. While the phrase “to the environment of other States or areas beyond national jurisdiction” could be interpreted as excluding the territory of other parts of the occupied State, draft principle 21 is intended to cover three situations: the territory of other States, areas beyond national jurisdiction, and any territory of the occupied State not under occupation.

Part Five

Principles applicable after armed conflict

Principle 22

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 as a result of the conflict.
2. Relevant international organizations should, where appropriate, play a facilitating role in this regard.

⁸⁰⁷ See, for instance, *Pulp Mills* (see footnote 796 above), pp. 55–56 and 58, para. 101; *Certain Activities and Construction of a Road* (footnote 796 above), pp. 720–721, paras. 153 and 156; *South China Sea Arbitration (the Republic of the Philippines v. the People’s Republic of China)*, Case No. 2013-19, Permanent Court of Arbitration, Award, 12 July 2016, para. 941. See also United Nations Compensation Commission, Governing Council, Report and recommendations made by the Panel of Commissioners concerning the third instalment of “F4” Claims (S/AC.26/2003/31), para. 33: while the Panel ruled on the basis that Iraq was liable for “any ... damage” (Security Council resolution 687 (1991)), it did not deny that the commonly accepted threshold for compensable damage was “significant”. See further Duvic-Paoli, *The Prevention Principle in International Environmental Law* (footnote 636 above), p. 164; K. Hulme, *War Torn Environment: Interpreting the Legal Threshold* (Leiden, Martinus Nijhoff, 2004), p. 68, pointing out that in case of environmental harm, it is common to use the standard of “significant” damage. Similarly T. Koivurova, “Due diligence”, *Max Planck Encyclopedia of Public International Law*, p. 241, para. 23, available from www.mpepil.com. See also J.M. Arbour, S. Lavallée, and H. Trudeau, *Droit International de l’Environnement*, 2nd ed. (Cowansville, Editions Yvon Blais, 2012/2012), p. 1058; U. Beyerlin and T. Marauhn, *International Environmental Law* (Hart-C.H. Beck-Nomos 2011), p. 41; P.M. Dupuy and J.E. Viñuales, *International Environmental Law*, 2nd ed. (Cambridge, Cambridge University Press, 2018), pp. 64–65 (“Damage that does not reach the threshold of significance will not breach the no-harm principle but States will remain bound by the due diligence duty to prevent it (see prevention principle) as well as by a norm such as the polluter-pays principle, which allocates the burden of tolerable (below threshold) damage to the polluter”); J. Brunnée, “Harm prevention” in L. Rajamani and J. Peel (eds.), *The Oxford Handbook of International Environmental Law*, 2nd ed. (Oxford, Oxford University Press 2021), pp. 271–272 (“although Principle 21 [of the Rio Declaration] did not stipulate a particular threshold of harm, it is accepted today that the rule focuses on ‘significant’ harm – harm that is more than ‘detectable’, but not necessarily ‘serious’ or ‘substantial’”).

⁸⁰⁸ See, for instance Convention on Biological Diversity, art. 3; United Nations Convention on the Law of the Sea, art. 194, para. 2. See, however, *South China Sea Arbitration* (see previous footnote), para. 941: (“Thus States have a positive ‘duty to prevent, or at least mitigate, significant harm to the environment when pursuing large-scale construction activities’. The Tribunal considers [that] this duty informs the scope of the general obligation in Article 192.”).

⁸⁰⁹ Second report of the International Law Association, Study Group on Due Diligence in International Law, July 2016, p. 8.

⁸¹⁰ See para. (7) of the commentary to para. 2 of draft principle 19 above.

Commentary

(1) Draft principle 22 reflects the fact that environmental considerations are, to a greater extent than before, being taken into consideration in the context of peace processes, including through the regulation of environmental matters in peace agreements. Reference can also be made to the heavy environmental impact of non-international armed conflicts that has led a growing number of States to include measures to protect and restore the environment in transitional justice processes.⁸¹¹

(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.⁸¹² Modern armed conflicts have a variety of outcomes that do not necessarily take the form of formal agreements. For example, at the end of hostilities, a ceasefire agreement, an armistice or a situation of *de facto* peace where no agreement could be reached. The outcome of a peace process often involves different steps and the adoption of a variety of instruments. 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 end of an armed conflict. For this purpose, and to also avoid any temporal *lacuna*, the words “as part of the peace process” have been employed.

(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. This phrase is understood to also refer to former parties to an armed conflict in case the conflict has ended.

⁸¹¹ “[T]ransitional justice ... comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof”, Report of the Secretary-General on “The rule of law and transitional justice in conflict and post-conflict societies” (S/2004/616), para. 8; numerous countries affected by post-conflict crises have adopted transitional justice mechanisms to enhance their environmental protection and restoration, some under assistance of the United Nations Environment Programme: see, for instance, United Nations Environment Programme, “Reporting on the state of the environment in Afghanistan: workshop report” (2019); United Nations Environment Programme, *South Sudan: First State of the Environment and Outlook Report 2018* (Nairobi, 2018); A. Salazar *et al.*, “The ecology of peace: preparing Colombia for new political and planetary climates”, *Frontiers in Ecology and the Environment* (September 2018), available at http://www.researchgate.net/publication/327605932_The_ecology_of_peace_preparing_Colombia_for_new_political_and_planetary_climates/download (accessed on 8 July 2019); United Nations Environment Programme, “Addressing the role of natural resources in conflict and peacebuilding” (Nairobi, 2015); United Nations Environment Programme, *Rwanda: From Post-Conflict to Environmentally Sustainable Development* (footnote 445 above); United Nations Environment Programme, “Sierra Leone: environment, conflict and peacebuilding assessment” (Geneva, 2010); Cambodia, Ministry of Environment, “Cambodia environment outlook” (2009); Sierra Leone, *An Agenda for Change* (2008); United Nations Environment Programme, *Environmental assessment of the Gaza Strip following the escalation of hostilities in December 2008–January 2009* (Nairobi, 2009).

