United Nations A/CN.4/750*

General Assembly

Distr.: General
16 March 2022

Original: English

International Law Commission
Seventy-third session
Geneva, 18 April–3 June and 4 July–5 August 2022

Third report on protection of the environment in relation to armed conflicts, by Marja Lehto, Special Rapporteur**

Contents

* Second reissue for technical reasons (26 April 2022).

** The Special Rapporteur wishes to thank all the persons who have assisted in the preparation of the present report, including Rosemary Mwanza from the University of Eastern Finland, Hannah van Dijcke from the Michigan University School of Law, Lingke Cai from the Geneva Graduate Institute, Matilde Masetti Placci and John Choi (Ching Jack) from the University College of London, Nina Roos from the Åbo Akademi, as well as Stella Ngono Ambassa, Olivia Flasch, Sarah Gale and Alva Rosqvist.

22-01395* (E) 260422

I. Introduction

A. Previous work on the topic

1. At its sixty-fifth session (2013), the Commission decided to include the topic "Protection of the environment in relation to armed conflicts" in its programme of work, and appointed Ms. Marie G. Jacobsson as Special Rapporteur for the topic.[1]

2. At its sixty-sixth session (2014) and sixty-seventh session (2015), the Commission considered the preliminary report of the Special Rapporteur.[2]

3. At its sixty-seventh session, the Commission considered the second report of the Special Rapporteur and took note of seven draft principles provisionally adopted by the drafting Committee.[3]

4. At its sixty-eighth session (2016), the Commission provisionally adopted seven draft principles and commentaries thereto.[4] At the same session, the Commission considered the third report of the Special Rapporteur,[5] and took note of nine additional draft principles provisionally adopted by the Drafting Committee.[6]

5. 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.[7] Following an oral report by the Chair of the Working Group, the Commission decided to appoint Ms. Marja Lehto as Special Rapporteur.[8]

6. At its seventieth session (2018), the Commission considered the first report of the current Special Rapporteur.[9] At the same session, the Commission provisionally adopted the draft principles it had taken note of at the sixty-eighth session, and the commentaries thereto prepared by Ms. Jacobsson, even though she was no longer a member of the Commission.[10]

7. At its seventy-first session (2019), the Commission considered the second report of the Special Rapporteur,[11] and adopted, on first reading, a complete set of 28 draft principles on protection of the environment in relation to armed conflicts, with

[1] 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.

[2] A/CN.4/674 and Corr.1; Report of the International Law Commission on the work of its sixty-sixth session *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), chap. XI.

[3] A/CN.4/685; Report of the International Law Commission on the work of its sixty-seventh session *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), chap. IX.

[4] Report of the International Law Commission on the work of its sixty-eighth session *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), para. 188.

[5] A/CN.4/700; Report of the International Law Commission on the work of its sixty-eighth session. *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), chap. X.

[6] A/CN.4/L.876.

[7] Report of the International Law Commission on the work of its sixty-ninth session. *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), paras. 255 and 260.

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

[9] A/CN.4/720; Report of the International Law Commission on the work of its seventieth session. *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), chap. IX.

[10] *Ibid.*, para. 218, at pp. 249–272.

[11] A/CN.4/728; Report of the International Law Commission on the work of its seventy-first session, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), chap. VI.

commentaries. At the same time, the draft principles were reorganized and renumbered.[12]

8. Also at its seventy-first session, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the set of draft principles through the Secretary-General to Governments, international organizations, including of the United Nations and the United Nations Environment Programme, and others, including the International Committee of the Red Cross (ICRC) and the Environmental Law Institute (ELI), for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2020. In September 2020, the deadline was extended to 30 June 2021, in the light of General Assembly decision No. 74/566, in which the Assembly postponed the seventy-second and seventy-third sessions of the Commission to 2021 and 2022, respectively.[13]

9. During the debate on the annual report of the Commission in the Sixth Committee in 2019, more than fifty States, including one acting behalf of the five Nordic countries, made observations on the set of draft principles adopted on first reading.[14]

10. As at 7 February 2022, the date of the submission of the present report, written comments in response to the Commission's request had been received from the following States: Belgium, Canada, Colombia, Cyprus, Czech Republic, El Salvador, France, Germany, Ireland, Israel, Japan, Lebanon, Netherlands, Portugal, Spain, Sweden, (on behalf of the five Nordic countries: Denmark, Finland, Iceland, Norway and Sweden), Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America.

11. Written comments upon this topic have also been received from the following international organizations, or offices thereof: the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean, the International Atomic Energy Agency (IAEA), the Office of the United Nations High Commissioner for Human Rights (OHCHR), the Organization for the Prohibition of Chemical Weapons (OPCW), the Economic Commission for Latin America and the Caribbean (ECLAC), the Economic and Social Commission for Asia and the Pacific (ESCAP), the United Nations Environment Programme (UNEP), the Food and Agriculture Organization of the United Nations (FAO), the United Nations High Commissioner for Refugees (UNHCR), and the United Nations Office for Disarmament Affairs (UNODA). Written comments were also received from ELI, ICRC and the International Union for Conservation of Nature (IUCN).[15] Furthermore, a joint submission was received

[12] *Ibid*., para. 66.

[13] General Assembly resolution 75/135, para. 6.

[14] Presentations in 2019 to the Sixth Committee on this topic were made by: Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belarus, Brazil, China, Colombia, Cuba, Cyprus, the Czech Republic, El Salvador, Egypt, Estonia, France, Germany, Greece, Honduras, India, Indonesia, Iran (Islamic Republic of), Italy, Jamaica, Japan, Lebanon, Malaysia, Mexico, Micronesia (Federated States of), Morocco, Netherlands, New Zealand, Norway (on behalf of the Nordic countries), Peru, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Sierra Leone, Singapore, Slovakia, Slovenia, Sudan, Thailand, Turkey, Ukraine, United Kingdom, United States of America and Viet Nam, and Holy See. In the debate on the annual report of the Commission in the Sixth Committee in 2018, observations were also made on the topic by the Bahamas, on behalf of the Caribbean Community (CARICOM); Israel; South Africa; Spain; and Switzerland. In addition, Croatia, Palau and Togo made observations on the topic in the debate on the annual report of the Commission in the Sixth Committee in 2015 and/or 2016.

[15] The European and Mediterranean Major Hazards Agreement of the Council of Europe, the Organization of American States, the United Nations Register of Damage caused by the Construction of the Wall in the Occupied Palestinian Territory, and the United Nations Relief and Works Agency for Palestine Refugees in the Near East each submitted replies indicating that they had no substantive comments.

from six civil society organizations: Al-Haq; Amnesty International; Conflict and Environment Observatory; Geneva Water Hub; International Human Rights Clinic of the Harvard Law School; and London Zoological Society (LZE).[16]

12. The draft principles and commentaries adopted on first reading have also received attention from practitioners[17] and scholars.[18]

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[16] Protection of the environment in relation to armed conflicts – joint civil society submission to the Secretary General of the International Law Commission following first reading, May 2021. Available at https://ceobs.org/joint-civil-society-submission-to-the-international-law-commissions-perac-study.

[17] 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), recommendation 18, p. 84, available from https://shop.icrc.org/guidelines-on-the-protection-of-the-natural-environment-in-armed-conflict-pdf-en.html; the ICRC blog series "Humanitarian law and policy", available at https://blogs.icrc.org/law-and-policy/category/special-themes/war-law-environment/; Security Council Arria-formula meetings on the protection of the environment in armed conflict, held on 6 November 2018 and 9 December 2019, available at https://media.un.org/en/asset/k1t/k1tkxd3w54 and https://media.un.org/en/asset/k1w/k1wjpianf4, respectively; the high-level open debate of the Security Council on the humanitarian effects of environmental degradation and peace and security, 17 September 2020, available at www.unccd.int/sites/default/files/inline-files/PRESS%20RELEASE_1.pdf. See also the United Nations Environmental Assembly resolutions 2/15 of 27 May 2016, "Protection of the environment in areas affected by armed conflict", and 3/1 of 6 December 2017, "Pollution mitigation and control in areas affected by armed conflict or terrorism". See also IUCN, "Resolution on the environment in relation to armed conflict", WCC-2020-Res-042-EN, available at https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2020_RES_042_EN.pdf.

[18] A. Wormald, "Protecting the environment during and after armed conflict, the International Law Commission and an overdue due diligence duty for corporations: good in principle?", *Journal of International Humanitarian Legal Studies*, vol. 12 (2021), pp. 314–343; D. Dam-de Jong and B. Sjöstedt, "Enhancing environmental protection in relation to armed conflict: an assessment of the ILC draft principles", *Loyola of Los Angeles International and Comparative Law Review*, vol. 44 (2021), pp. 129–159; B. Sjöstedt and A. Dienelt, "Enhancing the protection of the environment in relation to armed conflicts – the draft principles of the International Law Commission and beyond", *Goettingen Journal of International Law*, vol. 10 (2020), No. 1, Special Issue, pp. 13–25; S.-E. Pantazopoulos, "Reflections on the legality of attacks against the natural environment by way of reprisals", *ibid*., pp. 47–66; E. Hsiao (Lan Yin), "Protecting protected areas *in bello*: learning from institutional design and conflict resilience in the Greater Virunga and Kidepo landscapes", *ibid*., pp. 67–110; D. Dam-de Jong and S. Wolters, "Through the looking glass: corporate actors and environmental harm beyond the ILC", *ibid*., pp. 111–149; M. Davoise, "Business, armed conflict, and protection of the environment: what avenues for corporate accountability?", *ibid*., pp. 151–201; K. Hulme, "Enhancing environmental protection during occupation through human rights", *ibid*., pp. 203–241; D. Fleck, "The Martens clause and environmental protection in relation to armed conflicts", *ibid*., pp. 243–266; M. Bothe, "Precaution in international environmental law and precautions in the law of armed conflict", *ibid*., pp. 267–281; K. Yoshida, "The protection of the environment: a gendered analysis", *ibid*., pp. 283–305; T. Smith, "A framework convention for the protection of the environment in times of armed conflict: a new direction for the International Law Commission's draft principles?", *Journal of International Humanitarian Legal Studies*, vol. 11 (2020), pp. 148–162; T. Smith, "Critical perspectives on environmental protection in non-international armed conflict: developing the principles of distinction, proportionality and necessity", *Leiden Journal of International Law*, vol. 32 (2019), pp. 759–779; C. Stahn *et al*., "Protection of the environment and *jus post bellum*: some preliminary reflections environmental protection and transitions from conflict to peace" in C. Stahn *et al*. (eds.), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (Oxford: Oxford University Press, 2017), pp. 1–25, at pp. 11–15; D. Fleck, "Legal protection of the environment: the double challenge of non-international armed conflict and post- conflict peacebuilding", *ibid.*, pp. 203–219; D. Weir, "Reframing the remnants of war: the role of the International Law Commission, Governments, and civil society", *ibid.*, pp. 438–455; M. Bothe, "Protection of the environment in relation to armed conflicts – a preliminary comment on the work of the International Law Commission", in J. Crawford *et al.* (eds.), *The International Legal Order, Current Needs and Possible Responses: Essays in Honour of Djamchid Momtaz* (Leiden: Brill, 2017), pp. 641–659; M. Bothe, "The ILC Special Rapporteur's preliminary report on the protection of the

