

Protection of the Environment in Relation to Armed Conflicts – An Overview of the International Law Commission’s Ongoing Work

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We are honoured to have been asked to write some introductory remarks to this Special Issue of the Goettingen Journal of International Law on *Protection of the Environment in Relation to Armed Conflicts – Beyond the ILC*. Marie Jacobsson was a Member of the ILC 2007-2016 and Marja Lehto is a Member of the Commission since 2017. Both of us have served as the Special Rapporteur for the topic *Protection of the Environment in Relation to Armed Conflicts*. This article gives a brief overview of the work done by the ILC between 2011 and 2019 on the topic. This work is very familiar to many of the readers, but perhaps less so to others. Some can even rightly claim to be the real source – or cause – of the topic.

A. Background

In 2009, the UN Environment Programme (UNEP), the International Committee of the Red Cross (ICRC) and the Environmental Law Institute conducted the first comprehensive analyses of how the many different areas of international law could protect the environment during armed conflict. Their analysis was not confined to international humanitarian law. It also examined environmental law, human rights law and international criminal law. It presented twelve recommendations available in the publication: *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*.¹

Among the recommendations in the 2009 UNEP report, the United Nations (UN) International Law Commission (ILC) was encouraged to “[...] examine the existing international law for protecting the environment during armed conflict and recommend how it can be clarified, codified and expanded”.² Partly because the recommendation came from another UN body, the ILC assessed it and considered it suitable for being placed on its long-term programme of work in 2011. This is reflected in the syllabus of the topic that you can find in the 2011 ILC report.³ In 2013, the topic *Protection of the Environment in Relation to Armed Conflicts* was placed on the current programme of work, and Marie Jacobsson was appointed Special Rapporteur for the topic.

The ILC has its own method of work, and it is worthwhile to briefly explain the different stages of a topic’s lifecycle.⁴ The ILC, set up in 1947, consists of 34 legal experts representing the principal legal systems of the world and its Members are elected by the UN General Assembly. The Commission meets annually for up to 12 weeks a year, mostly in Geneva. It reports to the UN General Assembly on legal topics in need of being codified or progressively developed. The annual reports of the Commission are followed by a debate in the Sixth (Legal) Committee of the General Assembly, during which States

¹ UNEP, ‘Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law’ (2009), available at https://wedocs.unep.org/bitstream/handle/20.500.11822/7813/-Protecting%20the%20Environment%20During%20Armed%20Conflict_An%20Inventory%20and%20Analysis%20of%20International%20Law-2009891.pdf?sequence=3&isAllowed=1 (last visited 8 February 2020).

² *Ibid.*, 53.

³ *Report of the International Law Commission to the Sixty-Third Session, Annex E. Protection of the Environment in Relation to Armed Conflicts*, M. G. Jacobsson, UN Doc A/66/10, 26 April-3 June and 4 July-12 August 2011, 351-368.

⁴ For information on the Commission and its work see UN, ‘International Law Commission’, available at <http://legal.un.org/ilc/> (last visited 8 February 2020).

present their views on the work of the Commission. States are also requested to submit their views on particular topics. The views of States are carefully considered and taken into account. This means that the Commission is not working in an ivory tower. Over the years, the Commission has addressed topics such as the law of the sea, treaty law, diplomatic protection, responsibility of States and organizations, international criminal law, and protection of persons in the event of disasters, or more recently immunity of State officials, crimes against humanity, identification of customary international law and *jus cogens*.

Of particular interest in our context are the *Articles on the Effects of Armed Conflicts on Treaties* adopted in 2011. The Articles start from the presumption that:

“[t]he existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties:
 (a) as between States parties to the conflict;
 (b) as between a State party to the conflict and a State that is not.”⁵

The Draft Articles furthermore contained “[a]n indicative list of treaties whose subject matter involves an implication that they continue in operation, in whole or in part, during armed conflict [...].”⁶ This list includes human rights, environmental treaties and treaties on international criminal justice.⁷

Also of significance was the work the Commission did on the fragmentation of international law (2006), the law of transboundary aquifers (2008), the prevention of transboundary harm from hazardous activities (2001), the allocation of loss in the case of transboundary harm arising out of hazardous activities (2006), and the law of the non-navigational uses of international watercourses (1994).

So, let us go back to 2011 when the topic was placed on the Commission’s long-term programme of work. This was done in the very last year of the ILC’s quinquennial cycle. Elections for the new quinquennium were held in November 2011 and the partly newly composed ILC started its work in 2012. Informal consultations were held.⁸ The new Commission placed the topic of Protection of

⁵ *ILC Draft Articles on the Effects of Armed Conflicts on Treaties, Yearbook of the International Law Commission* (2011), Vol. II, Part Two, Article 3.

⁶ *Ibid.*, Article 7.

⁷ *Ibid.*, Annex.