⁸¹² 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 at <http://peacemaker.un.org/document-search> (accessed on 2 August 2022). See also Language of Peace database which complements and builds on the United Nations peace agreements database, available at www.languageofpeace.org/#/search (accessed on 2 August 2022).

(4) The word “should” is used to reflect the normative ambition of the provision, while also recognizing that it does not correspond to any general legal obligation.

(5) The draft principle is cast in general terms to accommodate the wide variety of situations that may exist as a result of an armed conflict. Armed conflicts often present one or more environmental issues, such as environmental degradation and scarcities as a causal factor in the conflict, exploitation of natural resources as a war-sustaining activity, or environmental damage caused during the conflict. The condition of the environment can vary greatly depending on a number of factors.⁸¹³ 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; in others, the damage the environment has suffered may not be so significant as to warrant urgent restoration.⁸¹⁴ Some environmental 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 group(s). 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, 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.⁸¹⁵

(7) Some modern peace agreements contain environmental provisions.⁸¹⁶ The types of environmental matters that have been addressed in the instruments concluded during the

⁸¹³ 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.

⁸¹⁴ Well-known examples of environmental damage caused in armed conflict is the damage caused by the United States Armed Forces’ 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 range in severity, have also been documented in other armed conflicts, such as the conflicts in Colombia, as well as in the Democratic Republic of the Congo, Iraq and Syria. See United Nations Environment Programme Colombia, “UN Environment will support environmental recovery and peacebuilding for post-conflict development in Colombia”, available at www.unenvironment.org/news-and-stories/story/un-environment-will-support-environmental-recovery-and-peacebuilding-post (accessed on 2 August 2022); United Nations Environment Programme, “Post-conflict environmental assessment of the Democratic Republic of the Congo”, available at https://postconflict.unep.ch/publications/UNEP_DRC_PCEA_EN.pdf (accessed on 2 August 2022); United Nations Environment Programme, “Post-conflict environmental assessment, clean-up and reconstruction in Iraq”, available at https://wedocs.unep.org/bitstream/handle/20.500.11822/17462/UNEP_Iraq.pdf?sequence=1&isAllowed=y (accessed on 2 August 2022); “Lebanon Environmental Assessment of the Syrian Conflict” (supported by UNDP and EU), available at <https://www.undp.org/sites/g/files/zskgke326/files/migration/lb/EASC-WEB.pdf> (accessed on 2 August 2022). See also International Law and Policy Institute, “Protection of the natural environment in armed conflict: an empirical study” (Oslo, 2014), pp. 34–40.

⁸¹⁵ See C. Bell, “Women and peace processes, negotiations, and agreements: operational opportunities and challenges”, Norwegian Peacebuilding Resource Centre, Policy Brief, March 2013, available at <http://noref.no> under “Publications”, p. 1 (accessed on 2 August 2022).

⁸¹⁶ Such instruments are predominantly concluded in non-international armed conflicts, between a State and a non-State actor and include the following: Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace between the National Government of Colombia and the Revolutionary Armed Forces of Colombia – People’s Army (FARC-EP), (Bogotá, 24 November 2016), available at https://www.jep.gov.co/Marco%20Normativo/Normativa_v2/01%20ACUERDOS/N01.pdf (in Spanish); <https://www.peaceagreements.org/viewmasterdocument/1845> (in English) (accessed on 2 August 2022).

Agreement on Comprehensive Solutions between the Government of the Republic of Uganda and Lord’s Resistance Army/Movement (Juba, 2 May 2007), available at https://peacemaker.un.org/sites/peacemaker.un.org/files/UG_070502_AgreementComprehensiveSolut

peace process 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 matters include preventing environmental crimes and enforcing national laws and regulations on natural resources and the sharing of communal resources.⁸¹⁷ Environmental aspects in peace processes also include the need to mitigate and minimize the specific negative effects of environmental degradation on people in vulnerable situations, who historically have borne the brunt of long-term environmental damage.⁸¹⁸ Mention should furthermore be made to the important role of local communities in peacebuilding⁸¹⁹ and of the right of women to full and equal participation in decision-making, planning and implementation regarding the restoration and protection of natural resources and the environment.⁸²⁰ The present draft principle aims to encourage parties to consider including such provisions in the agreements.

ions.pdf (accessed on 2 August 2022, para. 14.6; Darfur Peace Agreement (Abuja, 5 May 2006), available from <http://peacemaker.un.org/node/535> (accessed on 2 August 2022), chap. 2, at p. 21, art. 17, para. 107 (g) and (h), and at p. 30, art. 20; Final Act of the Inter-Congolese Political Negotiations (Sun City, 2 April 2003), available from <http://peacemaker.un.org/drc-suncity-agreement2003> (accessed on 2 August 2022), resolution No. DIC/CEF/03, pp. 40–41, and resolution No. DIC/CHSC/03, pp. 62–65; Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People’s Liberation Movement/Sudan People’s Liberation Army (Machakos, 20 July 2002), available from <http://peacemaker.un.org/node/1369> (accessed on 15 June 2022), chap. V, p. 71 and chap. III, p. 45, 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 further regulations on oil resources are found in paras. 3.1.1 and 4; Arusha Peace and Reconciliation Agreement for Burundi (Arusha, 28 August 2000), available from <http://peacemaker.un.org/node/1207> (accessed on 2 August 2022), Additional Protocol III, at p. 62, art. 12, para. 3 (e), and Additional Protocol IV, at p. 81, art. 8 (h); Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé, 7 July 1999), available from <https://peacemaker.un.org/sierraleone-lome-agreement99> (accessed on 2 August 2022), S/1999/777, annex, art. VII; Interim Agreement for Peace and Self-Government in Kosovo (Rambouillet Accords) (Paris, 18 March 1999), S/1999/648, annex; 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, annex, chap. II.