B. Purpose and structure of the present report

13. The primary purpose of the present report is to review the main comments and observations that have been made by States, international organizations and others on the draft principles and commentaries adopted on first reading, both in the 2019 debate in the Sixth Committee and in the written comments received since then. Occasionally, observations made in the earlier debates in the Sixth Committee that appear to remain pertinent to the second reading text are also mentioned.[19]

14. Following the present introduction, chapter II of the report contains a description of the comments and observations received from States, international organizations and others, and the suggestions made by the Special Rapporteur in response. Proposals for possible additional draft principles and a possible preamble to the draft principles are contained in Chapter III. Chapter IV of the report contains a proposal of the Special Rapporteur concerning the final form of the Commission's work on the topic and a draft recommendation to the General Assembly. As a matter of convenience, the draft principles adopted by the Commission on first reading, with the changes recommended by the Special Rapporteur, are reproduced in Annex I.

15. Annex II containing an updated bibliography related to the topic will be circulated as an addendum to the present report.

II. Comments and observations on the draft principles adopted on first reading

16. The Special Rapporteur is very grateful to all who commented orally and in writing on the draft principles and commentaries adopted on first reading, or earlier. These views have been carefully reviewed by the Special Rapporteur and many of them have been referred to in the present report. While, as was to be expected, the comments sometimes point in opposite directions, they are without exception thoughtful and constructive, and should greatly assist the Commission in improving its final output.

17. The present chapter begins with a summary of the general comments and observations received and continues with a review of the specific comments regarding each of the draft principles and the related commentaries. In each case, the comments and observations are briefly described and commented upon, after which the Special Rapporteur makes her recommendations, mainly regarding the text of the principles but also indicating, at least in general terms, whether changes should be made to the commentaries.

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environment in relation to armed conflicts: an important step in the right direction" in P. Acconci *et al*. (eds.), *International Law and the Protection of Humanity: Essays in Honor of Flavia Lattanzi* (Leiden: Brill, 2016), pp. 213–224; K. Hulme, "The ILC's work stream on protection of the environment in relation to armed conflict", *Questions of International Law*, vol. 34 (2016), pp. 27–41.

[19] The Special Rapporteur expresses in this connection her gratitude to the Secretariat, in particular Ms. Jessica Miriam Elbaz, Ms. Carla Gomez Horner Hoe, and Ms. Rina Amanda Kuusipalo, for the preparation of an analytical table of the comments and observations by Governments and international organizations made in the Sixth Committee of the General Assembly during the Commission's work on the topic from 2014 to 2019.

A. General comments and observations

1. Comments and observations

18. The relevance of the topic was widely recognized, with reference made both to the severe environmental consequences of armed conflicts and the need to consolidate the legal framework for the protection of the environment in relation to armed conflicts.[20] Colombia referred to the serious threat that "the environmental effects generated during and after an armed conflict could pose … to human beings and the surrounding ecosystems".[21] The Czech Republic pointed out that "armed conflicts always have negative impact on the environment not only where they take place, but also in other areas".[22] Japan held that the "protection of the environment in relation to armed conflicts has become an urgent issue".[23] ICRC pointed out that draft principles made "an important contribution to contemporary international law in line with the leading role played by the International Law Commission in its codification and progressive development".[24] The Nordic countries saw the draft principles as "a major step forward in the systematization of the law relating to the protection of environment in armed conflicts", inter alia, "because they have been developed in close consultations with States and relevant international and expert organizations".[25]

19. The general approach and methodology of the topic, including the temporal approach and the interplay of different areas of international law, in particular the role of international environmental law and international human rights law in complementing the law of armed conflict, were widely endorsed.[26] Spain expressed its appreciation for the temporal dimension, as well as to the "broad approach with regard to the parties involved (States, international organizations, non-State actors, corporations and other business enterprises) and the situations addressed (belligerency, the presence of military forces, peace operations, human displacement,

[20] Colombia, Protection of the environment in relation to armed conflicts: Comments and observations received from governments, international organizations and others, A/CN.4/749, general comments and observations; Cyprus, *ibid*.; Czech Republic, *ibid*.; ECLAC, *ibid*.; ELI, *ibid*.; El Salvador, *ibid*.; ESCAP, *ibid*.; Germany, *ibid*.; ICRC, *ibid*.; Ireland, *ibid*.; Lebanon, *ibid*. See also Egypt (A/C.6/74/SR.30, para. 22); Holy See (A/C.6/74/SR.31, para. 57); Jamaica (A/C.6/74/SR.33, para. 32); the Netherlands (A/C.6/74/SR.28, para. 72); Ukraine (A/C.6/74/SR.26, para. 124).

[21] Colombia (A/CN.4/749), general comments and observations.

[22] Czech Republic, *ibid*., general comments and observations.

[23] Japan, *ibid*., general comments and observations.

[24] ICRC, *ibid*., general comments and observations.

[25] Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (A/CN.4/749), general comments and observations.

[26] Colombia (A/CN.4/749), general comments and observations; El Salvador, *ibid*.; Ireland, *ibid*.; written comments of Japan, available from the Commission's website, at https://legal.un.org/ilc/sessions/73/pdfs/english/poe_japan.pdf, p. 2; Netherlands, A/CN.4/749, general comments and observations; Portugal, *ibid*., general comments and observations; Spain, *ibid*., general comments and observations; Sweden (on behalf of the Nordic countries), *ibid*., general comments and observations; Switzerland, *ibid*., general comments and observations and on draft principle 1; ELI, *ibid*., general comments and observations; OHCHR, *ibid*., general comments and observations. See also Algeria (A/C.6/74/SR.31, para. 51); Armenia, *ibid*., para. 54; Austria (A/C.6/73/SR.28, para. 58); Azerbaijan (A/C.6/73/SR.29, para. 114); Bahamas, statement on behalf of CARICOM, 22 October 2018, available at http://statements.unmeetings.org/media2/20304299/bahamas-caricom-82-.pdf; Cuba (A/C.6/74/SR.29, para. 119); Cyprus (A/C.6/74/SR.30, para. 96); Germany, *ibid*., para. 50; Iran (Islamic Republic of), *ibid*., para. 54; Italy (A/C.6/74/SR.28), para. 23; Jamaica (A/C.6/74/SR.33, para. 33); Lebanon (A/C.6/74/SR.30, para. 104); Malaysia (A/C.6/72/SR.26, para. 120); Mexico (A/C.6/73/SR.29, para. 4); Micronesia (Federated States of), *ibid*., para. 93; Morocco (A/C.6/74/SR.30, para. 3); New Zealand (A/C.6/73/SR.26, para. 101); Peru, statement of 30 October 2018 (in Spanish), available at http://statements.unmeetings.org/media2/20305382/peru-s-82-cluster-3.pdf; Republic of Korea (A/C.6/74/SR.30), para. 63; Romania (A/C.6/73/SR.29, para. 107); South Africa (A/C.6/73/SR.30, paras. 2–3); Viet Nam, *ibid*., para. 36.

situations of occupation and post-conflict actions)".[27] ELI held that the "broader framing" of the draft principles "reflects the realities of modern warfare, as well as substantial experience and legal developments over the past four decades".[28] Ireland "particularly welcome[d] the Commission's analysis of how certain aspects of international humanitarian law apply in relation to the protection of the environment, and of how other areas of international law, including international human rights and environmental law, complement international humanitarian law in relation to the protection of the environment in situations of armed conflict and occupation".[29] While some States saw more integration between the law of armed conflict and international environmental law, or more human rights wording, as desirable,[30] other States had reservations regarding one or more aspects of such integration,[31] and the view was also expressed that the protection of the environment in relation to armed conflict had been sufficiently addressed in the law of armed conflict.[32] It was further underlined that the applicability of human rights or environmental treaties during armed conflicts must be assessed "on a case-by-case basis, in the light of the provisions of the treaties and the intentions of the drafters".[33]

20. Many States gave their support to the applicability, in principle, of the draft principles to both international and non-international armed conflicts, either pointing out that both types of conflict had equally severe environmental consequences or referring to the convergence of the legal rules applicable to different conflicts.[34] Portugal noted that the choice to make no distinction was especially relevant with regard to preventive measures.[35] The Netherlands supported the Commission's approach but expressed the view that the commentaries should provide more substantive argument in this regard.[36] Germany made a similar comment.[37] At the same time, a number of States expressed reservations with regard to the general application of the draft principles to different types of armed conflict,[38] or recalled "the substantive differences between obligations related to international conflicts and those related to non-international conflicts".[39]

