Protection of the Environment in Relation to Armed Conflicts

Submission of Peace, Security and Conflict Specialist Group of the World Commission on Environmental Law, International Union for the Conservation of Nature (IUCN) to the Secretary General of the International Law Commission

'The future of life on earth depends on the choices we make and the way these decisions are implemented over the coming years. There is an urgent need for immediate action on a global scale. The need grows with every day that passes.' IUCN, Nature 2030: One Nature, One Future

The Peace, Security and Conflict Specialist Group of the World Commission on Environmental Law, International Union for the Conservation of Nature (IUCN) recognizes the outstanding value of the International Law Commission (ILC) Draft Principles and Commentary on the Protection of the Environment in Relation to Armed Conflicts (PERAC) in addressing the gaps in the present law of armed conflict in the protection of the environment during armed conflicts, by comprehensively covering a range of pertinent subjects covering the whole cycle of conflict, including pre- and post-conflict phases. The IUCN wishes to extend its sincere gratitude for the tireless, constructive and consultative approach taken by the two Special Rapporteurs, Ambassadors Jacobsson and Lehto.

At the urging of UNEP and the Environmental Law Institute (ELI) in a joint 2009 Report entitled, *Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law*, the ILC was requested to 'examine the existing international law for protecting the environment during armed conflict and recommend how it can be *clarified, codified and expanded*'.[1] The temporal approach adopted in the Draft Principles has allowed the Special Rapporteurs to give equal weighting and consideration to all three phases of conflict, providing a much richer analysis and extrapolation of the obligations upon States across a broader range of international legal regimes, and enabling the teasing out of the issues of environmental remediation, liability and cooperation. However, much has occurred in the global environment since the adoption of the Draft Principles in December 2019. The world has witnessed a global pandemic, highlighting the boundaries of human interactions with nature. Over 1 billion people are now covered by jurisdictions declaring a climate emergency. The UN has commenced its Decade on Ecosystem Restoration, designed to restore and revive damaged ecosystems to create a healthier planet[2] and The Decade of Ocean Science for Sustainable Development[3] in recognition of the ocean's role in climate regulation and the increasing pressures on marine life and the marine environment due to a changing ocean. Furthermore, in February 2021 the IUCN adopted its programme for the next decade, entitled Nature 2030: One Nature, One Future, where it warned that 'Our world is in a crisis. Rapid loss of biodiversity and dangerously changing climate are some indicators of this crisis'. Based on the IUCN Red List of Threatened Species, the IUCN warns that 'never have human impacts on nature been greater', with the rate of extinction risk at approximately 28% of all species, and worsening. And in human rights jurisprudence, a growing body of States are moving beyond a purely anthropocentric environmental human rights discourse to one

[1] Recommendation 3.
[2] Adopted the General Assembly Resolution 73/284, A/RES/73/284, 6 March 2019.
[3] Adopted by General Assembly Resolution 72/73, A/RES/72/73, 4 January 2018.

that recognises rights of nature.[4] We urge the ILC to consider these developments as the background to the adoption of the Draft Principles with a view to enhancing the protections for the environment in relation to armed conflicts well into the future.

Observations

We are very grateful for this opportunity to both welcome the Draft Principles and suggest clarifications to enhance the current formulations in order to better protect nature and ecosystems for the benefit of all people and all other life on earth, recognizing the ILC's dual mandate of codification and progressive development of international law.

We wish to comment on the lack of wording referring specifically to 'nature', 'species', 'wildlife', 'habitats' or 'biodiversity'. While we recognise that many provisions are drawn from the laws of armed conflict where the term 'natural environment' is preferred to refer more broadly to the composite whole of the 'natural world', we suggest the addition of a Preamble emphasizing the importance of all living and non-living components of the terrestrial, atmospheric, aquatic and marine environment and their interaction, as well as healthy ecosystem functioning and biodiversity. The Commentary could also refer specifically to obligations adopted by States within key treaties, such as the Convention on Biological Diversity, UN Framework Convention on Climate Change, Convention on Wetlands of International Importance Especially as Waterfowl Habitat, the African Convention on the Conservation of Nature and Natural Resources, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, and the Law of the Sea Convention.