⁸¹⁷ Chapultepec Agreement (see previous footnote), chap. II. Further regulations are found in art. 13 contained in annex II to the Peace 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, at p. 62, art. 12, para. 3 (e), and at p. 81, 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”. Whereas between 1989 and 2004, natural resources were mentioned in approximately half of all peace agreements, from 2005 to 2018, natural resource provisions were included in all major peace agreements. See S.J.A. Mason, D.A. Sguaitamatti and M. del Pilar Ramirez Gröbli, “Stepping stones to peace? Natural resource provisions in peace agreements”, in Bruch, Muffett and Nichols (eds.), *Governance, Natural Resources, and Post-conflict Peacebuilding* (see footnote 704 above), pp. 71–119.

⁸¹⁸ Including children, youth, persons with disabilities, older persons, indigenous peoples, ethnic minorities, refugees and internally displaced persons, and migrants: see United Nations Environmental Assembly resolution 2/15 (see footnote 342 above), fourteenth preambular paragraph.

⁸¹⁹ Security Council resolution 2282 (2016) and General Assembly resolution 70/262 of 12 May 2016. See also T. Ide *et al.*, “The past and future(s) of environmental peacebuilding”, *International Affairs*, vol. 97 (2021), pp. 1–16, at p. 8 (“Local communities are frequently successful in managing natural resources and mitigating or managing environmental conflict”).

⁸²⁰ See Security Council resolution 1325 (2000). See also the general recommendations of the Committee on the Elimination of Discrimination against Women: No. 30 (2013) on women in conflict prevention, conflict and post-conflict situations; No. 34 (2016) on the rights of rural women; No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19; No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change. See further United Nations Environmental Assembly resolution 4/17 of 15 March 2019 on

(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 to which resolutions of the United Nations Security Council apply, as well as situations in which relevant international organizations play a facilitating role with the consent of the relevant State or parties to an 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 envisaged 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, as well as the African Union, the European Union and the Organization of American States.⁸²¹ The draft principle also includes the words “where appropriate” to reflect the fact that the involvement of international organizations for this purpose is not always required, or wanted by the parties. It is furthermore recognized that international organizations, when involved in facilitation, should do so in cooperation across the humanitarian system, including local communities, national and international actors.

Principle 23 **Sharing and granting access to information**

1. To facilitate measures to remediate harm to the environment resulting from an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under applicable international law.
2. Nothing in paragraph 1 affects the right to invoke the grounds for refusal to share or grant access to information provided for in applicable international law. Nevertheless, States and international organizations shall cooperate in good faith with a view to providing as much information as possible under the circumstances.

Commentary

(1) Draft principle 23 addresses the obligation to share or grant access to relevant information to facilitate measures to remediate harm to the environment resulting from an armed conflict. It refers 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 information that is relevant for the taking of remedial measures and that could usefully be provided to other States or international organizations. While States are typically the most

“Promoting gender equality and the human rights and empowerment of women and girls in environmental governance” (UNEP/EA.4/Res.17) as well as UNEP/EA.3/Res.1 of 5 December 2017 on “Pollution mitigation and control in areas affected by armed conflict and terrorism”, preamble, para. 10.

⁸²¹ 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 the peace processes across the world. For example, the African Union has been involved in aspects of the peace processes in, *inter alia*, 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, p. 3, available from www.chathamhouse.org (accessed on 2 August 2022). The Organization of American States was involved in the peace process 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 at www.fas.org (accessed on 2 August 2022). See also African Union and Centre for Humanitarian Dialogue, *Managing Peace Processes: Towards more inclusive processes*, vol. 3 (2013), 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, a retreat of the International Organization of la Francophonie, 15–17 February 2007, available from www.swisspeace.ch, under “Publications” (accessed on 2 August 2022).

relevant subjects, the draft principle also refers to international organizations, with the addition of the qualifier “relevant”.

(2) While this obligation to share or grant access to information only applies to States and international organizations, it should be recalled that non-State armed groups also have obligations under the law of armed conflict, for instance regarding the clearance of landmines, that are relevant for the purpose of the draft principle. Non-State armed groups may also possess other environmental information in relation to armed conflict and should be encouraged to share that information.

(3) Draft principle 23 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 measures to remediate harm to the environment resulting from an armed conflict. Such measures may also be taken during an armed conflict. Paragraph 2 refers to grounds for refusal to which such sharing or access may be subject.

(4) The expression “in accordance with their obligations under applicable international law” reflects that several 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. It refers to obligations contained in treaties, rather than any corresponding rule of customary international law, and indicates that different States may have different obligations.

(5) 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 to such information, and thus signifies a more unilateral relationship.