21. Further general comments were made regarding the normative nature of the draft principles. While several States commended the Commission's efforts to distinguish between the draft principles that reflect customary international law and those intended as recommendations to promote the progressive development of

[27] Spain, A/CN.4/749, general comments and observations.
[28] ELI, *ibid*., general comments and observations.
[29] Ireland, *ibid*., general comments and observations.
[30] Austria (A/C.6/74/SR.27, para. 98); Spain, A/CN.4/749, general comments and observations; Switzerland, *ibid*. See also Austria, statement of 31 October 2019, available at http://statements.unmeetings.org/media2/23328809/-e-austria-statement.pdf; Italy (A/C.6/74/SR.28, para. 24).
[31] Czech Republic (A/CN.4/749), general comments and observations; United Kingdom, *ibid*.
[32] Israel, *ibid*., general comments and observations; Russian Federation (A/C.6/74/SR.31, para. 30).
[33] France, A/CN.4/749, general comments and observations.
[34] Cyprus, *ibid.*, general comments and observations; Portugal, *ibid.*; Sweden (on behalf of the Nordic countries), *ibid*.; Switzerland, *ibid*., on draft principle 1. See also Argentina (A/C.6/74/SR.29, para. 29); El Salvador (A/C.6/72/SR.26, para. 128); Lebanon (A/C.6/70/SR.24, para. 60); Mexico (A/C.6/73/SR.29, para. 6); New Zealand (A/C.6/74/SR.26, para. 92); Sierra Leone (A/C.6/74/SR.29, para. 63); Slovenia, *ibid*., para. 140.
[35] Portugal, A/CN.4/749, general comments and observations.
[36] Netherlands, *ibid*., general comments and observations.
[37] Germany, *ibid*., general comments and observations.
[38] Belarus (A/C.6/74/SR.28, para. 16); Canada, A/CN.4/749, general comments and observations; China (A/C.6/74/SR.27, para. 89); Czech Republic, A/CN.4/749, general comments and observations; France, *ibid*.; Iran (Islamic Republic of) (A/C.6/74/SR.29, para. 44).
[39] Australia (A/C.6/74/SR.29, para. 81); Brazil (A/C.6/73/SR.28, para. 69).

international law,[40] many expressed the view that there was a need for greater clarity in this regard.[41] Some of the comments underlined the role of the commentaries in clarifying the legal nature of each draft principle.[42] The United Kingdom, for instance, suggested "that the commentary make clear where the principles do not reflect existing law, to the extent that it does not already do so".[43] Attention was also drawn to the wording of the draft principles, in particular recommending the use of the words "shall" and "should" to indicate whether or not the provision reflected a legal obligation.[44] A view was also expressed that all draft principles should be revised as recommendations.[45]

22. The United States suggested that the Commission engage in a more in-depth analysis of State practice, and France recalled the need to take into account the diversity of the practice and *opinio juris* of States, including the reservations and declarations made by States to treaties to which they are parties.[46] A concern was also expressed that the commentary "cites a number of sources in support of the draft principles, of varying degrees of authority, many of which do not constitute State practice".[47] At the same time, the "efforts made by the Commission and the Special Rapporteur to ground the draft principles and the commentaries thereto in international practice and jurisprudence" were highlighted.[48]

2. Observations of the Special Rapporteur

23. The Special Rapporteur notes that many of the questions raised in the general comments also appear in relation to individual draft principles and are addressed in more detail in section B below. A few general observations in response are nevertheless addressed here.

24. The interplay of the law of armed conflict with other areas of international law, often recognized as being at the heart of the topic, is closely related to the temporal scope of the draft principles. While the reservations regarding other areas of international law mainly relate to the time of armed conflict, the topic covers the time before, during and after armed conflict, including in situations of occupation. The general applicability of international human rights law[49] and international environmental law[50] in armed conflicts, as confirmed by the International Court of Justice and the Commission itself, has provided an obvious point of departure for the Commission's work. At the same time, the Commission has repeatedly confirmed that the law of armed conflict, where applicable, is *lex specialis*. The Special Rapporteur

[40] Germany (A/CN.4/749), general comments and observations; Ireland, *ibid.*, general comments and observations; Italy (A/C.6/74/SR.28, para. 23); Netherlands, *ibid*., para. 73; Portugal, A/CN.4/749, general comments and observations; Sweden (on behalf of the Nordic countries), *ibid*.

[41] Australia (A/C.6/74/SR.29, para. 81); Brazil, *ibid*., para. 78; Canada, A/CN.4/749, general comments and observations; Czech Republic, *ibid*.; Germany, *ibid*.; Netherlands, *ibid*.; Spain, *ibid*.; Switzerland, *ibid*.; United Kingdom, *ibid.*; United States, *ibid*.

[42] Canada, *ibid*., general comments and observations; Germany, *ibid*.; Spain, *ibid*.; Switzerland, *ibid*.; United Kingdom, *ibid*.

[43] United Kingdom, *ibid*., general comments and observations.

[44] Germany, *ibid*., general comments and observations; Netherlands, *ibid*.; United States, *ibid*.

[45] Colombia, *ibid*., general comments and observations; Israel, *ibid*.

[46] France, *ibid*., general comments and observations; United States, *ibid*.

[47] United Kingdom, *ibid*., general comments and observations. Canada made a similar comment, see *ibid*.

[48] Spain, *ibid*., general comments and observations.

[49] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at para. 106; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at para. 25.

[50] *Legality of the Threat or Use of Nuclear Weapons* (see previous footnote), para. 33; 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) (see also General Assembly resolution 66/99 of 9 December 2011, annex).

is largely in agreement with the statement of France, according to which, "provisions of a treaty relating to the international protection of human rights or the environment … should be interpreted taking into account the specific context of situations of armed conflict and in the light of obligations under international humanitarian law".[51]

25. The general applicability of the draft principles to different types of conflicts is related both to the scope of the topic and the fact that, in addition to the law of armed conflicts, the topic draws on other areas of international law, which do not differentiate between international and non-international conflicts. There is also reason to recall that several draft principles address actors other than the parties to a conflict. Draft principles in Part Four, furthermore, only apply to situations of occupation as a subset of international armed conflict. The objections to the "non-differentiation" therefore concern only a number of draft principles in Part Three. At the same time, a related question pertaining to the applicability of some of the other draft principles to non-State armed groups also deserves attention.

26. Regarding the normative nature of the draft principles, the Special Rapporteur acknowledges the wish for more clarity, including in relation to the use of the modal verbs "shall" and "should", but notes that the Commission's choice cannot be limited to these words, as the precise formulation of each draft principle may indicate further nuances. The commentaries also play an important role in this regard and there is reason to recall that the draft principles, as always, are to be read together with the commentaries. Furthermore, as far as the clarification regarding the "different normative value [of the draft principles], including those that can be seen to reflect customary international law, and those of a more recommendatory nature" is concerned,[52] it states only the obvious, which is in accordance with the mandate of the Commission. The suggestion to phrase all draft principles in a recommendatory fashion would not provide more uniformity as even non-binding guidelines, when referring to existing obligations, need to be formulated in a manner that does not undermine such obligations.[53]

27. As for the comments on State practice, it is the Special Rapporteur's understanding that the Commission always attaches importance to taking into account all relevant State practice and expressions of *opinio juris*. At the same time, the international practice that is relevant for the purposes of the draft articles cannot be limited to State practice, as some of the draft articles also address international organizations. It should furthermore be recalled that the practice of international organizations may contribute to the formation, or expression, of rules of customary international law.[54] This could be the case, for instance, when international organizations deploy military forces for peacekeeping or for other purposes.[55] In addition, given the general applicability of the draft principles to international and non-international armed conflicts, examples of the commitments and practice of non-State armed groups regarding environmental protection could also be counted as relevant.

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[51] France, A/CN.4/749, general comments and observations.

[52] Draft principles on protection of the environment in relation to armed conflicts, A/74/10, paras. 70–71 ("Draft principles … 2019"), Introduction to the draft principles, para. (3) of the commentary.

[53] See, for instance, draft guidelines on the protection of the atmosphere, Report of the International Law Commission on the work of its seventy-second session , *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), paras. 39–40, guidelines 3, 4, 8 and 11.

[54] Draft conclusions on identification of customary international law, Report of the International Law Commission on the work of its seventieth session, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), paras. 51–52, draft conclusion 4, para. 2.

[55] *Ibid*., para. (6) of the commentary to draft conclusion 4.

B. Comments and observations regarding individual draft principles

Part One: Introduction

1. Principle 1
Scope

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

(a) Comments and observations

28. As indicated above, the scope of the draft principles *ratione temporis* received general support in the Sixth Committee and in the written comments. At the same time, some clarifications were requested regarding draft principle 1 and the commentary thereto.