We suggest that the concept of 'natural environment' be replaced throughout with that of 'environment'. The concept of natural environment is outdated. If it is ultimately determined that the term 'natural environment' is to be retained for the purposes of Part Three, it would be a valuable addition to the Commentary if it could provide an explanation of the shift in terminology. Further work on this aspect of the laws of armed conflict would be valuable in delineating where the pertinent issues of controversy remain, with a view to limiting inroads into the protection of all forms of nature, wherever it is found.

A. Principles of General Application

Principle 3: Measures to enhance the protection of the environment

We welcome the Draft Principle which reminds States in paragraph 1 of their existing international law obligations, including that of the dissemination of the laws of armed conflict as contained in Articles 83 and 19 of Additional Protocols I and II respectively. Furthermore, we suggest that the

[4] See for example, the Case of the Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v. Argentina, Inter-American Court of Human Rights, 6 February 2020, paragraph 289. The case builds on the Advisory Opinion *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) of the American Convention on Human Rights*, Advisory Opinion OC-23/18 of 15 November 2017, IACtHR, Series A, No.23; 'Mangroves Case', Ecuador Constitutional Court, no. 166-15-SEP-CC, 20 May 2015, and the Atrato River Case: Center for Social Justice Studies et al. v. Presidency of the Republic et al, no. T-622, Colombia Constitutional Court, 10 November 2016.

Commentary recognises that in order to effectively protect the environment during the whole cycle of armed conflict, environmental norms should be integrated into all aspects of policies and standing operating procedures of the armed forces and the defence sector, particularly for the prevention of environmental damage.

Principle 4: Designation of protected zones

Recognising the many obligations on States to designate spaces within their territories as protected areas[5], including in the marine environment, Draft Principle 4 could be rephrased as a mandatory obligation (ie 'shall') 'in accordance with a State's international legal obligations' (such as wetlands of international importance, Sites of Special Scientific Interest (SSSIs), world cultural and natural heritage). We suggest that the Draft Principle could also go further and stipulate that States '*should* also designate other environmentally important areas'.

We suggest that the Commentary could also stipulate that when designating such spaces in peacetime, States are strongly encouraged to take practical measures to plan for protection during armed conflict or other emergencies, including to avoid locating facilities or infrastructure in such locations that could be designated as military objectives according to the laws of armed conflict.

We welcome reference in the Commentary to the IUCN's definition of 'protected areas' as follows: 'natural or cultural area [*sic*] of outstanding international significance from the points of view of ecology, history, art, science, ethnology, anthropology, or natural beauty, which may include, *inter alia*, areas designated under any international agreement or intergovernmental programme which meet these criteria'.[6] We also recognise the authority of Indigenous Peoples' and Community Conserved Territories and Areas (ICCAs) as governance actors for conservation outcomes, and urge the ILC to include reference to the ICCAs in its Commentary to Draft Principles 4, 5 and 17.

We welcome the approach of the ILC in trying to keep the provision as broad as possible by referring to both major 'environmental' AND 'cultural' importance. We are, however, concerned that this phrasing narrows the scope of the Draft Principle unnecessarily and we suggest instead that the Draft Principle is rephrased to 'and/or' so as to remove the cumulative requirement. Thus, we suggest rephrasing as follows: 'Pursuant to their international obligations States shall designate and protect areas of environmental and/or cultural significance, and are encouraged to designate other important environmental and/or cultural areas for protection.'

Principle 5: Protection of the environment of Indigenous Peoples

We strongly commend the ILC on the inclusion of a provision recognising the need to protect the environmental resources and lands of indigenous peoples in relation to armed conflict.

Both the 2007 UN Declaration on the Rights of Indigenous Peoples (at Article 26(1)) and a growing body of human rights jurisprudence[7] recognises that indigenous peoples have land or property rights over an area that is broader than simply the area that they inhabit, such as their 'lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'. We suggest, therefore, that the wording of the Draft Principle is rephrased to better reflect this broader concept of indigenous property and land, water and sea rights, and the duty to cooperate therein.

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[5] For example, Article 8, 1992 Convention on Biological Diversity; Article 2, 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat; Article 3, 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage.

[6] IUCN Commission on Environmental Law and the International Council of Environmental Law, 1996 Draft Convention on the Prohibition of Hostile Military Activities in Internationally Protected Areas, Article 1.