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

(7) The origins of the right to access to information in modern international human rights law can be found in article 19 of the Universal Declaration of Human Rights,⁸²² as well as in article 19 of the International Covenant on Civil and Political Rights.⁸²³ 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 to access to information held by public bodies.⁸²⁴

(8) 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*,⁸²⁵ 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 2011.⁸²⁶ 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).⁸²⁷

(9) Article 2 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)

⁸²² General Assembly resolution 217 (III) A of 10 December 1948.

⁸²³ New York, 16 December 1966, United Nations, *Treaty Series*, vol. 993, No. 14531, p. 3.

⁸²⁴ 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*, vol. I (A/66/40 (Vol. I)), annex V, para. 18.

⁸²⁵ *Guerra and Others v. Italy*, 19 February 1998, *Reports of Judgments and Decisions* 1998-I.

⁸²⁶ Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information; *Office of Communications v. Information Commissioner*, case C-71/10, judgment of 28 July 2011.

⁸²⁷ *Case of Claude-Reyes et al. v. Chile*, Inter-American Court of Human Rights, Judgement of 19 September 2006 (merits, reparations and costs), Series C, No. 151 (2006).

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, as well as the state of human health and safety insofar as it may be affected by these elements.⁸²⁸ Article 4 of the Aarhus Convention stipulates that State parties must “make such [environmental] information available to the public, within the framework of national legislation”. Such an obligation implies 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. In addition, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), adopted on 4 March 2018, contains similar provisions.⁸²⁹

(10) 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 Protocol II to the Convention on Certain Conventional Weapons, as well as article 4, paragraph 2, on “Recording, retaining and transmission of information” of Protocol V to the Convention on Certain Conventional Weapons. With regard to some remnants of war, the relevant instruments and customary rules contain requirements on providing environmental information or other information that may contribute to the taking of remedial measures. 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.⁸³⁰ 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.⁸³¹ Reference can also be made to the International Mine Action Standards.⁸³²

(11) 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”.⁸³³ 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.

(12) 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, which could include environmental organizations gathering environmental data as a means of “contributing to prevent or repair damage to the environment.”⁸³⁴

(13) In connection with post-armed conflict environmental assessments, it is worth recalling that the United Nations Environment Programme guidelines on integrating environment in post-conflict assessments include a reference to the importance of public

⁸²⁸ Aarhus Convention, art. 2.

⁸²⁹ See also United Nations Framework Convention on Climate Change, art. 6; Cartagena Protocol on Biosafety to the Biodiversity Convention (Montreal, 29 June 2000), United Nations, *Treaty Series*, vol. 2226, p. 208, art. 23; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, art. 15; Stockholm Convention on Persistent Organic Pollutants, art. 10; Minamata Convention on Mercury, art. 18; Paris Agreement, art. 4, para. 8, and art. 12; United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Paris, 14 October 1994), United Nations, *Treaty Series*, vol. 1954, No. 33480, p. 3, art. 16, also art. 19.

⁸³⁰ Art. 4, para. 6 (h).

⁸³¹ Art. 5.

⁸³² International Mine Action Standards, available from www.mineactionstandards.org (accessed on 2 August 2022).

⁸³³ United Nations, Department of Peacekeeping Operations and Department of Field Support, “Environmental Policy for UN Field Missions”, 2009, para. 23.5.

⁸³⁴ See ICRC, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (see footnote 608 above), guideline 19, referring to the Fourth Geneva Convention, art. 63, para. 2, and Additional Protocol I, arts. 61–67. See also ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), para. 13, which states that “[t]he content of the 1994 Guidelines remains valid today”.

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.⁸³⁵

(14) 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.⁸³⁶ 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”.⁸³⁷ 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.

(15) Paragraph 2 contains a saving clause referring to grounds for refusal to share or grant access to information provided for in applicable international law. The first sentence of the paragraph 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 for which the disclosure of information may be refused. Such grounds relate, *inter alia*, to confidential information concerning “international relations, 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.⁸³⁸ At the same time, many multilateral environmental agreements exclude “information on health and safety of humans and the environment” from the categories of information that may be regarded as confidential.⁸³⁹ For some international organizations confidentiality requirements may affect the extent of information that they can share or grant access to in good faith.⁸⁴⁰ In general, the applicable treaties contain very different conditions and exceptions regarding sharing and granting access to information. Paragraph 2 therefore refers to the existing grounds for refusal and confirms that paragraph 1 of the draft principle does not affect them. 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.

Principle 24

Post-armed conflict environmental assessments and remedial measures

Relevant actors, including States and international organizations, should cooperate with respect to post-armed conflict environmental assessments and remedial measures.

⁸³⁵ United Nations Environment Programme, Guidance Note, *Integrating Environment in Post-Conflict Needs Assessments* (Geneva, 2009): see United Nations Environment Programme, “Disasters and conflicts programme”, p. 3.

⁸³⁶ 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.

⁸³⁷ Art. 14, para. 1 (c).

⁸³⁸ See Aarhus Convention, art. 4. Other grounds include the confidentiality of commercial and industrial information and the confidentiality of personal data. The grounds for refusal shall furthermore be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the requested information relates to emissions into the environment. See also Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 22 September 1992), United Nations, *Treaty Series*, vol. 2354, No. 42279, p. 67, 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 (Escazú Agreement), art. 5, para. 6 (b).

⁸³⁹ See, for instance, Stockholm Convention on Persistent Organic Pollutants, art. 9, para. 5; Cartagena Protocol, art. 21 para. 6 (c); Minamata Convention on Mercury, art. 17, para. 5.

⁸⁴⁰ See, for instance, UNHCR, *Policy on the Protection of Personal Data of Persons of Concern to UNHCR* (2015).

Commentary

(1) The purpose of draft principle 24 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.