29. As for the scope *ratione materiae* of the draft principles, their general applicability to different types of conflicts has attracted a number of comments, as also indicated above. Some of these comments directly concern draft principle 1, the commentary to which states that "[n]o distinction is generally made between international armed conflicts and non-international armed conflicts". [56] ESCAP suggested including this *ratione materiae* element explicitly in the text of the draft principle.[57] UNEP invited the Commission to give special consideration to extending the application of existing norms and obligations to non-international armed conflicts, taking into account that most armed conflicts today are non-international in nature, and frequently linked to natural resources.[58] Israel suggested that new language be included in the commentary explaining that this approach "is not intended to imply that there are no differences between the legal regimes that apply to either type of conflict".[59] The Special Rapporteur recalls that the word "generally" was added to the commentary at the time of the first reading to indicate that some of the draft principles, in particular those related to situations of occupation, only apply to international armed conflicts. The Special Rapporteur continues to believe that this situation is best explained in the commentary, so as not to overburden the text of the draft principle. At the same time, the Special Rapporteur sees merit in the proposal of Israel to encourage States, as a matter of policy, "to apply legal protections and other protective policies relating to the natural environment regardless of the type of conflict in question" and believes this, too, can be reflected in the commentary.[60] She also recalls that a similar recommendation is contained in the updated ICRC *Guidelines on the Protection of the Natural Environment in Armed Conflict*.[61]

30. Further, ICRC suggested adding a mention of situations of occupation to draft principle 1. ICRC recalled in this regard that occupation is a specific type of international armed conflict and has been treated as such in the relevant instruments, in particular the Hague Regulations of 1907 and the Geneva Conventions of 12 August 1949.[62] The joint civil society submission made a similar suggestion.[63] Switzerland sought clarification regarding the possible links and overlaps between

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[56] Draft principles … 2019, commentary to draft principle 1, para. (3).
[57] ESCAP, A/CN.4/749, on draft principle 1.
[58] UNEP, *ibid*., general comments and observations. See also Portugal, *ibid*., general comments and observations.
[59] Israel, *ibid*., on draft principle 1.
[60] Israel, *ibid*.
[61] ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict* (see footnote 17 above), recommendation 18, p. 85.
[62] ICRC, A/CN.4/749, on draft principle 1.
[63] Joint civil society submission (footnote 16 above), p. 8.

the different parts of the draft principles, in particular those applicable during an armed conflict, in situations of occupation, and after an armed conflict.[64] The Special Rapporteur agrees with the suggested addition, which she sees as a factual change reflecting the scope of the set of draft principles after the addition of Part Four. It should furthermore be recalled that the draft principles in Parts Two, Three and Five apply *mutatis mutandis* to situations of occupation.[65]

31. In addition, proposals were made regarding the scope of the draft principles *ratione personae*. The United States expressed the view that the wording of draft principle 1 suggested an unnecessarily broad scope and proposed that the text be amended so that it would only cover measures that States can take to protect the environment before, during and after an armed conflict. The United States also suggested adding the phrase "in relation to armed conflict" to make clear that environmental harm unrelated to armed conflicts would not be covered.[66] ICRC pointed out that non-State armed groups parties to a non-international armed conflict are bound by the law of armed conflict, and suggested that the scope *ratione personae* of the draft principles be further clarified in the commentary to draft principle 1.[67] Switzerland sought clarification regarding the applicability of the draft principles to organized armed groups and to other non-State actors, such as private military and security companies.[68] ELI pointed out that it was not always clear, which of the draft principles were meant to apply to non-State armed groups and other non-State actors.[69] The Special Rapporteur recalls that the draft principles are not only addressed to States but may, depending on their scope, also address international organizations, non-State armed groups parties to an armed conflict, or other actors including civil society organizations. This general scope is in her view best reflected in the current language of draft principle 1. Regarding the other comments above, the Special Rapporteur believes that necessary clarifications can be inserted either to the text of the individual draft principles, as the case may be, or to the related commentary.

32. Finally, a number of proposals concern the relationship of the draft principles to the law of armed conflict, or other rules of international law. ICRC suggested that a without prejudice clause be included in a second paragraph of draft principle 1, reading as follows: "The present draft principles shall not be interpreted as restricting or impairing applicable rules of international law, in particular the law of armed conflict".[70] The United States made a similar suggestion, proposing to state that the principles "should be construed consistent with the State's obligations under international law, in particular, international humanitarian law, which is the *lex specialis* applicable to armed conflict".[71] Switzerland suggested specifying in draft principle 1 or 2 "that the draft principles do not alter existing obligations".[72] Spain drew attention to the references to applicable international law in a number of draft principles ("in accordance with", "pursuant to", "without prejudice"), which in its view could be replaced by a general clause. "These caveats", according to Spain, "which are intended to ensure that the draft principles do not change or expand the scope of the rules of international law in force, could be consolidated in a general

[64] Switzerland, A/CN.4/749, on draft principle 1. See also Republic of Korea A/C.6/74/SR.30, para. 63.
[65] Draft principles … 2019, commentary to Part Four, Introduction, para. (7).
[66] United States, A/CN.4/749, on draft principle 1.
[67] ICRC, *ibid.*, on draft principle 1.
[68] Switzerland, *ibid.*, on draft principle 1.
[69] ELI, *ibid.*, general comments and observations.
[70] ICRC, *ibid.*, general comments and observations.
[71] United States, *ibid.*, general comments and observations.
[72] Switzerland, *ibid.*, general comments and observations.

provision … in the introductory part of the text." [73] Further comments and observations from States, which do not however make a clear proposal, point in the same direction. Japan shared its understanding that "these draft principles do not alter the rights and obligations under existing international law".[74] Colombia suggested clarifying "that these principles will not run counter to other obligations of States under other international conventions or the principles of environmental law". [75] France pointed out that "the draft principles cannot create new legal obligations".[76] The United Kingdom welcomed "the fact that in its work on this topic the Commission does not seek to modify the law of armed conflict, or the law of occupation".[77]

33. The Special Rapporteur agrees with the substance of these comments. The topic has been developed consistent with the point of departure that the Commission has no intention, and is not in the position, to change the law of armed conflict.[78] It is also clear that the work of the Commission, as such, does not have a binding effect. At the same time, as Spain pointed out, a number of draft principles already contain a saving clause or a reference to existing international obligations. While the proposal to consolidate these phrases into one general clause is interesting, it would require a complete overhaul of the draft principles, which is hardly possible at the stage of the second reading. The Special Rapporteur also refers to the practice of the Commission of including in its work a saving clause regarding other rules of international law, which seems to be limited to draft articles intended to become a treaty. In its recent work, the Commission has thus included a general saving clause in the articles on the prevention of transboundary harm from hazardous activities of 2001[79] and the articles on the protection of persons in the event of disasters of 2016.[80] In the case of the present draft principles, Special Rapporteur believes that the concerns reflected above could be addressed in the commentary.

(b) Recommendation of the Special Rapporteur

34. In light of the comments and considerations above, the Special Rapporteur suggests adding a reference to situations of occupation to draft principle 1. The draft principle would read as follows:

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.

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[73] Spain, *ibid.*, general comments and observations.
[74] Japan, *ibid*., on draft principle 1.
[75] Colombia, *ibid.*, on draft principle 2.
[76] France, *ibid.*, general comments and observations.
[77] United Kingdom, *ibid*., general comments and observations.
[78] Preliminary report of Ms. Jacobsson (A/CN.4/674 and Corr.1), para. 62; first report of Ms. Lehto (A/CN.4/720), para. 16.
[79] See article 18 of the draft articles on the prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 97 (see also General Assembly resolution 62/68 of 6 December 2007, annex); article 18 of the draft articles on the protection of persons in the event of disasters, *Yearbook … 2016*, vol. II (Part Two), para. 48. No such clause is included in the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities of 2006 (General Assembly resolution 61/36 of 4 December 2006, annex; see also *Yearbook … 2006*, vol. II (Part Two), paras. 66–67). The guidelines on the protection of the atmosphere include a specific without prejudice clause concerning certain questions that were excluded at the outset from the work on the topic: see draft guidelines on the protection of the atmosphere (A/76/10), paras. 39–40, draft guideline 2, para. 2.
[80] Articles on the protection of persons in the event of disasters, art. 18, (see previous footnote), p. 26, para. 48.

2. Principle 2
Purpose

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

(a) Comments and observations

35. Comments and observations on draft principle 2 largely focus on one textual addition. While welcoming the draft principle and its references to preventive and remedial measures to enhance the protection of the environment in relation to armed conflict, ICRC pointed out that international humanitarian law also contains relevant obligations to avoid damage from occurring, and suggested that a reference be added to "avoiding" in addition to "minimizing" damage to the environment.[81] Switzerland, too, suggested that the draft principles should be aimed at "avoiding, and in any event to minimizing" environmental damage in relation to armed conflict.[82] A similar proposal was made by Greece, Portugal and UNEP, and in the joint civil society submission.[83] Portugal and the United Kingdom furthermore made proposals concerning the harmonization of the wording in several draft principles. Portugal suggested that the word "restoration" could be added before the words "and remedial measures",[84] and the United Kingdom considered that the phrase "to prevent, mitigate and remediate harm to the environment" during armed conflict should be used consistently in draft principles 2, 6, 7, and 8.[85]

36. The United States, furthermore, pointed out that the measures to be taken would depend on the specific circumstances, and suggested adding the word "appropriate" before the words "preventive measures" as well as before the words "remedial measures". As a further comment, the United States referred the purpose of the draft principles – "to 'enhance' the protection of the environment, rather than to codify existing law" – and suggested that "the remaining principles be drafted with that purpose in mind".[86]

37. The Special Rapporteur understands that the concept of "prevention" entails both avoidance and minimization of harm, while the current wording of the draft principle only refers to minimization. As is clear from the comments reviewed above, there are several ways to make the wording more inclusive. In view of the fact that several draft principles contain a similar list of measures, however, she sees merit in the proposals to use the same phrase consistently in each of them. Given that the concept of "restoration" is covered by the broader term "remediation",[87] she suggests using the phrase referring to prevention, mitigation and remediation, as proposed by the United Kingdom. Concerning the proposal to add the word "appropriate" before the word "measures", it is recalled that a suggestion to qualify the text with words like "as appropriate" was considered by the Commission and found "inopportune …,

[81] ICRC, A/CN.4/749, on draft principle 2.
[82] Switzerland, *ibid*., on draft principle 2.
[83] Greece (A/C.6/71/SR.29, para. 16); Portugal, A/CN.4/749, on draft principle 1; UNEP, *ibid*., general comments and observations; joint civil society submission (footnote 16 above), p. 9.
[84] Portugal, A/CN.4/749, on draft principle 1. See also the comments of Portugal concerning draft principle 6, *ibid*., and draft principle 7, *ibid*.
[85] United Kingdom, *ibid*., on draft principle 2.
[86] United States, *ibid*., on draft principle 2.
[87] Draft principles … 2019, commentary to draft principle 2, para. (3). See also *ibid*., commentary to draft principle 7, para. (7), according to which the notion of "remediation" encompasses "any measure that may be taken to restore the environment".