⁸ Likewise important: discussions with the ICRC and at the University of Geneva, see *Report of the International Law Commission to the Sixty-Fourth Session*, UN Doc A/67/10, 7 May–1 June and 2 July–3 August 2012, 140, para. 296; *Ibid.*, 141, para. 306.

the Environment in Relation to Armed Conflicts on the current programme of work and appointed Marie Jacobsson Special Rapporteur in 2013. She presented three reports that the Commission considered in 2014, 2015 and 2016. As a result, the Commission provisionally adopted eight Draft Principles as well as commentaries to these principles. It took note of nine other Draft Principles that had been provisionally adopted by the Drafting Committee. Since the Commission did not have the time to consider the commentaries to these principles in 2016 (which was Marie Jacobsson's last year in the Commission), their provisional adoption was postponed until a new Special Rapporteur – Ambassador Marja Lehto – had been appointed.⁹

The first challenge for the first Special Rapporteur in 2014 was how to deal with such a complex topic. There were two aspects: how to structure the work and what to include and exclude.

The 2011 syllabus already indicates that it was not possible to pick up the suggestion from the 2009 UNEP report to restrict the analysis to the law applicable during the armed conflict phase.¹⁰ That would have met resistance since the ILC has never been a forum for addressing the sensitive Law of Armed Conflict (LOAC) – *jus in bello*. At the same time, the UNEP report was correct in saying that other areas of international law, such as human rights law, environmental law and international criminal law, were also applicable during armed conflict. LOAC was *lex specialis* – that is correct – but that does not mean that it was the only applicable law.

In fact, the Commission had already taken this position, namely in the Draft Articles on the Effect of Armed Conflicts on Treaties and in the Fragmentation Study. The syllabus from 2011 reflects this. It also points out that even the LOAC contains rules that are applicable before and after an armed conflict. It should be underlined that the syllabus carefully listed what the Commission could – but not what it should – address. It was also of crucial importance to signal to some reluctant States in the Sixth Committee that the Commission was not attempting to revise the LOAC. The open-ended syllabus was very important for the survival of the topic.

⁹ Preceding her appointment, the Commission had established a Working Group under the chairmanship of Mr Vázquez-Bermúdez to consider the way forward for the consideration of the topic “Protection of the environment in relation to armed conflicts”, *Provisional Summary Record of the 3375th Meeting*, UN Doc A/CN.4/SR 3375, 14 July 2017, 7. See *First Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto*, UN Doc A/CN.4/720, 30 April 2018, 3, paras. 1-2.

¹⁰ *Report of the International Law Commission to the Sixty-Third Session, Annex E. Protection of the Environment in Relation to Armed Conflicts*, M. G. Jacobsson, *supra* note 3, 211-215.

Following Marie Jacobsson's proposal, the Commission decided to structure the topic into three temporal phases in order to examine the legal rules applicable before, during and after armed conflict. It seemed to be the only manageable way. It also meant that the legal framework governing the *during armed conflict* phase could be treated as *lex specialis*.

It was also important for the first Special Rapporteur to indicate what the proposed Draft Principles should not address. Among those were root causes of armed conflict, water, refugee law and protection of cultural heritage as such. Likewise, they should not address specific weapons, such as nuclear weapons. The preliminary work also excluded natural resources. The main purpose of the initial work was to confine the topic so as to enable it to move on and not be stopped.

B. The Draft Principles¹¹ That Stem From the First Three Reports

The first Draft Principle sets out the scope of the Draft Principles by making clear that they apply to the protection of the environment before, during and after an armed conflict. Hence, the Draft Principle sets out both a temporal and a substantive framework without limitations.

The second Draft Principle sets out the purpose of the Draft Principles, namely that they “[...] are aimed at enhancing the protection of the environment in relation to armed conflict [...]”. This includes “[...] preventive measures for minimising damage to the environment during armed conflict [...]” and “remedial measures”. The Draft Principle signals that whatever rules are already applicable, it is not enough to refer to them and be satisfied. The aim is to enhance protection. The purpose clearly covers all three temporal phases.

This is followed by a set of general principles (Draft Principles 3 to 11) both of an overarching character and to address specific situations. The first of these, Draft Principle 3 (*Measures to enhance the protection of the environment*), recalls the obligations States have, pursuant to their obligations under international law, to take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflict. This

¹¹ All Draft Principles cited in this contribution can be found in the following official document: *Text and Titles of the Draft Principles Provisionally Adopted by the Drafting Committee of the International Law Commission on First Reading to the Seventy-First Session, Protection of the Environment in Relation to Armed Conflicts*, UN Doc. A/CN.4/L.937, 6 June 2019.

formulation recognizes that such obligations do exist and that they must be implemented through national legislation or other legally binding means. The choice of the word *shall* indicates that such obligations are already legally binding. But States should also take further measures, as appropriate, to enhance the protection of the environment in relation to armed conflict. The word *should* is somewhat weak, but it reflects the fact that the Draft Principles cannot impose obligations on States.