(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, have a role to play in relation to environmental assessments and remedial measures. The word “should” indicates the scarcity of practice regarding post-conflict environmental assessments. Its use in the draft principle is without prejudice to the different treaty-based obligations to remediate harm to the environment resulting from an armed conflict.⁸⁴¹

(3) The term “environmental assessment” is distinct from an “environmental impact assessment”, which is typically undertaken *ex ante* as a preventive measure.⁸⁴² Such impact 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 effects, including health effects, in a plan or programme.⁸⁴³

(4) It is in this context that post-conflict environmental assessment has emerged as a tool to mainstream environmental considerations in the development plans for 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.⁸⁴⁴ 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.⁸⁴⁵ Such post-conflict environmental assessment, undertaken at the request of a State, may take the form of: (a) a needs assessment;⁸⁴⁶ (b) a quantitative risk

⁸⁴¹ Such obligations may derive from disarmament treaties, such as amended Protocol II to the Convention on Certain Conventional Weapons and 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) (Geneva, 3 May 1996), United Nations, *Treaty Series*, vol. 2399, No. 22495, p. 100, the Convention on Cluster Munitions or the Treaty on the Prohibition of Nuclear Weapons (New York, 7 July 2017), United Nations, *Treaty Series*, No. 56478 (volume number has yet to be determined), available from <https://treaties.un.org>. Reference can also be made to environmental law conventions, such as the Convention on Biological Diversity, or the World Heritage Convention, which require environmental assessments after a major event such as an armed conflict. Obligation to cooperate may also be based on the law of armed conflict or international human rights law.

⁸⁴² See, for instance, Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), United Nations, *Treaty Series*, vol. 1989, No. 34028, p. 309.

⁸⁴³ Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, available at www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/protocolenglish.pdf (2 August 2022).

⁸⁴⁴ Post-crisis environmental assessment, available at www.unenvironment.org/explore-topics/disasters-conflicts/what-we-do/preparedness-and-response/post-crisis-environmental (accessed on 2 August 2022).

⁸⁴⁵ D. Jensen, “Evaluating the impact of UNEP’s post conflict environmental assessments”, *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding* (see footnote 450 above), pp. 17–62, at p. 18.

⁸⁴⁶ 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.

assessment;⁸⁴⁷ (c) a strategic assessment;⁸⁴⁸ or (d) a comprehensive assessment.⁸⁴⁹ The comprehensive assessment of Rwanda, for example, involved a scientific expert evaluation and assessment, covering a range of activities, including scoping, desk study, field work, 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”.⁸⁵⁰

(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”.⁸⁵¹ Such assessments may furthermore be crucial in facilitating measures to remediate harm to the environment resulting from an armed conflict.

(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, rehabilitating ecosystems, mitigating risks and ensuring sustainable utilization of resources in the context of the concerned State’s development plans.⁸⁵²

Principle 25 **Relief and assistance**

When, in relation to an armed conflict, the source of environmental damage is unidentified, or reparation is unavailable, States and relevant international organizations should take appropriate measures so that the damage does not remain unrepaired or uncompensated, and may consider establishing special compensation funds or providing other forms of relief or assistance.

Commentary

(1) The purpose of draft principle 25 is to encourage States to take appropriate measures aimed at repairing and compensating environmental damage caused during armed conflict. More specifically, it addresses relief and assistance in situations where the source of environmental damage is unidentified or reparation is otherwise not available. Such a situation may arise because of different reasons. The particular features of environmental damage may complicate the establishment of responsibility: the damage may result from a chain of events rather than from a single act, and extend over the course of many years, which makes it difficult to establish a causal link to specific acts.⁸⁵³ The presence of multiple State

⁸⁴⁷ 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.

⁸⁴⁸ 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.

⁸⁴⁹ 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 term. *Ibid.*, p. 20.

⁸⁵⁰ DAC Network on Environment and Development Cooperation (ENVIRONET), “Strategic environment assessment and post-conflict development SEA toolkit” (2010), p. 4, available at http://content-ext.undp.org/aplaws_publications/2078176/Strategic%20Environment%20Assessment%20and%20Post%20Conflict%20Development%20full%20version.pdf (accessed on 2 August 2022).

⁸⁵¹ *Ibid.*

⁸⁵² United Nations Environment Programme, “Disasters and conflicts programme”, p. 3.

⁸⁵³ “First, the distance separating the source from the place of damage may be dozens or even hundreds of miles, creating doubts about the causal link even where polluting activities can be identified.”;

and non-State actors in contemporary conflicts may further complicate the allocation of responsibility.⁸⁵⁴ While such difficulties do not exempt the responsible State from the obligation to make reparation,⁸⁵⁵ a situation may arise, in which the responsible actor cannot be identified, or there is no means of implementing the responsibility and obtaining reparation.⁸⁵⁶ Environmental damage in armed conflict may moreover result from acts that are lawful under the law of armed conflict.⁸⁵⁷

(2) It is not uncommon that States and international organizations use *ex gratia* payments to make amends for wartime injury and damage without acknowledging responsibility, and possibly also seeking to exclude further liability. Such payments serve different purposes and may be available for damage and injury caused by lawful action.⁸⁵⁸ In most cases, amends are