particularly for a draft provision dealing with purpose".[88] Regarding the comment on the word "enhance", the Special Rapporteur also refers to the preparatory work on the draft principle, which clarifies that the word "enhancing", while central to the purposive nature of the provision, was "not intended to have a connotation of an effort to progressively develop the law" and that the provision "does not in any way constitute a statement on the statutory role of the Commission".[89]

(b) Recommendation of the Special Rapporteur

38. In light of the comments and considerations above, the Special Rapporteur proposes reformulating draft principle 2 as follows:

Principle 2
Purpose

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

Part Two: Principles of general application

3. Principle 3 [4] Measures to enhance the protection of the environment

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

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

(a) Comments and observations

39. Switzerland, ICRC and IUCN welcomed draft principle 3.[90] The Nordic countries also supported the provision and pointed out that "views might differ on the exact scope and content of obligations regarding the protection of the environment in situations of armed conflict" but "all States had an obligation to respect and ensure respect for their obligations under international humanitarian law".[91] Australia, Lebanon, the Federated States of Micronesia, Slovenia and Ukraine also welcomed draft principle 3.[92]

40. While most of the comments and observations received regarding draft principle 3 concerned the commentary, some suggestions were made regarding its wording. As far as paragraph 1 is concerned, Israel and the United States expressed the view that the word "enhance", in spite of the reference to "international obligations", would seem to go further than merely call upon States to comply with existing obligations.[93] The United States suggested deleting the word "enhance" and referring instead to "measures that provide protection to the environment from the harmful effects of

[88] Statement by the Chair of the Drafting Committee, Mr. Mathias Forteau, 30 July 2015 (all statements of the Chairs of the Drafting Committee are available under the analytical guide to the topic, at https://legal.un.org/ilc/guide/8_7.shtml#dcommrep), p. 3.
[89] *Ibid*.
[90] Switzerland, A/CN.4/749, on draft principle 3; ICRC, *ibid*.; IUCN, *ibid*.
[91] Norway (on behalf of the Nordic countries) (A/C.6/71/SR.27, para. 93).
[92] Australia (A/C.6/74/SR.29, para. 81); Lebanon (A/C.6/73/SR.29, para. 97); Micronesia (Federated States of) (A/C.6/74/SR.29, para. 94; Slovenia (A/C.6/71/SR.29, para. 52); Ukraine (A/C.6/71/SR.30, para. 2).
[93] Israel, A/CN.4/749, on draft principle 3; United States, *ibid*.

armed conflict".[94] Israel suggested either deleting the words "to enhance" or explaining in the commentary that the paragraph only requires States to take measures that are "necessary to fulfil their respective obligations under international law".[95] Austria pointed out that the phrase "pursuant to their obligations under international law" could be construed "as restricting the obligations to measures already required by existing international law and excluding new obligations".[96] The Special Rapporteur points out that the phrase "to enhance the protection of the environment", included in both paragraphs, corresponds to the purpose of the draft principles.[97] She also recalls that the Commission, when opting for the phrase "pursuant to", intended "to emphasize the need to fulfil existing obligations".[98] The Special Rapporteur believes that the wording of paragraph 1 quite accurately gives expression to this intention.

41. Furthermore, UNEP suggested that a reference be added to the draft principle concerning the strengthening of the environmental rule of law.[99] In the Special Rapporteur's view, environmental rule of law would provide a relevant framework for how States can effectively implement both obligations under paragraph 1 and voluntary commitments under paragraph 2 of the draft principle. It may be recalled in this regard that environmental rule of law "integrates critical environmental needs with the elements of rule of law, and thus creating a foundation for environmental governance".[100] Reference can also be made to Sustainable Development Goal 16, which commits to advancing "rule of law at the national and international levels" in order to "[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels".[101] Conditions of weak environmental rule of law can create a vacuum that allows for environmentally damaging practices such as illicit exploitation of natural resources. Weak rule of law may furthermore undermine post-conflict peacebuilding efforts such as environmental remediation and restoration. It would therefore seem appropriate to address the issue in the commentary.

42. The specific comments regarding the commentary addressed two main issues: the interpretation of common article 1 of the Geneva Conventions, and the obligation to investigate and prosecute violations of the law of armed conflict. Paragraph (6) of the commentary refers to the interpretation of common article 1, according to which this article requires that States, when they are in the position to do so, exert their influence to prevent and stop violations of the Geneva Conventions by parties to an armed conflict. Switzerland welcomed the reference to common article 1, as well as the interpretation referred to in the text, including its "domestic and [] international dimension[s]".[102] Canada, Israel, the United Kingdom and the United States, however, expressed their disagreement and suggested that the text of the paragraph be amended to recognize that the scope of application of common article 1 was still subject to debate.[103]

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[94] United States, *ibid*., on draft principle 3.
[95] Israel, *ibid*., on draft principle 3.
[96] Austria (A/C.6/71/SR.27, para. 106).
[97] Draft principles … 2019, commentary to draft principle 3, para. (1).
[98] Statement of the Chair of the Drafting Committee, Mr. Pavel Šturma, 9 August 2016, p. 3.
[99] UNEP, A/CN.4/749, on draft principle 2. See also UNEP, *Environmental Rule of Law: First Global Report*, (2019), pp. 231–232. Available at www.unep.org/resources/assessment/environmental-rule-law-first-global-report.
[100] UNEP, *Environmental Rule of Law: First Global Report* (see previous footnote), p. 8.
[101] Sustainable Development Goals, General Assembly resolution 70/1 of 25 September 2015. Also available at https://sdgs.un.org/goals.
[102] Switzerland, A/CN.4/749, on draft principle 3.
[103] Canada, *ibid*., on draft principle 3; Israel, *ibid*.; the United Kingdom, *ibid*.; the United States, *ibid*.

43. Paragraph (10) of the commentary deals with the obligation to exercise jurisdiction and prosecute persons suspected of crimes that fall within the category of grave breaches of the Geneva Conventions. ICRC recommended that the commentary be complemented to also refer to other serious violations of international humanitarian law relevant to the protection of the natural environment. [104] Switzerland, too, referred to the obligation of States to investigate all war crimes over which they have jurisdiction and, if appropriate, to prosecute the suspects. [105] Canada pointed out that States only have an obligation "to ensure that prosecutions are possible, not that jurisdiction is exercised". [106]

44. As a general point regarding the commentary, ICRC proposed to make it clear that the list of different obligations under the law of armed conflict is non-exhaustive. [107] IUCN suggested highlighting 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. [108] UNEP sought clarification regarding relevant obligations of States based on multilateral environmental agreements. [109] The joint civil society submission suggested referring to further obligations States may have regarding certain weapons, such as landmines and cluster munitions, that contaminate the environment during and after conflict. [110] Colombia suggested that the commentary provide more examples of voluntary measures in accordance with paragraph 2. [111] In a similar vein, Belarus and the Russian Federation asked for clarification regarding the notion of "other measures". [112]

(b) Recommendation of the Special Rapporteur

45. The Special Rapporteur does not suggest any change to the draft principle adopted on first reading. The Commission may nevertheless wish to consider changes to the commentary that would take into account some of the comments received. The Special Rapporteur will make suggestions to this effect in due course.

4. Principle 4 [I-(x), 5]
Designation of protected zones

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

(a) Comments and observations

46. The inclusion in the set of draft principles of provisions on area-based environmental protection was commended both in the written comments and in the Sixth Committee. Cyprus regarded draft principles 4 and 17 as "essential for the enhancement of the protection afforded to areas of environmental and cultural importance". [113] The Nordic countries held that the two provisions would keep "great

[104] ICRC, *ibid.,* on draft principle 3. See also ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict* (see footnote 17 above), commentary to rule 28, pp. 109–110.
[105] Switzerland, A/CN.4/749, on draft principle 3.
[106] Canada, *ibid*., on draft principle 3.
[107] ICRC, *ibid*., on draft principle 3.
[108] IUCN, *ibid*., on draft principle 3.
[109] UNEP, *ibid*., on draft principle 4.
[110] Joint civil society submission (footnote 16 above), p. 9.
[111] Colombia, A/CN.4/749, on draft principle 3.
[112] Belarus (A/C.6/73/SR.29, para. 74); Russian Federation (*ibid.*, para. 129).
[113] Cyprus, A/CN.4/749, on draft principle 4.

potential" to enhance environmental protection in relation to armed conflicts,[114] and the United Kingdom agreed that it was "positive to have a mechanism for conferring special protection on zones of major environmental importance".[115] Draft principles 4 and 17 were also supported by Germany, Greece, Mexico, Peru, Portugal and Switzerland.[116] The Russian Federation expressed the view that the designation of such areas "in the absence of war should not be a subject for consideration".[117]

47. Regarding the wording of the draft principle, the element of "cultural importance" attracted a few comments. Portugal welcomed the combination of the concepts of "environmental importance" and "cultural importance" as an example of "a systematic and integrated international legal framework" serving the interests and needs of the humankind as a whole and not only to the inhabitants of the sites concerned.[118] ICRC pointed out that areas of major environmental importance will most often also have cultural significance, particularly in the meaning of the Convention on Biological Diversity.[119] Cyprus, Japan and Switzerland sought further clarification regarding the element of "cultural importance".[120] Germany suggested that the draft principle and the commentary make clear "that the cultural aspect is subordinate and of derivative meaning".[121] Mexico suggested that the commentary refer to the practice under the 1972 World Heritage Convention[122] and the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.[123] The commentary should also contain an additional section on preventive measures to be taken in peacetime.[124] IAEA provided information of its Safety Standards, which included references to cultural activities and indigenous peoples in the context of environmental protection.[125]