Draft Principle 4 encourages States to designate areas of major environmental and cultural importance as protected zones. This is a signal that States should, well in advance of armed conflict, consider the establishment of such zones so as to protect them from the ecological consequences of armed conflict. The mere establishment of a zone does not mean that the area in question becomes an area that will never be used or affected by an armed conflict. Whether a protected zone will remain unaffected will be guided by the LOAC, political considerations and Rules of Engagement. But there are many other ways of enhancing protection through the designation of such zones and the Draft Principle also recognizes that the format (“[...] by agreement or otherwise [...]”) is less important than the content.

Draft Principle 5 concerning the *protection of the environment of indigenous peoples* was far from uncontroversial. Its recognition of the special relationship between the indigenous peoples and their environment and of the fact that this relationship continues during and after an armed conflict. States cannot passively disregard this special relationship but should take appropriate measures to protect their environment. This can be done before an armed conflict occurs. The commentaries exemplify how this can be done, for example by avoiding placing military installations on indigenous peoples' land or by designating their land as a protected area under Draft Principle 4. The Draft Principle specifically addresses what remedial measures a State should take after an armed conflict, including effective consultations with the indigenous peoples.

There were conflicting views on the inclusion of this principle both in the Commission and in the 6th Committee. Some did not want it at all; others were of the view that it was essential to include it. The compromise language found in the Drafting Committee in 2016 was possible because the wording of the paragraph now follows agreed language from other agreements and declarations. The original proposed wording by Special Rapporteur Jacobsson did not survive.¹²

¹² *Third Report of the Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts* by M. G. Jacobsson, UN Doc A/CN.4/700, 3 June 2016, 36, para 129,

Draft Principle 6 deals with agreements concerning the *presence of military forces* in relation to armed conflict. This is a provision under which States and international organizations should include provisions on environmental protection in agreements concerning the presence of military forces in relation to armed conflict. The wording of the Draft Principle is elastic since such provisions should be included *as appropriate*. It also adds that such provisions may include preventive measures, impact assessments, restoration and clean-up measures.

To a large extent, this Draft Principle reflects what is already done in practice, but without an accompanied *opinio juris*.

Principle 7 requires States and international organizations involved in *peace operations* to consider the impact of such operations on the environment. They shall take appropriate measures to prevent, mitigate and remediate the negative environmental consequences thereof. This Draft Principle reflects an emerging trend, namely that States and international organizations are becoming aware of the environmental footprints they leave during an operation. But the Draft Principle reaches beyond a mere clean-up-mission. It reflects the perception that international activities in a conflict area have larger implications than the carefully negotiated mandate for the mission. In order for a peace operation to be a successful, sustainable and effective contribution to peace, environmental considerations cannot be set aside. Respect for the environment is a key component.

Most modern peace processes address environmental aspects. Draft Principle 23 aims to reflect this and remind parties to an armed conflict that they should, as part of the peace process, address matters relating to the restoration and protection of the environment damaged by the conflict, or to include it in peace agreements. Relevant international organizations should, where appropriate, play a facilitating role in this regard.

This brings us to the post-conflict situation. Let us recall that an armed conflict may have had devastating consequences for the environment, the natural resources, flora and fauna even if there has not been a breach of the LOAC. There may be someone to blame but not to hold accountable. At the

Proposal for “Draft principle IV-1 Rights of indigenous peoples:

1. The traditional knowledge and practices of indigenous peoples in relation to their lands and natural environment shall be respected at all times.
2. States have an obligation to cooperate and consult with indigenous peoples, and to seek their free, prior and informed consent in connection with usage of their lands and territories that would have a major impact on the lands.”

same time, it may be a question of survival for the population to restore the environment or to mitigate damage. A destroyed environment is a security threat. It is in this context that international cooperation will be of the utmost importance. Draft Principle 25 encourages *relevant actors* and international organizations to cooperate in undertaking *post-armed conflict environmental assessments and remedial measures*. The formulation could have been stronger, but the idea of making post-armed conflict environmental assessments and remedial measures part of the Draft Principles reflects a new trend where post-conflict environmental assessment has emerged as a tool to mainstream environmental considerations in the post- armed conflict phase.

This bridges over to the classic issue of remnants of war. They are dealt with in two separate Draft Principles, namely Draft Principle 27 concerning *remnants of war* and Draft Principle 28 concerning *remnants of war at sea*. Parties to a conflict have an obligation to remove or render harmless toxic and hazardous remnants of war that are under their jurisdiction or control that are causing or risk causing damage to the environment. This formulation is a clear reflection of present international environmental law. It is disconnected from the obligations of parties to a conflict to clear mines, minefields or other devices.

Draft Principle 28 on *remnants of war at sea* is very short. Special Rapporteur Jacobsson had suggested a far more detailed Draft Principle. The reason was that remnants of war at sea may have extensive long-lasting environmental effects on the natural environment, living resources and sustainable use of the area. Remnants of war at sea are like ghosts: you do not see them. Unlike ghosts, however, they do exist. The original proposal contained references to compulsory cooperation and sharing of information.¹³

It was, however, decided that this would be covered by the Draft Principle on sharing and granting access to information, now Draft Principle 24. The Draft Principle is carefully worded and reflects modern international environmental law obligations and human rights instruments. At the same time, it reflects the need of States to share and grant access to information vital to their national defence or security.