“Second, the noxious effects of a pollutant may not be felt until years or decades after the act.”; “Third, some types of damage occur only if the pollution continues over time”; and “Fourth, the same pollutant does not always produce the same detrimental effects due to important variations in physical circumstances.” A.C. Kiss and D. Shelton, *Guide to International Environmental Law* (Leiden, Martinus Nijhoff, 2007), pp. 20–21. See also P.-M. Dupuy, “L’État et la réparation des dommages catastrophiques”, in F. Francioni and T. Scovazzi (eds.), *International Responsibility for Environmental Harm* (Boston, Graham and Trotman, 1991), pp. 125–147, p. 141, who describes the inherent characteristics of ecological damage as follows: “au-delà de ses incidences immédiates et souvent spectaculaires, il pourra aussi être diffus, parfois différé, cumulatif, indirect” [“beyond its immediate and often spectacular consequences, it could also be pervasive, sometimes deferred, cumulative, indirect”]. See also C.R. Payne, “Developments in the law of environmental reparations. A case study of the UN Compensation Commission”, in Stahn, Iverson, and Easterday (eds.), *Environmental Protection and Transitions from Conflict to Peace ...* (footnote 541 above), pp. 329–366, p. 353. For the definition of environmental harm, see Sands, *Principles of International Environmental Law* (footnote 607 above), pp. 741–748.

⁸⁵⁴ See *Armed Activities*, Reparations (footnote 484 above), para. 94. See also ICRC, “International humanitarian law and the challenges of contemporary armed conflicts”, document prepared for the 32nd International Conference of the Red Cross and Red Crescent (2015), *International Review of the Red Cross*, vol. 97 (2015), pp. 1427–1502, at pp. 1431–1432.

⁸⁵⁵ *Armed Activities*, Reparation (footnote 484 above), para. 97 (“However, the fact that the damage was the result of concurrent causes is not sufficient to exempt the Respondent from any obligation to make reparation”).

⁸⁵⁶ For the history of war reparations, see P. d’Argent, *Les réparations de guerre en droit international public. La responsabilité internationale des États à l’épreuve de la guerre* (Brussels, Bruylant, 2002). See also ICRC commentary (1987) to Additional Protocol I, art. 91, para. 3651: “On the conclusion of a peace treaty, the Parties can in principle deal with the problems relating to war damage in general and those relating to the responsibility for starting the war, as they see fit.” The United Nations Compensation Commission’s experience was groundbreaking in the area of reparations for wartime environmental harm (see footnote 487 above). The other relevant international instances of either addressing wartime environmental damage or having the potential to do so include: the Eritrea-Ethiopia Claims Commission that was established in 2000 (see Agreement on Cessation of Hostilities between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (Algiers, 18 June 2000), United Nations, *Treaty Series*, vol. 2138, No. 37273, p. 85, and Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea for the resettlement of displaced persons, as well as rehabilitation and peacebuilding in both countries (Algiers, 12 December 2000), *ibid.*, No. 37274, p. 93); and the 2004 Advisory Opinion of the International Court of Justice concerning the construction of a wall in the Occupied Palestinian Territories, see *Legal Consequences of the Construction of a Wall* (footnote 351 above), p. 189, para. 131, and p. 192, para. 136. See also *Armed Activities on the Territory of the Congo, Judgment ... 2005* (see footnote 484 above), p. 257, para. 259.

⁸⁵⁷ This would arguably be the case with most environmental harm in conflict, given that the specific prohibitions in the law of armed conflict “do not address normal operational damage to the environment that is left after hostilities cease, from sources such as the use of tracked vehicles on fragile desert surfaces; disposal of solid, toxic, and medical waste; depletion of scarce water resources; and incomplete recovery of ordnance”, as pointed out by C.R. Payne, “The norm of environmental integrity in post-conflict legal regimes”, in Stahn, Easterday and Iverson (eds.), *Jus Post Bellum: Mapping the Normative Foundation* (footnote 753 above), pp. 502–518, at p. 511. See draft principle 14 and para. (8) of the commentary thereto above.

⁸⁵⁸ University of Amsterdam and Center for Civilians in Conflict, “Monetary payments for civilian harm in international and national practice” (2015). See also United States, Government Accountability

paid for civilian injury or death, or damage to civilian property, but they may also entail remediation of harm to the environment, including when parts of the environment constitute civilian property. Victim assistance is a broader and more recent concept used in relation to armed conflicts – but also in other contexts – to respond to harm caused to individuals or communities, *inter alia* by military activities.⁸⁵⁹

(3) An example of environmental remediation in a situation envisaged in the draft principle is provided by the assistance to Lebanon following the bombing of the Jiyeh power plant in 2006. After the strike on the power plant on the Lebanese coast by Israeli Armed Forces, an estimated 15,000 tons of oil were released into the Mediterranean Sea.⁸⁶⁰ Following requests for assistance from the Government of Lebanon, the Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea provided remote and on-site technical assistance in the clean-up. Assistance was provided pursuant to the 2002 Protocol concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea, one of protocols to the Barcelona Convention.⁸⁶¹ The amends related to the use of Agent Orange (an herbicide containing the toxic substance dioxin) by the United States in the Viet Nam War provide an example of *ex gratia* response to environmental and health effects of armed conflict.⁸⁶²

(4) The term “reparation” is used in the draft principle as a general notion that covers different forms of reparation for an internationally wrongful act.⁸⁶³ The context, however, is one in which reparation is unavailable, including where there has been no wrongful act. The term “unrepaired” similarly refers to the lack of any reparative measures, while “uncompensated” refers specifically to the lack of monetary compensation. These terms define the specific circumstances in which States are encouraged to take appropriate measures of relief and assistance. Such measures may include establishment of a compensation fund.⁸⁶⁴ The terms “relief” and “assistance” should also be read as including

Office, “Military operations. The Department of Defense’s use of solatia and condolence payments in Iraq and Afghanistan”, Report, May 2007; and W.M. Reisman, “Compensating collateral damage in elective international conflict”, *Intercultural Human Rights Law Review*, vol. 8 (2013), pp. 1–18.