48. A number of comments and observations were related to the phrase "major environmental and cultural importance". The Nordic countries suggested "rephrasing the provision to avoid the impression that an area should be both of major environmental and cultural importance in order to be designated as a protected zone".[126] Germany, too, noted that "if read as a cumulative requirement" the conjunction "and" "raises questions about zones that fulfil only one of the criteria".[127] The same concern was raised by Spain, as well as by ICRC and in the joint civil society submission.[128] ICRC suggested that the phrase should be reformulated so that it would not "exclude the overlap in meaning between 'environmental' and 'cultural' importance that is set out in the commentary", nor be seen as a necessary definitional element.[129]

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[114] Sweden (on behalf of the Nordic countries), *ibid*., on draft principle 4.
[115] United Kingdom, *ibid*., on draft principle 4.
[116] Germany, *ibid*., on draft principle 4; Greece (A/C.6/74/SR.28, para. 49); Mexico (A/C.6/74/SR.29, para. 111); Peru (A/C.6/74/SR.31, para. 2); Portugal, A/CN.4/749, general comments and observations; Switzerland, *ibid*., on draft principle 4.
[117] Russian Federation (A/C.6/73/SR.29, para. 127).
[118] Portugal, A/CN.4/749, general comments and observations.
[119] ICRC, *ibid*., on draft principle 4. For the Convention on Biological Diversity (Rio de Janeiro, 5 June 1992), see United Nations, *Treaty Series*, vol. 1760, No. 30619, p. 79.
[120] Cyprus, *ibid*., on draft principle 4; Japan, *ibid*.; Switzerland, *ibid*.
[121] Germany, *ibid*., on draft principle 4.
[122] Convention for the Protection of the World Cultural and Natural Heritage (Paris 16 November 1972), United Nations, *Treaty Series*, vol. 1037, p. 151 (World Heritage Convention).
[123] 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.
[124] Mexico (A/C.6/73/SR.29, para. 5).
[125] IAEA, A/CN.4/749, general comments and observations.
[126] Sweden (on behalf of the Nordic countries), *ibid*., on draft principle 4.
[127] Germany, *ibid*., on draft principle 4.
[128] Spain, *ibid*., on draft principle 4; ICRC, *ibid*.; joint civil society submission (footnote 16 above), pp. 9–10.
[129] ICRC, A/CN.4/749, on draft principle 4.

49. The Special Rapporteur agrees that the phrase "major environmental and cultural importance" can be read as a cumulative requirement. This does not, however, seem to have been the intention of the Commission. As pointed out in 2015, "[t]he idea here is to protect areas of major 'environmental importance'. The reference to 'cultural' is intended to infer the existence of a close linkage to the environment. It would accordingly include, for example, ancestral lands of indigenous peoples, who depend on the environment for their sustenance and livelihood."[130] It seems that the conjunctive term "and" was chosen instead of a disjunctive term "or" to make it clear that the draft principle was not intended to be applicable to areas that only have cultural value. It is to be recalled in this regard that "[t]he purpose of the [] draft principle is not to affect the regime of the 1954 … Convention [on the Protection of Cultural Property in the Event of Armed Conflict], which is separate in its scope and purpose".[131] The Special Rapporteur finds that the reformulation proposed by ICRC accurately captures both considerations: "States should designate, by agreement or otherwise, areas of major environmental importance as protected zones, including where those areas are of major cultural importance."[132] This wording would also seem to respond to the concern expressed by Germany. Regarding the requests for clarification, the Special Rapporteur notes that the commentary gives quite an extensive presentation of the interlinkages between environmental and cultural importance in paragraphs (6)–(13). Further clarifications may nevertheless be added to the commentary as necessary.

50. Clarifications have also been asked regarding the process of designation of protected zones, in particular when a zone is not designated by an agreement but "otherwise". Germany, Switzerland and the United States raised the question about unilateral designation. Switzerland was concerned about the legal effects of such a designation.[133] Germany pointed out that, in general, a treaty on the designation of protected areas would be necessary to have binding effect on all parties under international law. Only in specific instances, such as in the case of non-defended localities, would other forms of designation, have legally binding effects for other States. Germany suggested making this clear by adding to the draft principle the qualification "in accordance with international law" after the word "otherwise".[134] The United States suggested that the words "or otherwise" be deleted and replaced by a mention of unilateral designation. Referring to the existing rules of the law of armed conflict governing the declaration of villages, towns, or cities as undefended, the United States suggested that the following wording be added to the draft principle: "or should otherwise seek to afford such areas of particular importance protection under international humanitarian law, where feasible, by removing all military objectives from such areas, declaring that they will not place any military objectives in those areas, use them for military purposes, use them to support military operations, attack forces of the adversary present in such areas, or oppose the capture of such areas by the adversary in armed conflict".[135]

51. Colombia asked for clarification regarding the actors with which a State could "designate by agreement" areas of environmental or cultural importance as protected zones.[136] Switzerland noted that "the draft principle should better reflect the fact that

[130] Statement of the Chair of the Drafting Committee, Mr. Mathias Forteau, 30 July 2015, p. 5. See also draft principles … 2019, commentary to draft principle 4, para. (8).
[131] Draft principles … 2019, commentary to draft principle 4, para. (8). See also Statement of the Chair of the Drafting Committee, Mr. Mathias Forteau, 30 July 2015, p. 5.
[132] ICRC, A/CN.4/749, on draft principle 4.
[133] Switzerland, *ibid*., on draft principle 4.
[134] Germany, *ibid*., on draft principle 4.
[135] United States, *ibid*., on draft principle 4.
[136] Colombia, *ibid*., on draft principle 4.

agreements may be concluded with or between non-State actors".[137] The Czech Republic made a similar comment.[138]

52. Regarding the suggestion of Germany, the Special Rapporteur believes that it is clear from the commentary that the draft principle only refers to agreements and arrangements concluded in accordance with international law. She agrees that the wording proposed by the United States usefully clarifies the steps that could be taken to unilaterally declare an area of major environmental importance as protected. At the same time, the words "or otherwise" do not only refer to unilateral declarations but stand for, *inter alia*, verbal agreements, unilateral or reciprocal and concordant declarations, agreements with non-State actors or designation through an international organization.[139] The phrase "by agreement or otherwise" is furthermore sufficiently open to cover agreements with non-State actors.

53. Questions were also raised concerning the relationship between draft principle 4 and draft principle 17. Switzerland sought further clarification with regard to the complementarity and possible overlaps between of the two provisions.[140] Estonia found the two draft principles repetitive and suggested merging them.[141] The Czech Republic asked about the status of protected zones and the rules governing them during armed conflict.[142] Japan suggested that considerations regarding the management and operation of protected zones be added to the commentary.[143] These questions are addressed below in the context of draft principle 17 below.

(b) Recommendation of the Special Rapporteur

54. In light of the comments and considerations above, the Special Rapporteur proposes one amendment to the draft principle. The amended text would read as follows:

Principle 4
Designation of protected zones

States should designate, by agreement or otherwise, areas of major environmental importance as protected zones, including where those areas are of major cultural importance.

5. Principle 5 [6]
Protection of the environment of indigenous peoples

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

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

[137] Switzerland, *ibid*., on draft principle 4.
[138] Czech Republic, *ibid*., on draft principle 4.
[139] Draft principles … 2019, commentary to draft principle 4, para. (4).
[140] Switzerland, A/CN.4/749, on draft principle 4.
[141] Estonia statement of 5 November 2019. Available at http://statements.unmeetings.org/media2/23329053/-e-estonia-statement.pdf.
[142] Czech Republic, A/CN.4/749, on draft principle 4.
[143] Japan, *ibid*., on draft principle 4.

(a) Comments and observations

55. Draft principle 5 received support from El Salvador, Malaysia, the Federated States of Micronesia, the Netherlands, Peru, the Republic of Korea and Sweden, on behalf of the Nordic countries.[144] Underlining the special relationship of the indigenous peoples with their environment, the Nordic countries recalled that indigenous peoples "have a particular internationally recognized legal status and rights that flow from that status".[145] The United States expressed appreciation for the goals of the draft principle.[146] IUCN, ELI, OHCHR, ICRC and UNHCR also welcomed the draft principle.[147] IUCN commended the Commission "on the inclusion of a provision recognizing the need to protect the environmental resources and lands of indigenous peoples in relation to armed conflict".[148] OHCHR pointed out that damage to the territory and lands of indigenous peoples "may affect their survival and well-being, as well as specific ways of life, livelihood and ancestral traditions", and noted that this issue has repeatedly been raised by United Nations human rights mechanisms.[149] The United Kingdom, however, took the view that "[q]uestions concerning the status of indigenous land in the context of armed conflict fall outside the topic", and suggested that the draft principle be deleted.[150] Similar views were expressed by the Russian Federation.[151]

56. The specific comments on the formulation of draft principle 5 concerned, first, the phrases "in the event of an armed conflict" in paragraph 1 and "[a]fter an armed conflict" in paragraph 2, which indicate the temporal scope of the draft principle. ICRC noted that the phrase "in the event of an armed conflict" could be unduly restrictive and suggested that it be replaced by the formulation "in relation to an armed conflict".[152] OHCHR questioned the limitation of effective consultations and cooperation to the time after an armed conflict, and queried the legal basis for such a limitation, which, it noted, did not seem to take into account the continued application of human rights law during armed conflicts.[153] UNEP considered that effective consultations with indigenous peoples should be included in both paragraphs.[154] The Nordic countries emphasized the participatory rights of indigenous peoples relating to their lands, territories and resources.[155] ICRC further suggested that the Commission reconsider the limitation of paragraph 2 of the draft principle to the time "after an armed conflict", pointing out that remedial measures, such as clearance of landmines, could be taken already during armed conflict "to the extent possible and as required by international law, especially in light of the long duration of contemporary armed conflicts".[156]

57. The Special Rapporteur recalls that draft principle 5 "recognizes that States should, due to the special relationship between indigenous peoples and their environment, take appropriate measures to protect such environment in relation to an

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[144] El Salvador (A/C.6/71/SR.27, para. 150); Malaysia (A/C.6/73/SR.30, para. 67); Micronesia (Federated States of) (A/C.6/74/SR.29, para. 93); Netherlands, A/CN.4/749, on draft principle 5; Peru (A/C.6/74/SR.31, para. 2); Republic of Korea (A/C.6/73/SR.30, para. 30); Sweden (on behalf of the Nordic countries), A/CN.4/749, on draft principle 5.