The Draft contains several provisions identified as directly applicable during armed conflict.

¹³ *Ibid.*, 80, para. 265, Proposal for a “Draft principle on III-IV Remnants of war at sea:

1. States and international organizations shall cooperate to ensure that remnants of war do not constitute a danger to the environment, public health or the safety of seafarers.
2. To this end States and organizations shall endeavour to survey maritime areas and make the information freely available.”

The starting point is that the Draft Principles do not attempt to rewrite the LOAC as such. As Special Rapporteurs having been involved in issues relating to the LOAC for a very long time, we are fully aware of the legal and political considerations that States have had and may still have in this respect. At the same time, the Commission believed that it was time to move forward and recognize that the normative values that have developed in other areas of the law, such as environmental law, inform conduct before, during and after military operations. In fact, the most important sources of the proposals in Marie Jacobsson's reports were the work done by individual States and regions, such as China, Russia, Latin America, Africa and Western States – to mention but a few – and organizations, such as the United Nations, the AU and NATO.

The first set of five principles was based on the proposal by the Special Rapporteur Jacobsson. They address the *general protection of the natural environment during armed conflict* (Draft Principle 13); application of the LOAC to the natural environment (Draft Principle 14); *environmental considerations* (Draft Principle 15); *prohibition of reprisals* (Draft Principle 16); and *protected zones* (Draft Principle 17).

Of these five Draft Principles, Draft Principle 16 on the prohibition of reprisals was initially by far the most difficult principle to maintain. The controversy surrounding this Draft Principle was caused by different views on whether or not attacks against the natural environment by way of reprisals were prohibited under customary law. The considerations are reflected in the draft commentaries.¹⁴ As a consequence of the proposals by the second Special Rapporteur Lehto, such as the prohibition of pillage and the Martens Clause, Part III on the Principles applicable during armed conflict has been strengthened.

The Principles of general application and those Principles that are applicable after an armed conflict are of particular interest and carry a certain element of novelty. They connect obligations that already exist with situations of armed conflict. They require that States and parties to a conflict consider the environmental impact in their military planning and training before an armed conflict, as well as after an armed conflict. Hopefully this will also influence their operations during an armed conflict. In addition, the Draft Principles also encourage the establishment of protection for zones of major environmental and cultural interest. As we know, these areas can have critical importance, both for

¹⁴ *Report of the International Law Commission to the Sixty-Eighth Session*, UN Doc A/71/10, 2 May-10 June and 4 July-12 August 2016, 336-339. This reflect the wording of the original proposal see, *Second Report of the Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts* by M. G. Jacobsson, UN Doc A/CN.4/685, 28 May 2015, 73.

protecting fragile ecosystems and for ensuring the rights of local communities and indigenous peoples.

C. The Work by the Commission 2017 - 2019

In 2017, when the Commission resumed its work on Protection of the Environment in Relation to Armed Conflicts, the topic was already well on its way. The basic frame, including the temporal and substantive approach, had been endorsed by the Commission and the UN General Assembly, Marie Jacobsson as the first Special Rapporteur had produced three reports that covered all temporal phases, and put forward altogether 17 Draft Principles. It could have been said, and some of the members of the Commission were of the view, that the work was practically complete. Others thought that there was still work to do to complement the existing Draft Principles and at the end this view prevailed.

The Commission thus decided to appoint Marja Lehto as the new Special Rapporteur and also identified a few issues that should be prioritized in the work that remained to be done. The work list included streamlining, terminology, filling gaps and overall structuring of the text, but also certain substantive questions:

“[...] complementarity with other relevant branches of international law, such as international environmental law, protection of the environment in situations of occupation, issues of responsibility and liability, the responsibility of non-State actors and overall application of the draft principles to armed conflicts of a non-international character”.¹⁵

The subsequent work that has led to the completion of the first reading of the whole set of 28 Draft Principles and commentaries in 2019 has followed this guidance quite closely. Marja Lehto’s first report in 2018 focused on situations of occupation, while her second report addressed certain questions related to the protection of the environment in non-international armed conflicts, as well as questions concerning the responsibility and liability for environmental harm in relation to armed conflicts. Furthermore, certain *gaps* were identified, and Draft Principles proposed to fill them.

¹⁵ *Report of the International Law Commission to the Sixty-Ninth Session*, UN Doc A/72/10, 1 May-2 June and 3 July-4 August 2017, 212, para. 259.