[7] African Commission on Human and Peoples' Rights V. Republic of Kenya, Application No. 006/2012, Judgment 26 May 2017. See also the Lhaka Honhat case, supra.

Principle 6: Agreements concerning the presence of military forces in relation to armed conflict

We commend the recognition of the importance of including obligations of environmental protection in military forces agreements. In relation to 'preventive measures' we suggest that the Commentary reference the need that such measures should be accompanied by the 'means to ensure implementation of such measures'.

Principle 8: Human displacement

We commend the ILC on the inclusion of the Draft Principle which recognises the need to provide for displaced persons in tandem with the need to protect the environment from over-exploitation and other damaging impacts. We suggest that this Draft Principle may be further reinforced by highlighting the link between the provision of adequate relief and assistance for displaced persons, the protection of the environment and the prevention of environmental health risks as well as upholding fundamental human rights.

Principle 9: State responsibility

We welcome Draft Principle 9 on State responsibility for environmental damage, although precedents for holding States liable for environmental damage caused in relation to armed conflict is limited. We commend the ILC on recognising the bases of environmental damage adopted by the International Court of Justice in the Case of Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica V. Nicaragua), Compensation, Judgment, 2 February 2018, I.C.J. Reports 2018, p. 15, at para.41, which referred to 'the principle of full reparation' as requiring compensation for damage caused to the environment 'in and of itself'. We would urge the ILC to repeat the wording of the ICJ in the Commentary, where the ICJ further explains that 'Such compensation may include indemnification for the impairment or loss of environmental goods and services in the period prior to recovery and payment for the restoration of the damaged environment' in para.42, and that such compensation may include amounts for 'active restoration measures' which 'may be required in order to return the environment to its prior condition, in so far as that is possible' in para.43.

We urge the ILC also to recognise in the Commentary the growing Rights of Nature jurisprudence in many States that may require additional compensatory actions for damaged environments.

We welcome the approach of the Draft Principles in not distinguishing between international and non-international armed conflicts, and the damaging environmental effects caused by members of Non-State armed groups. Thus, while we welcome the inclusion of the principle of State responsibility, we also urge the ILC to include a Draft Principle on ensuring the responsibility and liability of members of Non-State armed groups.

Principles 10 and 11: Corporate due diligence and liability

We commend the ILC for the inclusion of Draft Principles 10 and 11 on corporate due diligence and liability. This area is clearly an important one, as demonstrated by the previous adverse impacts of the exploitation of natural resources during conflicts. The Commentary usefully highlights the burgeoning legal developments and guidance in this field requiring States to impose due diligence obligations on companies or enterprises to respect human rights and environmental standards, including in relation to supply chains. There are already clear synergies between human rights and environmental protection more broadly, albeit most notably through the stand-alone right to a healthy environment that is recognised by most States around the world. Therefore, we suggest specific reference in the provisions to 'including in relation to human health' appears to be unnecessarily narrow. We suggest

instead the ILC rephrase the Draft Principles to refer to 'including through human rights obligations'. This dimension is particularly important because human rights obligations of States are recognised as clearly having a continuing nature during conflict.

The current Draft Principles refer to 'an area of armed conflict or in a post-conflict situation'. While recognising the desire to avoid overly complex language, at present the exact confines of the provisions are unclear. We suggest that the ILC could mirror the formulation adopted in the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, which refers to 'areas affected by conflict', stating that, for example, these would include post-conflict situations and areas under occupation.

Draft Principle 10 refers to due diligence obligations of the corporation 'when acting' in areas affected by conflict etc, and Draft Principle 11 refers to 'harm caused by [the corporation]'. Thus, in relation to the environmental harm caused or the notion of 'acting', we note that the threshold in the first sentence appears to be currently set at the level of the corporation itself directly causing that harm. While this direct causation of harm in the affected areas is possible, the more likely scenario is that the corporation or enterprise receives or sources materials from the affected area, either knowingly or recklessly being complicit in such sourcing, or otherwise contributes to such harm (for example through business partners) – as is clearly recognised in the second sentence. We suggest that the current provision may perhaps create unnecessary confusion, or worse it may unduly restrict the liability and the due diligence requirements, therefore, by such wording, and so we suggest that the wording be replaced by 'when operating or acting in or sourcing from'.