[145] Sweden (on behalf of the Nordic countries), A/CN.4/749, on draft principle 5.

[146] United States, *ibid*., on draft principle 5.

[147] IUCN, *ibid*., on draft principle 5; ELI, *ibid.*; OHCHR, *ibid*.; ICRC, *ibid*.

[148] IUCN submission to the Commission's seventy-third session, p. 3. Available at https://legal.un.org/ilc/sessions/73/pdfs/english/poe_iucn.pdf.

[149] OHCHR, A/CN.4/749, on draft principle 5.

[150] United Kingdom, *ibid*., on draft principle 5.

[151] Russian Federation (A/C.6/74/SR.31, para. 32).

[152] ICRC, A/CN.4/749, on draft principle 5.

[153] OHCHR, *ibid*., on draft principle 5.

[154] UNEP, *ibid*., on draft principle 5.

[155] Sweden (on behalf of the Nordic countries), *ibid*., on draft principle 5.

[156] ICRC, *ibid*., on draft principle 5.

armed conflict".[157] A temporal limitation does not seem essential for such a general reminder. It can furthermore be seen from the preparatory work of the Commission that the protection under paragraph 1 was not meant to be temporally limited.[158] The draft principle is placed in Part Two (Principles of general application), and the chosen wording seems to refer to a possible future event, and not necessarily to one that has already occurred.[159] As this wording nevertheless seems to be subject to different interpretations, there may be reason to add further clarifications to the commentary.

58. Paragraph 2 refers specifically to the consultations and cooperation required for the purpose of taking remedial measures. As has been pointed out by ICRC and OHCHR, a number of obligations or remediation require measures also during an armed conflict. Reference can also be made to the 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, which do not limit remedies to the time after an armed conflict.[160] As a practical example, the General Assembly has urged "the Afghan authorities to provide efficient and effective remedies to the victims of grave violations of human rights and of accepted humanitarian rules" during an ongoing armed conflict.[161] While some treaties require that remedies are to be made at the end of hostilities, or after an armed conflict, this is often in relation to reparations between States, and not individual or group claims.[162] The Special Rapporteur is not aware of any reason why paragraph 2 should be limited to the time after the termination of an armed conflict, and suggests removing this specification.

59. Second, a number of comments addressed the normative nature of the draft principle. Spain suggested replacing the verb "should" with "shall" in paragraphs 1 and 2 in order to better align the provision "with developments in international law in this area, in particular in relation to the obligation to obtain free, prior and informed consent when implementing measures that could have an impact on indigenous peoples or their territories".[163] ELI made a similar comment, referring to the 1989 Indigenous and Tribal Peoples Convention (ILO 169),[164] the United Nations Declaration on the Rights of Indigenous Peoples,[165] as well as to a number of judgments by regional courts and tribunals.[166] OHCHR suggested that the

[157] Draft principles … 2019, commentary to draft principle 5, para. (1).

[158] Statement of the Chair of the Drafting Committee, Mr. Pavel Šturma, 9 August 2016, p. 4: the protection "is not temporally limited: it applies generally in the event of an armed conflict".

[159] Draft articles on the protection of persons in the event of disasters, *Yearbook … 2016*, vol. II (Part Two), para. 48: art. 1, para. (4) of the commentary explains that the phrase "in the event of" in the title of the topic, defines the scope of the draft articles *ratione temporis* as being "primarily focused on the immediate post-disaster response and early recovery phase, including the post-disaster reconstruction phase. Nonetheless … the predisaster phase falls within the scope of the draft articles."

[160] 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.

[161] General Assembly resolution 51/108 of 4 March 1997 on the situation of human rights in Afghanistan, para. 11.

[162] See, e.g., art. 3 of the First Protocol to the Hague Convention for the Protection of Cultural Property (The Hague, 14 May 1954), available at http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/first-protocol/.

[163] Spain, A/CN.4/749, on draft principle 5.

[164] International Labour Organization, Convention concerning Indigenous and Other Tribal Peoples in Independent Countries (Geneva, 27 June 1989) (Indigenous and Tribal Peoples Convention, 1989 (No. 169)), United Nations, *Treaty Series*, vol. 1650, No. 28383, p. 383.

[165] United Nations Declaration on the Rights of Indigenous Peoples, General Assembly resolution 61/295 of 13 September 2007, annex.

[166] ELI, *ibid*., on draft principle 5.

Commission take into account international human rights standards in its further consideration of draft principle 5.[167] France, however, took the view that the draft principle does not reflect customary international law[168] and the United States expressed appreciation for the word "should".[169] While the Special Rapporteur does not deny the importance of the ongoing legal developments regarding consultations with indigenous peoples, including at the national level in States with a significant presence of indigenous peoples,[170] it seems that there is not as yet reason to change the Commission's assessment on first reading.

60. Some comments referred to other groups of vulnerable peoples. The Czech Republic pointed out that indigenous peoples may not be the only category of particularly vulnerable people with a special relationship with their environment.[171] UNHCR sought clarification regarding the application of the draft principles to the protection of the environment of territories where other peoples reside, for instance ethnic minorities dependent on certain natural resource, or nomadic peoples, and suggested that "a more inclusive term that includes not only indigenous peoples but other communities as well" be used in the draft principle.[172] Viet Nam made a similar comment regarding ethnic minorities.[173] The Federated States of Micronesia urged the Commission to consider whether the draft principle could be applied to local communities as "a group recognized in the Convention on Biological Diversity and its Nagoya Protocol, and also in the Paris Agreement on climate change".[174] Germany supported the draft principle but raised questions about "emphasizing a specific and privileged protection among protected persons in particular in times of active hostilities".[175]

61. The Special Rapporteur believes that framing the question in terms of vulnerability may miss the point that is central to draft principle 5: a recognition of a special, established relationship to the land, territories and environment. Regarding the suggestions to include other groups with a special relationship to the environment within the scope of the draft principle, it should be recalled that the legal instruments on which the draft principle relies are specific to indigenous peoples and delimit its scope. The protection of groups other than indigenous peoples is a separate question and including in draft principle 5 a list of various groups would risk detracting from its integrity and purpose. At the same time, while this provision recognizes the unique position of indigenous peoples, it should not exclude States from considering similar recommendations for other groups with a special connection to the environment.[176]

62. The Czech Republic suggested that the draft principle should also cover situations in which non-State actors exercise control over territory inhabited by

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[167] OHCHR, *ibid.*, on draft principle 5.
[168] France, *ibid*., on draft principle 5.
[169] United States, *ibid*., on draft principle 5.
[170] See, e.g., Canada, Supreme Court, *Haida Nation v. British Columbia (Minister of Forests)*, Judgment, 18 November 2004; African Court on Human and Peoples' Rights, *African Commission of Human and Peoples' Rights v. Republic of Kenya*, application No. 006/2012, Judgment, 26 May 2017.
[171] Czech Republic, A/CN.4/749, on draft principle 5.
[172] UNHCR, *ibid*., general comments and observations.
[173] Viet Nam (A/C.6/74/SR.30, para. 37).
[174] Micronesia (A/C.6/73/SR.29, para. 146). For Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya, Japan, 29 October 2010), see UNEP, document UNEP/CBD/COP/10/27, annex, decision X/1, annex I; for the Paris Agreement (Paris, 4 November 2016), see United Nations, *Treaty Series*, No. 54113 (volume number yet to be determined).
[175] Germany, A/CN.4/749, on draft principle 5.
[176] See e.g. United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, General Assembly resolution 73/165 of 17 December 2018.

indigenous peoples.[177] ELI also considered that the draft principle should be rephrased so that it would apply to non-State actors.[178] ICRC suggested a clarification in the commentary recalling the obligations of non-State armed groups under international humanitarian law.[179] The Special Rapporteur notes that control over territory and people by non-State armed groups has been a recurrent phenomenon in recent non-international armed conflicts.[180] It could therefore be worthwhile to consider extending the draft principle to such actors. This would seem to be possible with regard to paragraph 1, given that it is more generally drafted than paragraph 2, which in turn refers to particular treaty-based obligations and commitments of States.

63. IUCN recalled that the United Nations Declaration on the Rights of Indigenous Peoples and human rights jurisprudence recognize that indigenous peoples have land or property rights over an area that is larger than the area that they inhabit. IUCN suggested therefore that the phrase "where indigenous peoples inhabit" be replaced with a formulation such as "lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired".[181] The joint civil society submission made the same proposal, and suggested also to refer in both paragraphs to the "free, prior and informed consent" of indigenous peoples.[182] The Special Rapporteur recalls that both concepts are referred to in the commentary, which also points out that "[t]he specific rights of indigenous peoples over certain lands or territories may be the subject of different legal regimes in different States. Further, in international instruments concerning the rights of indigenous peoples, various formulations are used to refer to the lands or territories connected to indigenous peoples, and over which they have various rights and protective status."[183] The current wording follows the formulation of article 7, paragraph 4, of the Indigenous and Tribal Peoples Convention of the International Labour Organization (ILO No. 169), which refers to the protection and preservation of "the environment of the territories which indigenous peoples inhabit".[184] While the Special Rapporteur understands that the current wording is a result of a thorough debate in the Commission, she would not object to proposals to use a more inclusive phrase.