⁸⁵⁹ See, e.g., Handicap International, “Victim Assistance in the context of mines and explosive remnants of war”, Handicap International (July 2014). Available at https://handicap-international.ch/sites/ch/files/documents/files/assistance-victimes-mines-reg_anglais.pdf (accessed on 2 August 2022). See also International Human Rights Clinic, Harvard Law School, “Environmental remediation under the treaty on the prohibition of nuclear weapons” (April 2018). Available at <http://hrp.law.harvard.edu/wp-content/uploads/2018/04/Environmental-Remediation-short-5-17-18-final.pdf> (accessed on 2 August 2022). See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005, annex. Principle 9 states that “[a] person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted”.

⁸⁶⁰ United Nations Environment Programme, *Lebanon Post-Conflict Environmental Assessment* (2007), pp. 42–45. Available at https://postconflict.unep.ch/publications/UNEP_Lebanon.pdf (accessed on 2 August 2022). See also Office for the Coordination of Humanitarian Affairs, “Environmental emergency response to the Lebanon crisis”. Available at https://www.unocha.org/sites/dms/Documents/Report_on_response_to_the_Lebanon_Crisis.pdf (accessed on 2 August 2022).

⁸⁶¹ Protocol concerning Cooperation in Preventing Pollution from ships and, in cases of emergency, combating pollution of the Mediterranean Sea (Valletta, 25 January 2002), United Nations, *Treaty Series*, vol. 2942, annex A, No. 16908, p. 87.

⁸⁶² See United States, Congressional Research Service, “U.S. Agent Orange/Dioxin Assistance to Vietnam” (updated on 21 February 2019). Available at <https://fas.org/sgp/crs/row/R44268.pdf> (accessed on 2 August 2022).

⁸⁶³ Art. 34 and commentary thereto of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at pp. 95–96.

⁸⁶⁴ Draft principle 25 has been modelled after article 12 on “Collective reparation” of the Institute of International Law resolution on responsibility and liability under international law for environmental damage from 1997 reading as follows: “Should the source of environmental damage be unidentified or compensation be unavailable from the entity liable or other back-up sources, environmental regimes should ensure that the damage does not remain uncompensated and may consider the

remedial measures in the sense in which the term has been used in the present draft principles, encompassing any measure of remediation that may be taken to restore the environment.⁸⁶⁵ The provision is without prejudice to existing obligations States may have concerning reparations.

(5) Draft principle 25 has been located in Part Five containing draft principles applicable after an armed conflict. While it was recognized that it could be preferable to take measures to address environmental damage already during an armed conflict, given that environmental damage accumulates and restoration becomes more challenging with time, the draft principle was seen as primarily relevant in post-armed conflict situations.

Principle 26 **Remnants of war**

1. Parties to an armed conflict shall seek, as soon as possible, to remove or render harmless toxic or other 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 or other 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 26 aims to strengthen the protection of the environment in a post-conflict situation. It seeks to ensure that toxic or other 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 or other hazardous remnants of war on land, as well as those which have been placed or left 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.⁸⁶⁶ In other words, removing the remnants of

intervention of special compensation funds or other mechanisms of collective reparation, or the establishment of such mechanisms where necessary". International Law Institute, resolution on "Responsibility and liability under international law for environmental damage", *Yearbook*, vol. 67, Part II, Session of Strasbourg (1997), p. 486, at p. 499.

⁸⁶⁵ See para. (3) of the commentary to draft principle 2 above. See also para. (6) of the commentary to draft principle 24 above. See further S. Hanamoto, "Mitigation and remediation of environmental damage", in Y. Aguila and J. Vinuales (eds.), *A Global Pact for the Environment – Legal Foundations* (Cambridge, Cambridge University Press, 2019), p. 79: "Mitigation and remediation of environmental damage aim at 'avoid[ing], reduc[ing] and, if possible, remedy[ing] significant adverse effects' (Article 5(3)(b), Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment to the environment). More precisely, '[m]itigation is the use of practice, procedure or technology to minimise or to prevent impacts associated with proposed activities' and '[r]emediation consists of the steps taken after impacts have occurred to promote, as much as possible, the return of the environment to its original condition' (Antarctic Treaty Consultative Meeting, Revised Guidelines for Environmental Impact Assessment in Antarctica, 3.5, 2016)."

⁸⁶⁶ 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", *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, J.E. Austin and C.E. Bruch

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 or other 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.⁸⁶⁷ 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”.⁸⁶⁸

(4) The words “as soon as possible” indicate a time frame for the removal or rendering harmless of toxic or other hazardous remnants of war that is not related to a formal end of an armed conflict. The phrase “as soon as possible” is found in several treaties relevant to the draft principle.⁸⁶⁹

(5) 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.⁸⁷⁰ 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.⁸⁷¹ It therefore “refers to the factual capacity of effective control over activities outside the jurisdiction of a State”.⁸⁷²

(6) The present draft principle is intended to apply to international as well as non-international armed conflicts, including in situations of occupation. For this reason, paragraph 1 addresses “parties to a conflict”. The phrase “party to a conflict” has been used

(eds.) (Cambridge, Cambridge University Press, 2000), pp. 226–249. The Chemical Munitions Search and Assessment (CHEMSEA) is an example of a project of cooperation among the Baltic States, which is partly financed by the European Union. Information on the CHEMSEA project can be found at http://ec.europa.eu/regional_policy/en/projects/finland/chemsea-tackles-problem-of-chemical-munitions-in-the-baltic-sea (accessed on 2 August 2022). See also the Baltic Marine Environment Protection Commission (Helsinki Commission) website at <https://helcom.fi/baltic-sea-trends/hazardous-substances/sea-dumped-chemical-munitions/> (accessed at 2 August 2022).