Where States are able to hold corporations and enterprises liable for such harms, we suggest that Draft Principle 11 encourage States to allow for environmental damages to be recovered and awarded to the affected States, as recognised by the International Court of Justice in the Case of Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica V. Nicaragua), Compensation, Judgment, 2 February 2018, I.C.J. Reports 2018, p. 15.

B. Principles Applicable During Armed Conflict

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

We welcome and support the inclusion of the Martens Clause with reference to the protection of the environment. It is clear from developments in human rights and environmental law that the 'dictates of public conscience' must today include the protection of the environment. In recognition of the burgeoning jurisprudence in these areas, we also suggest that the Commentary wording refers to 'the rights of future generations'.

Principle 13: General protection of the natural environment during armed conflict

We reiterate the point in the introductory comments about undertaking further work with States to elucidate where the controversies remain in relation to maintaining reference to 'natural' environment with a view to specifically addressing these in the Draft Principles, or else referring instead throughout only to the 'environment' to maintain consistency.

However, we further suggest that since the first paragraph is not a direct formulation of a provision applicable in the law of armed conflict there is no need to include the 'natural' qualifier of the word environment. Specific rules of the law of armed conflict that relate to the 'natural environment' would be equally constrained by the Draft Principle whether or not it contained the term 'natural' (due to

the reference to 'in accordance with applicable international law'), but it unnecessarily constrains continuing rules of international environmental law or human rights law. We, therefore, suggest the ILC delete the word 'natural' in paragraph 1.

We welcome the inclusion in paragraph 2 of a general duty of taking 'care' or due diligence towards the environment during armed conflict, which serves as a conflict-specific application of the environmental law principle of prevention or the 'no harm' principle. We note that the obligation in paragraph 2 applies throughout the territory of the parties to the conflict, due to the omission of the more limiting 'in warfare' phrasing of Article 55(1) of Additional Protocol I, and, thus, does not repeat the exact wording of Article 55(1). We recognise the continued inclusion of the three-fold threshold of harm, which has severely hampered the protective scope of the obligation in practice.

Alternatively, we suggest the ILC could mirror the obligation in Article 57(1) of Additional Protocol I, in relation to military operations more specifically. Here the obligation would be that 'constant care shall be taken to spare the civilian population, civilians and civilian objects' – with the environment being generally now recognised as a prima facie civilian object. We suggest that the ILC could further elucidate what actions, steps or considerations States should take into account when fulfilling the care obligation, such as the importance of ecologically rich environmental areas, or vulnerable or fragile ecosystems. Notably, this obligation could include the removal of military objectives from the vicinity of a State's national parks, for example, and could include the closure of particularly sensitive chemical facilities. During the conflict in Kosovo, for example, the operators of some facilities attempted to remove or make safe hazardous chemicals on site so that if attacked the damage would be minimised.[8]

While a number of States have questioned the lack of State practice to evidence a customary obligation of 'care' for non-State armed groups, we nonetheless encourage the ILC to engender State support for this recognition by the ILC, which builds on the work of the ICRC and would provide valuable State practice and *opinio iuris*. Requiring non-State armed groups to adhere to the general duty of vigilance towards the environment could be viewed as part of State obligations to respect and protect the environment outlined in Draft Principle 13(1).

We suggest that it is unclear why Draft Principle 13(3) retains reference to the 'natural' environment, since this is not a precise formulation of a rule of the laws of armed conflict. The provision merely applies the rule of distinction to the environment. We submit that the provision would have the same meaning with or without the reference to 'natural' environment, because no part of the environment, natural or otherwise, could be attacked unless it fulfilled the definition of a 'military objective'.

Principles 14 and 15: Application of the law of armed conflict to the natural environment and environmental considerations

Albeit recognising that the Draft Principles will sit alongside the laws of armed conflict and the new Guidelines on the Protection of the Natural Environment in Armed Conflict adopted by the ICRC, we nevertheless suggest that a key element is missing from Draft Principle 14 in relation to the fundamental limitation that 'the rights of parties to an armed conflict to choose methods or means of warfare is not unlimited', and we suggest the ILC to rephrase the provision to ensure its inclusion. By its nature this provision also requires States to undertake an assessment, akin to Article 36 of Additional Protocol I, before using any weapons in armed conflict.