The remaining areas posed their own challenges. As for situations of occupation, the substantive body of research on different legal aspects of situations of occupation – ranging from the concept of occupation, the beginning, and the end of occupation to human rights in situations of occupation – barely touches the protection of the environment. Similarly, the question has been mostly ignored in international instruments, with the sole exception of the Rio Declaration of 1992.¹⁶ A UN report reviewing the implementation of the Rio Principles twenty years later painted a bleak picture regarding this Principle.¹⁷ There were undoubtedly “[...] several instances whereby the environment and natural resources of people under oppression, domination and occupation are being depleted and degraded [...]”, the report stated, but “[...] ultimately, there is no satisfactory legal framework in place [...]” as the international law “[...] relevant to Principle 23 is largely indirect and surrounded with ambiguities”.¹⁸

The Commission had no intention, and was not in the position to rewrite the law of occupation¹⁹ but it seemed evident that there was a need to clarify the applicable law, in line with the objectives of the topic that include explaining how existing international law protects the environment in relation to armed conflicts. As a point of departure, the protection provided to the environment by the law of occupation is mostly indirect. The principal instruments setting forth the law of occupation, the 1907 Hague Regulations²⁰ and the Fourth Geneva Convention of 1949,²¹ lack specific provisions on the protection of the environment. At the same time, they have proved flexible enough to be adapted

¹⁶ *Rio Declaration on Environment and Development*, UN Doc A/CONF/151/26 (vol.1), 12 August 1992, Principle 23: “The environment and natural resources of people under oppression, domination and occupation shall be protected.”

¹⁷ Sustainable Development in the 21st Century, ‘Review of Implementation of the Rio Principles’ (2011), available at <https://sustainabledevelopment.un.org/content/documents/1127rioprinciples.pdf> (last visited 8 February 2020).

¹⁸ *Ibid.*, 149.

¹⁹ To paraphrase one of the most often-cited notes of caution with regard to the Commission’s work on the topic. See, for instance, *Preliminary Report of the Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts by M. G. Jacobsson*, UN Doc. A/CN.4/674, 30 May 2014, 18, para. 62; *Preliminary Report of the Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts by M. G. Jacobsson, Corrigendum*, UN Doc A/CN.4/674/Corr.1, 11 August 2014.

²⁰ *1907 Hague Regulations Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907, 187 CTS 227.

²¹ *Geneva Conventions of 1949, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTC 286.

to changing circumstances. For instance, some of their provisions on property rights have for long been consistently interpreted to apply to natural resources, such as oil and water.

What was done in Special Rapporteur Lehto's first report, and endorsed by the Commission, was to identify certain general concepts in the 1907 Hague Regulations that lend themselves for evolutive interpretation and can be given a contemporary content. This was the case, as will be explained later, of such notions as *civil life* in Article 43 and *usufruct* in Article 55 of the Hague Regulations. The report further recognized the great variety of different situations of occupation in terms of stability and duration – from occupations lasting a few hours, as during the conflict between Eritrea and Ethiopia, to the more than half a century of the Israeli occupation of the Palestinian territories or 45 years of the Turkish occupation of Northern Cyprus. As a rule of thumb, it can be said that the longer an occupation lasts, the more onerous the obligations of the Occupying Power.²² In addition to the law of occupation, other areas of law such as human rights law and international environmental law gain more relevance in protracted occupations.

Accepting these points of departure, the Commission adopted three Draft Principles regarding situations of occupation, the first of which laid down the *General Obligations of an Occupying Power* (Draft Principle 20). According to this provision, an Occupying Power has certain environmental obligations including the obligation to take appropriate measures to prevent significant harm to the environment of the occupied territory that is likely to prejudice the health and well-being of the population of the occupied territory. The provision was based on the Occupying Power's general obligation under Article 43 of the Hague Regulations to restore and maintain the civil life in the occupied territory,²³

²² The relevant ICRC commentary also confirms that the obligations of the occupier are “[...] commensurate to with the duration of the occupation”. See ICRC, Commentary to the First Geneva Convention (2016), Article 2, para. 322, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518> (last visited 8 February 2020).

²³ According to Article 43 of the Hague Regulations, “The [...] occupant [...] shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety [...] 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. McDougal & F. P. Feliciano, *Law and Minimum World Public Order*.

understood as “[...] an obligation to ensure that the occupied population lives as normal a life as possible”²⁴ under the circumstances.

The second Draft Principle on *sustainable use of natural resources* (Draft Principle 21) states that an Occupying Power, to the extent it is permitted to administer and exploit the natural resources of an occupied territory, must do so in a way that ensures their sustainable use and minimizes environmental harm. The provision is based on Article 55 of the Hague Regulations, according to which an Occupying Power must administer public immovable property in the occupied country “[...] in accordance with the rules of *usufruct*”. Given that the concept of *usufruct* provides a general standard of good housekeeping, the Commission agreed that a contemporary understanding of that standard necessarily includes sustainability.