⁸⁶⁷ 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, No. 31IC/11/5.1.1.3, p. 18.

⁸⁶⁸ See M. Ghalaieny, “Toxic harm: humanitarian and environmental concerns from military-origin contamination”, discussion paper (Toxic Remnants of War project, 2013), p. 2. See also https://paxforpeace.nl/media/download/987_icbuw-toxicharmtrwproject.pdf (accessed on 2 August 2022). For more information on toxic remnants of war, see also the Geneva Academy, *Weapons Law Encyclopedia*, available at www.weaponslaw.org (accessed on 2 August 2022) under “Glossary”, which cites ICRC, “Strengthening legal protection for victims of armed conflicts”, 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.

⁸⁶⁹ Such as the Convention on the Prohibition, Use, Stockpiling, Production or Transfer of Anti-Personnel Mines and on Their Destruction and the Convention on Cluster Munitions.

⁸⁷⁰ See para. (9) of the commentary to art. 1 of the articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98, at p. 151. See also General Assembly resolution 62/68 of 6 December 2007, annex.

⁸⁷¹ Para. (12) of the commentary to art. 1, *ibid.*

⁸⁷² *A/CN.4/692*, para. 33. Concerning the concept of “control”, see *Namibia, Advisory Opinion* (footnote 774 above), at p. 54, para. 118, where the Court 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.”

in various provisions of law of armed conflict treaties in the context of remnants of war.⁸⁷³ This term is used 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.

(7) Paragraph 2 should be read together with paragraph 1. It aims to encourage cooperation and technical assistance amongst parties to render harmless the remnants of war referred to in paragraph 1. Paragraph 2 does not aim to place any new international law obligations on parties to cooperate. It is nevertheless foreseeable that there may be situations in which toxic or other hazardous remnants of war remain in a territory where a State does not have full control and is not in a position to ensure that such remnants are rendered harmless. It was thus considered valuable to encourage parties to cooperate in this regard.

(8) 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 are unaffected. There are various law of armed conflict treaties and obligations under customary international law that concern remnants of war, and different States thus have varying obligations in this regard.⁸⁷⁴

(9) 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.⁸⁷⁵

Principle 27 **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 26, which deals with remnants of war more generally, draft principle 27 deals with the specific situation of remnants of war at sea including the long-lasting effects on the marine environment. Draft principle 27 has added value as draft principle 26 only covers remnants of war under the jurisdiction or control of a former party to an armed conflict, which means that it is not broad 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.⁸⁷⁶

⁸⁷³ See, for example, Protocol II to the Convention on Certain Conventional Weapons, as well as the Protocol V to the Convention on Certain Conventional Weapons.

⁸⁷⁴ 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; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Geneva, 3 September 1992), *ibid.*, vol. 1974, No. 33757, p. 45.

⁸⁷⁵ See the wording of the 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; Convention on Cluster Munitions.

⁸⁷⁶ 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. 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 weapons 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 and identifying the appropriate intergovernmental bodies within the United Nations for further consideration and implementation, as appropriate, of those measures.

(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.⁸⁷⁷ It is therefore not surprising that remnants of war at sea pose significant legal challenges.⁸⁷⁸ There may be a legal obligation on the State or States concerned to take all necessary measures to prevent, reduce and control pollution of the marine environment.⁸⁷⁹ This is not always the case, however, and the coastal State, whose cooperation is needed in efforts to get rid of remnants, may not even have been a party to the conflict. Furthermore, as with any remnants of war, the parties to the armed conflict may have ceased to exist or 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. 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 risk.

(3) Accordingly, draft principle 27 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,⁸⁸⁰ to cooperate to ensure that 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 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 international 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.⁸⁸¹ Dangers posed to the environment by remnants of war at sea could cause significant collateral damage to human health and safety, especially of seafarers and fishermen.⁸⁸² The clear link between danger to the environment and public health and safety

⁸⁷⁷ See the United Nations Convention on the Law of the Sea. The remnants of war could be located in the internal waters, the territorial sea, archipelagic 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.

⁸⁷⁸ 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*, vol. 1 (2015), pp. 57–69, and W. Searle and D. Moody, “Explosive Remnants of War at Sea: Technical Aspects of Disposal”, in *Explosive Remnants of War: Mitigating the Environmental Effects*, A. Westing (ed.) (Taylor & Francis 1985).

⁸⁷⁹ United Nations Convention on the Law of the Sea, art. 194, para. 1 (“States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.”). See also art. 192 and art. 194, para. 2.

⁸⁸⁰ 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 866 above).

⁸⁸¹ See General Assembly resolutions 65/149 of 20 December 2010 and 68/208 of 20 December 2013 and A/68/258. See also Mensah, “Environmental damages under the Law of the Sea Convention”, p. 233.

⁸⁸² 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/ (accessed on 2 August 2022).

has been recognized in several international law instruments, and it was thus considered particularly important to encourage cooperation amongst States and international organizations to ensure that remnants of war at sea do not pose danger to the environment.⁸⁸³

⁸⁸³ There is a clear link between danger to the environment and public health and safety. See, for example, article 55, paragraph 1, of Additional Protocol I 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 interactions among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors”.