Taking these two Draft Principles together, there is an apparent overlap in that the principle of proportionality is mentioned in both provisions. While a suggestion may be to delete Draft Principle 15 as otiose, we suggest that the rule of proportionality is of such importance to the protection of the

[8] 'The Kosovo Conflict: Consequences For the Environment and Human Settlements', United Nations Environment Programme and United Nations Centre for Human Settlements (Habitats), Switzerland, 1999, p. 35.

environment that the Draft Principle be retained and strengthened. Draft Principle 15 could be strengthened by specific reference to the notion that States need to take into account harm due to the foreseeable direct and indirect ('reverberating') impacts on the environment when applying the principle of proportionality. We strongly welcome and commend the ILC's recognition in the Commentary to Draft Principle 15 (at para. 5) that 'environmental considerations cannot remain static over time, they should develop as human understanding of the environment develops'.

Principle 17: Protected Zones

We welcome the Draft Principle providing for the concept of 'Protected Zone' designation for environmental areas during armed conflict and recognise the work undertaken in linking Draft Principle 4 with Draft Principle 17 so as to continue that protection during conflict. We recognise that under the law of armed conflict an environmental area, for example a forest, is subject to attack when it fulfils the criteria for a military objective. Civilian status is lost when the area by its 'nature, location, purpose or use' makes an effective contribution to military action etc. Thus, we strongly welcome the clarification in Draft Principle 17 that unless the environmental area (or part of it) *contains* a military objective – by purpose or use - that the zone would not be subject to attack. Thus, as we read it, the Draft Principle supports the proposition that the 'location' or 'nature' of an environmental zone would not be sufficient to lose its protected status from attack.

The Article 60 formulation of Additional Protocol I for 'demilitarised zones', is recognisably broader than the Draft Principle 17 provision in that it extends beyond a prohibition of 'attack' to also include a prohibition on the 'Parties to the conflict to extend their military operations to [such] zones'. This latter aspect is particularly important for the protection of the environment, especially habitats and biodiversity rich or fragile ecosystems, due to the destructive effects of the 'footprint' of conflict. Thus, we would urge the ILC to include wording to similar effect in Draft Principle 17.

We also recognise that there is no explicit prohibition in the Draft Principles on siting military installations inside nature reserves or other protected areas, although such an obligation is certainly implied in Article 58 of Additional Protocol I, which requires states to take 'necessary precautions' to protect such civilian objects under their control 'against the dangers resulting from military operations'. Furthermore, in accordance with recognition by the ILC in its work on the 2011 Draft Articles on the Effects of Armed Conflicts on Treaties[9], environmental law treaty obligations prima facie continue to apply during armed conflict. Thus, the State is under an obligation to continue to protect those areas during armed conflict, which would include not siting military objectives in those areas. We also reiterate the tenor of the formulation of the draft Article 32 of the 2000 IUCN Draft International Covenant on Environment and Development. Thus, we would urge the ILC to consider adding such wording to Draft Principle 17.

Similar to the suggested reformulation of Draft Principle 4, we suggest that the additional requirement of the area being of 'cultural' importance be disjunctive. Such a change would enhance the protection of wildlife and habitats.

Thus, we suggest the ILC redraft the Draft Principle, such that,

'The Parties to the conflict:

a) shall, to the maximum extent feasible, take the necessary precautions to protect the protected zones within Principle 4 in areas under their control against the dangers resulting from military operations;

[9] [2011] II:2 YBILC.

b) shall observe, outside areas of armed conflict, all protected zones subject to international environmental law treaty obligations;
c) should designate further environmental and/or cultural areas, by agreement or otherwise, as a protected zone, which shall be protected against attack so long as it does not contain a military objective. It is also prohibited for the Parties to the conflict to extend their military operations to such zones.'