The third principle relative to situations of occupation deals with *due diligence* (Draft Principle 22). It states that an Occupying Power shall exercise due diligence – in other words take appropriate and reasonable measures – to ensure that activities in the occupied territory do not cause significant transboundary harm to the environment. This is the established Principle that all States should ensure that activities in their territory or control do not cause significant harm to the environment of other States or areas beyond national jurisdiction.²⁵ The International Court of Justice, in the Advisory Opinion on the *Legality of Nuclear Weapons*, has confirmed the customary nature of this Principle in international environmental law.²⁶ The applicability of the Principle in situations of occupation has also been firmly established.²⁷ As originally proposed, the Draft Principle referred to “[...] the environment of another State or to areas beyond national jurisdiction”. This language was replaced in the

²⁴ *The Legal Regulation of International Coercion*. (1961), 746. See also Y. Dinstein, *The International Law of Belligerent Occupation* (2009), 89.

²⁵ T. Ferraro, ‘The law of occupation and human rights law: some selected issues’, in R. Kolb & G. Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (2013), 273, 279.

²⁶ Declaration on the Human Environment, *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev. 1, 16 June 1972, 5, Principle 21; *Rio Declaration on Environment and Development*, *supra* note 16, principle 2; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, para. 101.

²⁷ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 241, para. 29. See also *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *supra* note 25, para. 101.

²⁷ *ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities*, *Yearbook of the International Law Commission* (2001), Vol. II, Part Two, 151, para. 12; *Ibid.*, 153, para. 10.

Drafting Committee by a reference to “[...] the environment of areas beyond the occupied territory”. It is doubtful whether this change adds much clarity.

The Commission furthermore agreed that the variety of different situations of occupation justified the application *mutatis mutandis* of the Draft Principles relative to the *during* phase, those relative to post-armed conflict situations, and those of general application to situations of occupation.²⁸

Compared to occupation as a specific sub-set of armed conflicts, addressing the remaining broad issues that had been identified in 2017 as being in need for further work entailed a fair amount of choice. This was evident both in how Special Rapporteur Lehto’s second report approached non-international armed conflicts and how issues of responsibility and liability were discussed.

The report considered first certain questions related to the protection of the environment in non-international armed conflicts, with a general focus on natural resources. The two questions chosen for consideration, illegal exploitation of natural resources and unintended environmental effects of human displacement, are not exclusive to non-international armed conflicts. Nor do they provide a basis for a comprehensive consideration of environmental issues relevant to non-international conflicts. At the same time, they are representative of problems that have been prevalent in current non-international armed conflicts and have caused severe stress to the environment.²⁹ The pertinence of both issues from the point of view of the environment, has also been recognized by the UN Environmental Assembly.³⁰

The environmental effects of *human displacement* are addressed in Draft Principle 8. While legal rules in the area are few, a number of international actors have drawn attention to the problem and provided solutions, including

²⁸ See *Report of the International Law Commission to the Seventy-First Session*, UN Doc A/74/10, 20 August 2019, 268, para. 7.

²⁹ Reference can in this regard be made to research based on the post-conflict environmental assessments which has identified that the use of extractive industries to fuel conflict, and human displacement are among the six principal pathways for direct environmental damage in conflict. See D. Jensen and S. Lonergan, ‘Natural resources and post-conflict assessment, remediation, restoration and reconstruction: Lessons and emerging issues’, in D. Jensen & S. Lonergan (eds), *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding* (2012), 411, 414.

³⁰ See *UN Environment Assembly of the UN Environment Programme, Protection of the Environment in Areas Affected by Armed Conflict*, UN Doc UNEP/EA.2/Res. 15, 4 August 2016, preamble, paras. 1, 11; *UN Environment Assembly of the UN Environment Programme, Pollution Mitigation and Control in Areas Affected by Armed Conflict or Terrorism*, UN Doc UNEP/EA.3/Res. 1, 30 January 2018, preamble, para. 10.

the United Nations High Commissioner for Refugees (UNHCR),³¹ the UNEP,³² the World Bank,³³ and the International Organization for Migration.³⁴ Furthermore, Article 9 para. 2 lit. j of the Kampala Convention of the African Union Convention requires State parties to “[t]ake necessary measures to safeguard against environmental degradation in areas where internally displaced persons are located”. The Commission adopted a Draft Principle along the same lines, and on the understanding that conflict-related human displacement is a phenomenon that may have to be addressed both during and after an armed conflict.

Illegal exploitation of natural resources – a problem well-known in non-international armed conflicts, and one that can seriously impair the environment, pollute air, water and soil, and displace communities³⁵ – provides the context for altogether three Draft Principles. The *prohibition of pillage* (Draft Principle 18) represents the hard core of the international law related to conflict resources. The prohibition has been enshrined in the Fourth Geneva Convention as well as in Additional Protocol II and is therefore applicable in both international and non-international armed conflicts. It is generally agreed that the prohibition covers both organized pillage and isolated acts of indiscipline. It furthermore applies to all categories of property, whether public or private,³⁶ and therefore also to natural resources.³⁷

In addition to Draft Principle 18, the problem of illegal exploitation of natural resources has been addressed from the point of view of prevention in

³¹ UNHCR, ‘Environmental Guidelines’ (2005), 6-7, available at <https://www.refworld.org/docid/4a54bbd10.html> (last visited 10 May 2020).

³² See, for instance, UNEP, ‘Rwanda: From Post-Conflict to Environmentally Sustainable Development’ (2011), available at https://postconflict.unep.ch/publications/UNEP_Rwanda.pdf, 74 (last visited 10 May 2020).

³³ A. Christensen & N. Harild, ‘Forced Displacement – The Development Challenge’, *Conflict, Crime & Violence Issue Note* (2009) published by the Social Development Department of the World Bank Group.

³⁴ *Compendium of IOM Activities in Disaster Risk Reduction and Resilience*, 2013, as referenced in IOM, ‘IOM Outlook on Migration, Environment and Climate Change’ (2014), available at https://publications.iom.int/system/files/pdf/mecc_outlook.pdf (last visited 3 November 2019).

³⁵ K. Nelleman et al. (eds), *The Rise of Environmental Crime – A Growing Threat to Natural Resources Peace, Development And Security*, UNEP–INTERPOL (2016), 69.

³⁶ ICRC, *Commentary on the Fourth Geneva Convention* (1958), Article 33, 226, para. 2.

³⁷ This interpretation was acknowledged by the *Armed Activities* Judgment of the International Court of Justice, see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports 2005, 168, 253, para. 250.

Draft Principle 10 on *corporate due diligence* and Draft Principle 11 on *corporate liability*. These two Draft Principles address the activities of corporations and other business enterprises operating in areas of armed conflict or in post-armed conflict situations. The first-mentioned provision asks States to take legislative and other measures aimed at ensuring that such corporations and enterprises exercise due diligence with regard to the protection of the environment and human health. The latter Draft Principle asks States to take measures aimed at ensuring that corporations can be held liable if and when they cause such damage. As these two Draft Principles do not reflect generally binding legal obligations, they have been phrased as recommendations.

Draft Principle 11 also responds to the wish that the responsibility of non-State actors should be addressed. Special Rapporteur Lehto's second report discussed this issue more broadly, both from the point of view of the responsibility of non-State armed groups,³⁸ and of individual criminal responsibility.³⁹ It nevertheless concluded that corporate liability provided a better basis for a Draft Principle on the responsibility of non-State actors than the two other areas. This choice also followed from an attempt to keep the number of new Draft Principles manageable. Additionally, it reflected the need for finding sufficient support for the proposed Draft Principles in either established law or recognized best practices.

Draft Principle 9 on *State responsibility* originated from a simple *without prejudice clause* that now figures as paragraph 2 of the provision. In Special Rapporteur Lehto's second report, it was accompanied with a paragraph relative to situations in which it is not possible to establish State responsibility, and which the Drafting Committee reformulated as a self-standing Draft Principle 27 on *relief and assistance*. This new provision is closely linked to Draft Principles 25, on sharing and granting access to information, and 26 on post-armed conflict environmental assessments and remedial measures. The Drafting Committee also added a new paragraph 1 which contains a restatement of 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. Paragraph 1 further reaffirms the applicability of this Principle to internationally wrongful acts in relation to armed conflict as well as to environmental damage.

³⁸ Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, UN Doc A/CN.4/728, 27 March 2019, 23-28, paras. 51-58.

³⁹ Ibid., 28-32, paras. 59-66.

As originally proposed, paragraph 2 concerned the compensability under international law of pure environmental damage. This paragraph was merged with the new paragraph 1 of Draft Principle 9 and is reflected in its final words “[...] including damage caused to the environment in and of itself”. Luckily, one should add, since the deletion of these words, as proposed by some members, would have deprived the Draft Principle of its greatest import.⁴⁰

Two further Draft Principles were proposed in the second report in the way of *filling of gaps* and were adopted by the Commission with minor modifications. Both provisions were based on specific proposals that had been made by members of the Commission: one regarding the 1976 Environmental Modification Convention (the ENMOD Convention)⁴¹ and the other regarding the Martens Clause. Even though both Draft Principles were based on existing treaty or customary law, they triggered protracted debates in the Drafting Committee and in the context of the adoption of the commentaries.

The major issue with regard to the Martens Clause was not its application to the protection of the environment as such but its relevance to post-armed conflict situations, and therefore its location in the structure of the Draft Principles. A separate debate concerned the mention of “principles of humanity” in the context of environmental protection. Most members agreed that it was important to retain that reference to protect the integrity of the Martens Clause. It was also agreed that humanitarian and environmental concerns are not mutually exclusive. Finally, the Commission settled on the inclusion of *Martens Clause with respect to the protection of the environment in relation to armed conflict* as Draft Principle 12 in Part Three containing Draft Principles applicable during armed conflict. The original text was only slightly amended by deleting the mention of future generations. A reference to the intergenerational Principle would in the second Special Rapporteur’s view have tied the environmental emphasis to Principles of humanity but the Drafting Committee preferred to stick, to the extent possible, to the established language of the Martens Clause.