Suggested additional provisions for part three

We suggest that Part Three captures more of the law of armed conflict protections for the environment, including the rules contained in Articles 54 and 56 of Additional Protocol I and their equivalent provisions at Articles 14 and 15 of Additional Protocol II, as well as the rules governing the protection of property in Article 23(g) of the 1907 Hague Regulations concerning the laws and customs of war on land, and Article 147 of the Fourth Geneva Convention. This objective could be achieved through a Draft Principle that made specific reference to these provisions which are generally perceived to be customary international law.[10]

C. Principles Applicable in Situations of Occupation

Principle 20: General obligations of an Occupying Power

We welcome the Draft Principles governing occupation as recognising that occupying powers already have clear obligations towards the environment under a modern view of the law of occupation, together with the complementarity of other legal regimes, particularly environmental law (including the Biodiversity Convention and Wetlands Convention etc) and human rights law, as reflected in the reference to 'applicable international law'.

We welcome paragraph two which refers to the growing body of environmental human rights requiring the prevention of significant environmental damage likely to prejudice the health and well-being of the occupied population. And we commend the Commentary to paragraph 2 which refers to the importance to human health of biodiversity, healthy soils and water quality (para. 5). However, we recognise that a number of States will have more substantial human rights obligations drawn from a stand-alone right to a healthy environment or from a rights of nature approach that move beyond seeing nature only as having value to humans.

Adopting the human rights formulation of 'prevent' in paragraph 2, we welcome the inclusion of the obligation on the occupying power to minimise environmental damage caused by non-State actors in areas under its control, such as individuals and companies. However, we suggest that the wording 'of the occupied territory' is unnecessary, with the scope of the provision being clearly covered by the titles to Part Four and the Principle itself.

In the Commentary to paragraph 3 we welcome the notion that States may need to take proactive measures in protecting the environment in occupied territories, but would urge the ILC to draw that possibility more specifically into the wording of the provision.

[10] Note Rules 54, 42, 50 and 156 respectively in Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, volume I: Rules and volume II: Practice (Parts 1 and 2) (Cambridge: Cambridge University Press, 2005).

Principle 21: Sustainable use of natural resources

We recognise that the Draft Principle leaves the issue of the legality of *when* an occupying power can use the natural resources of the occupied territory to the law of occupation, referencing that such occupying powers must do so in a way that 'ensures their sustainable use and minimizes environmental harm'. However, the law in this area is not entirely straightforward and would welcome further guidance in the Commentary.

We welcome the specific reference to the need to ensure the minimization of environmental harm and the legal basis for this, as well as the new phrasing of 'sustainable use' rather than the historic notion of usufruct. We appreciate the concern of some States that this formulation might appear to weaken the existing standard, however we view both concepts as being designed to prevent the over-exploitation of natural resources, and so the new formulation should continue to safeguard the occupied State's property and means of subsistence. We recognise that this is the only specific reference made in the Draft Principles to the fundamental environmental law concept of sustainable development and repeat our suggestion that the ILC include a Preamble or opening statement, that would set the Principles into the context of the importance of nature, biodiversity and other environmental law concepts.

In terms of wording we suggest clarifying that the locus of the 'benefit' is with the protected population within the occupied territory, as understood in the Fourth Geneva Convention, and that this provision should not be open to abuse through the transfer of persons into the territory or out of the territory (Article 49, Fourth Geneva Convention). Thus, we suggest the addition of the word 'protected' before population in Draft Principle 21. Equally, we suggest, such 'administration and use' must be carried out in adherence with international human rights obligations, including without discrimination and ensuring effective participation in decision making.

D. Principles Applicable After Conflict

Principle 23: Peace Processes

We commend the ILC on the inclusion of Draft Principle 23, which suggests that parties to the conflict should include environmental protection and restoration within peace processes, thus recognising the importance of environmental peacebuilding. This development is certainly a very positive one. Many armed conflicts have included at least one environmental issue, whether it is environmental damage, scarcities or inequalities as a causal factor in the conflict, or exploitation of natural resources as a war-sustaining or financing activity, or simply environmental damage caused in warfare. We suggest, however, that the current wording could be rephrased to read, 'damaged in relation to the conflict' since not all environmental damage will be attributable directly to being caused 'by the conflict'. Thus, the new wording would help to ensure that there are no gaps in protection.

We suggest that the Commentary to paragraph 2 include mention of the important role of local communities in the peacebuilding process, as required by international human rights law, including obligations of effective participation in decision making and access to justice.