⁴⁰ The President of the International Court of Justice, in his address to the Commission in July 2019, drew attention to the Draft Principle, and reaffirmed the Principle of “[...] full reparation [for environmental damage in the context of armed conflict], including damage to the environment in and of itself”, Speech by H.E. Mr. Abdulqawi Ahmed Yusuf, President of the International Court of Justice, at the 71st session of the International Law Commission (11 July 2019), available at <https://www.icj-cij.org/files/press-releases/0/000-20190711-STA-01-00-EN.pdf>, 7 (last visited 5 November 2019).

⁴¹ *Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques*, 10 December 1976, 1108 UNTS 151.

Draft Principle 19 on *environmental modification techniques* has been modelled on Article 1 of the ENMOD Convention. This Convention was deemed worthy of particular attention in the context of the Draft Principles as the first and so far the only international treaty that specifically addresses the means and methods of environmental warfare. The Draft Principle includes the phrase “[i]n accordance with their international obligations [...]”⁴² due to the ambiguity regarding the customary status of the prohibition in the ENMOD Convention.

The issue with the inclusion of Draft Principle 19 was related to the absence of reference to other specific weapons, such as biological, chemical or nuclear weapons, in the Draft Principles. It was agreed that this concern would be addressed in the commentary. The phrase “[t]he inclusion of draft principle 19 in the set of draft Principles is without prejudice to the existing conventional or customary rules of international law regarding specific weapons [...]”⁴³ was meant to meet this concern but was not regarded as sufficient. Finally, a felicitous way was found to solve the problem by adding a few words at the end of the above-mentioned sentence, which now refers to specific weapons “[...] that have serious impacts on the environment”.⁴⁴ This formulation arguably covers all weapons of mass destruction.

D. Concluding Remarks

The work of the Commission is soon reaching its conclusion⁴⁵ and it is encouraging to note that this happens at a critical time, when concurrent efforts from other organizations are emerging. For instance, the ICRC Guidelines are currently being revised to better reflect the developments since 1994.⁴⁶ In addition, the resolution on the protection of the environment in areas affected by armed conflicts agreed by consensus at the UN Environment Assembly in

⁴² Proposed by the Special Rapporteur Lehto in the context of the introduction of her second report.

⁴³ *Report of the International Law Commission to the Seventy-First Session*, *supra* note 28, 265, para. 6.

⁴⁴ *Ibid.*

⁴⁵ The first reading completed, the Commission has invited States, international organizations and others to submit written comments by 1 December 2020. The second reading, in 2021, will be conducted in light of these comments.

⁴⁶ Indeed, one of the recommendations of the 2009 UN Environment report addressed the need to update the ICRC Guidelines, for instance to define key terms and examine protection of the environment during non-international armed conflicts.

May 2016 was a major signal of the commitment of UN Member States to address the issue. This was followed by a resolution by the UN Environment Assembly (2018). These initial UN Environment Assembly resolutions were positive signals that could be used to establish synergies for the future between the ongoing work of UNEP and the ILC, and the important work undertaken by the ICRC on this topic. In addition, engagement by civil society organizations helps to develop these issues further. One example of such a contribution is the partnership between UNEP, academia and civil society to share best practices on environmental protection and peacebuilding through a knowledge platform.

The work on the French-led initiative, a Global Pact for the Environment, has taken off.⁴⁷ It contains a draft article on armed conflict and the environment. But even in this context we had to fight to keep it. It is also remarkable that the UN study on gaps in environmental law does not address protection of the environment in relation to armed conflict, but merely refers to the work of the ILC in a footnote.⁴⁸

In parallel, an important development for protection of the environment is taking place in international criminal law. In September 2016, the Office of the Prosecutor of the International Criminal Court (ICC) published a policy paper on case selection and prioritisation, which clearly signals that environmental crimes are to be regarded as priority areas for the Court in terms of determining the gravity of the crimes.⁴⁹

In summary: The international community has come a long way since 2009. As the path for increased protection of the environment in relation to armed conflicts continues, it is our hope that the momentum established by these concurrent tracks within the UN, the ICRC, the ICC and the ILC might serve to provide holistic and integrated protection of the environment in relation to armed conflicts, for the benefit of existing and future generations.

⁴⁷ 'Global Pact for the Environment', available at <https://globalpactenvironment.org/le-pacte/ou-en-est-on/> (last visited 8 February 2020).

⁴⁸ *Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment, Report of the Secretary-General*, UN Doc A/73/419, 30 November 2018.

⁴⁹ See Office of the Prosecution of the International Criminal Court, 'Policy Paper on Case Selection and Prioritization' (2016), paras 7, 40, 41, available at https://www.icc-cpi.int/itemsDocuments/20160915 OTP-Policy_Case-Selection_Eng.pdf (last visited 31 March 2020).