We encourage the ILC in the Commentary to recognise the particular situation of vulnerable persons who have historically borne the brunt of long-term environmental damage. Such phrasing could be taken from the UNEA Resolution 2/15, 'Recognizing also the need to mitigate and minimize the specific negative effects of environmental degradation post-conflict on people in vulnerable situations, including children, youth, persons with disabilities, older persons, indigenous peoples, [ethnic

minorities], refugees and internally displaced persons, and migrants, as well as to ensure the protection of the environment in such situations'.[11]

Principle 24: Sharing and granting access to information

We welcome the inclusion of Draft Principle 24 on access to information. In light of the global recognition of the participatory rights of local communities in the environmental decision-making process[12] we urge the ILC to add the following words to the end of paragraph 1, 'in particular those obligations that ensure the rights of local communities in environmental decision-making'.

Principle 25: Post-armed conflict environmental assessments and remedial measures

We welcome the Draft Principle and recognition of the importance of post-conflict environmental reviews. We note that questions have been raised as regards the legal basis for the principle.

While we appreciate that there is no specific principle of international environmental law, human rights law or humanitarian law which calls specifically for such post-conflict environmental assessments, it is the case that most environmental law treaties contain the basic requirement of protection of sites or species, or the reduction of pollution. Thus, States would have to undergo such assessments as these in order to fulfil their environmental law treaty obligations in any event. The 1992 Biodiversity Convention, for example, requires ongoing monitoring of conservation sites and protection of biodiversity more generally, and, thus, would, by implication, require an assessment following any major incident, such as armed conflict. The same would undoubtedly be true for the obligations under the 1972 Convention for the Protection of World Cultural and Natural Heritage. One could also argue the same point for many human rights obligations, such as the environmental health dimensions of the right to health, water, food and life.[13] We, therefore, suggest that the ILC Commentary could be expanded to include such recognition. Environmental assessments can also aid the state in its recovery by pinpointing the worst affected environmental areas and so help with planning and prioritisation of resources, as well, of course, as building an evidential basis for any legal claim of responsibility for harm, and thus aligns with Draft Principle 9.

Principle 27: Remnants of war

We welcome the specific post-conflict remedial obligation contained in Draft Principle 27 on remnants of war, and the recognition that such remnants should be removed because of the damage or risk of damage that they are causing *to the environment*. This phraseology that specifically relates clearance to the potential for environmental harm is a very welcome one for the protection of the environment, including nature and habitats that will benefit from such protection.

We suggest, however, the removal of the conjunctive nature of 'toxic' and 'hazardous' remnants as this better reflects the post-conflict obligations of States under human rights law, particularly to fulfil

[11] UNEA, Resolution 2/15, Protection of the environment in areas affected by armed conflict, 4 August 2016, UNEP/EA.2/Res.15, Preamble.

[12] Article 3, (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters; Articles 1 and 7, 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement); Article 19, International Covenant on Civil and Political Rights; Article 24, 1981 African Charter on Human and Peoples' Rights; Article 8, 1950 European Convention on Human Rights.

[13] For example, see General Comment No.14, *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, Committee on Economic, Social and Cultural Rights, E/C.12/2000/4, 11 August 2000, para.15.

the obligations to respect and ensure the rights to life and health. Similarly, it is unclear why States are mandated only to 'seek to' remove, and it is unclear exactly what this obligation might entail. We encourage the ILC to reformulate the provision to refer to a mandatory obligation, as evidenced in human rights law (such as the right to life).

We recognise, however, that the current formulation that applies this obligation to non-State armed groups is unclear. It is unlikely that many non-State armed groups would be able to do more than provide location information of such remnants and to provide access to affected areas.

Principle 28: Remnants of war at sea

We welcome the recognition by the ILC of the many long-standing issues of environmental harm due to remnants at sea. Such wreckage is often located in the marine environments of States that took no part in conflict and who can least afford both the costs of remediation and the ongoing impact on their marine life and environmental human rights. We, therefore, welcome the Draft Principle, which imposes no time limit on the need to address all remnants where they constitute a danger to the environment. We do, however, suggest the ILC add reference also to avoiding the risk of such remnants endangering the enjoyment of human rights.