64. Further comments concerned the commentary. Spain sought clarification regarding the "relevant public interest" referred to in paragraph (6) of the commentary as a possible justification for military activities in the lands of indigenous peoples.[185] UNHCR suggested that the commentary address situations in which military activities taking place in ancestral territories concern more than one State, as well as the responsibility of States in preventing non-State actors and corporations from negatively affecting ancestral territories in the event of armed conflict.[186] The Nordic countries, furthermore, considered that the commentary could be aligned with paragraph (9) of the commentary to draft principle 4.[187] In addition, the Fund for the Development of Indigenous Peoples of Latin America and the Caribbean suggested that references to the American Declaration on the Rights of Indigenous Peoples be

[177] Czech Republic, A/CN.4/749, on draft principle 5.
[178] ELI, *ibid.*, general comments and observations.
[179] ICRC, *ibid.*, on draft principle 5.
[180] See, for instance, T. Rodenhäuser, "The legal protection of persons living under the control of non-State armed groups", *International Review of the Red Cross*, vol. 102 (2020), pp. 991–1020.
[181] IUCN, A/CN.4/749, on draft principle 5.
[182] Joint civil society submission (footnote 16 above), pp. 10–11.
[183] Draft principles … 2019, commentary to draft principle 5, para. (4).
[184] International Labour Organization, Indigenous and Tribal Peoples Convention (ILO No. 169), art. 7, para. 4 ("Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit").
[185] Spain, A/CN.4/749, on draft principle 5.
[186] UNHCR, *ibid.*, general comments and observations.
[187] Sweden (on behalf of the Nordic countries), *ibid.*, on draft principle 5.

added to the commentary.[188] The Commission may wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

(b) Recommendation of the Special Rapporteur

65. In light of the comments received, the Special Rapporteur suggests two changes to the draft principle. As amended, draft principle 5 would read as follows:

Principle 5
Protection of the environment of indigenous peoples

1. Appropriate measures should be taken, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit.

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

6. Principle 6 [7]
Agreements concerning the presence of military forces in relation to armed conflict

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

(a) Comments and observations

66. Draft principle 6 received general support from Ireland, Cyprus, the Federated States of Micronesia and Morocco.[189] IUCN also welcomed the provision.[190] Cyprus indicated that it would seek to include environmental provisions in future status of forces agreements with allied States.[191]

67. A number of comments were made regarding the first sentence of the draft principle. Israel pointed out that the reference to "the presence of military forces in relation to armed conflict" raised practical problems, given that in "most current status of forces agreements that Israel is aware of, there is no distinction between situations pertaining to armed conflicts and situations that occur outside armed conflicts".[192] While Israel suggested amending the draft principle so that it would be applicable only to agreements explicitly referring to armed conflict situations,[193] Cyprus expressed the view that clauses on the protection of the environment should be incorporated in agreements or arrangements "regulating the presence of foreign armed forces in a country for the purposes of military drills, training or any other conduct not necessarily related to an armed conflict".[194] The United States pointed

[188] Fund for the Development of Indigenous Peoples of Latin America and the Caribbean, submission to the Commission's seventy-third session. Available at https://legal.un.org/ilc/sessions/73/pdfs/spanish/poe_filac.pdf.
[189] Ireland, A/CN.4/749, general comments and observations; Cyprus, *ibid.*, on draft principle 6; Micronesia (Federated States of) (A/C.6/71/SR.28, para. 55); Morocco (A/C.6/74/SR.30, para. 6).
[190] IUCN, A/CN.4/749, on draft principle 6.
[191] Cyprus, *ibid*., on draft principle 6.
[192] Israel, *ibid*., on draft principle 6.
[193] *Ibid*.
[194] Cyprus, *ibid*., on draft principle 6.

out that the phrase "in relation to armed conflict" would seem to be "inconsistent with existing State practice in concluding status-of-forces agreements, which generally do not use this phrase". Concluding nevertheless that the phrase, rather than describing certain categories of status of forces agreements, served to delimit the scope of the draft principle, the United States suggested moving the phrase earlier in the sentence so that it would refer to "the protection of the environment" and not to "agreements concerning the presence of military forces".[195] The Special Rapporteur understands that the phrase "in relation to armed conflict" was added to the text "in order to emphasize the clear link between the agreements and situations of armed conflict and to make it clear that not all military activities were intended to be covered in the scope of the draft principle".[196] At the same time, she takes note of the comments regarding the actual practice of States. The commentary to draft principle 6 also refers to agreements "with a less clear relation to armed conflict"[197] in addition to those with such a relation.[198] The change of order proposed by the United States would, in the Special Rapporteur's view, have the benefit of retaining the focus of the draft principle on armed conflicts while alleviating the problem of practical applicability. Accordingly, the words "in relation to armed conflict" could be dropped from the title of the draft principle.

68. Specific suggestions were also made concerning the wording of the second sentence of the draft principle. Colombia suggested adding the word "environmental" before the words "impact assessments" to make the provision more specific.[199] The United Kingdom suggested replacing the words "may include preventive measures, impact assessments, restoration and clean-up measures" in the second sentence with the words "should include measures to prevent, mitigate and remediate harm to the environment".[200] Portugal, too, suggested a change that would align the wording of different draft principles.[201] The United States suggested replacing the word "include" by the word "address", and to add the phrase "*inter alia*" before the list of measures.[202] As indicated above in relation to draft principle 2, the Special Rapporteur sees merit in using the same phrase consistently in draft principles 2, 6, 7, and 8. A reference to "measures to prevent, mitigate and remediate harm to the environment" would be consistent with the general nature of the draft principles. Further specifications may be added to the commentary as necessary.

69. Colombia furthermore recalled that military forces were not necessarily the central actors in an armed conflict, and suggested reviewing the wording of draft principle 6 to take into account the prevalence of non-State actors in current conflicts as well as their responsibility for environmental damage.[203] France sought clarification regarding the scope of the draft principle, in particular "whether or not the agreements mentioned include defence or stationing agreements concluded in peacetime in anticipation of a possible future conflict".[204] IUCN suggested that, in addition to the measures referred to in the second sentence of the draft principle, the means to ensure their implementation would also be addressed in the commentary.[205] The joint civil society submission pointed out that, even in urgent circumstances, issues of environmental protection should be addressed to the extent possible.[206]

[195] United States, *ibid*., on draft principle 6.
[196] Statement of the Chair of the Drafting Committee, Mr. Pavel Šturma, 9 August 2016, p. 3.
[197] Draft principles … 2019, commentary to draft principle 6, para. (4).
[198] *Ibid*., para. (3).
[199] Colombia, A/CN.4/749, on draft principle 6.
[200] United Kingdom, *ibid*., on draft principle 2.
[201] Portugal, *ibid*., on draft principle 6.
[202] United States, *ibid*., on draft principle 6.
[203] Colombia, *ibid*., on draft principle 6.
[204] France, *ibid*., on draft principle 6.
[205] IUCN, *ibid*., on draft principle 6.
[206] Joint civil society submission (footnote 16 above), p. 11.

Japan provided information of the Supplementary Agreement on Cooperation in the Field of Environmental Stewardship relating to the United States Armed Forces in Japan that was concluded between the two States in 2015.[207]

(b) Recommendation of the Special Rapporteur

70. In light of the comments and considerations above, the Special Rapporteur suggests reformulating draft principle 6 as follows. The Commission may also wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

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.

7. Principle 7 [8] Peace operations

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

(a) Comments and observations

71. Slovenia welcomed draft principle 7 and pointed out that measures to prevent, mitigate and remediate the negative environmental consequences of peace operations are "of the utmost importance during the planning and operational phases".[208] General support to the draft principle was also expressed by Malaysia.[209]

72. Several comments regarding this draft principle focused on the use of the mandatory term "shall". Canada, Germany, Japan, the Netherlands and the United States pointed out that there was no corresponding customary obligation for States participating in peace operations.[210] Ireland and Switzerland sought further clarification regarding the legal status of the obligations underlying draft principle 7.[211] The Netherlands noted that the draft principle was based on non-binding policy documents adopted by the European Union, the United Nations and the North Atlantic Treaty Organization (NATO). "Although such documents make an important contribution to the development of customary international law and often reflect customary international law, there is no conclusive proof that this is already the case in this particular instance."[212] Canada, Germany, the Netherlands, and the United

[207] Japan, A/CN.4/749, on draft principle 6: Agreement between Japan and the United States 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, regarding Facilities and Areas and the Status of United States Armed Forces in Japan (Washington, D.C., 28 September 2015).
[208] Slovenia (A/C.6/74/SR.29, para. 141).
[209] Malaysia (A/C.6/73/SR.30, para. 68).
[210] Canada, A/CN.4/749, on draft principle 7; Germany, *ibid*.; Japan, *ibid.*; Netherlands, *ibid*.; United States, *ibid*.
[211] Ireland, *ibid*., general comments and observations; Switzerland, *ibid*., on draft principle 7.
[212] Netherlands, *ibid*., on draft principle 7.

States suggested replacing "shall" with "should" and Japan suggested using the phrase "are encouraged".[213]

73. The Special Rapporteur understands that the Commission's intention in formulating draft principle 7 was to take into account both "the vast practice that existed in this field, in particular within the United Nations" and the consideration that this practice "consisted mainly of policy considerations and did not reflect any existing legal obligation".[214] Given this explanation, it seems that the Commission's understanding of the normative nature of the draft principle was not different from that of the comments received. The question rather seems to be about the chosen language. It seems that 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 their environmental impacts.[215] There does not seem to be reason to change this wording. The Special Rapporteur also draws attention to the term "appropriate", which moderates the latter part of the sentence, as well as to the developing practice. Reference can in this regard be made, for instance, to recent NATO decisions concerning the reduction of military emissions.[216]

74. The United Kingdom suggested that the words "the negative environmental consequences thereof" be replaced with another formulation "harm to the environment resulting from those operations".[217] The Special Rapporteur believes that a change along these lines would indeed improve the wording. Japan pointed out that "[m]ultiple actors, not limited to States and international organizations, may be involved in armed conflict and have some effect on the environment". Japan therefore suggested modifying the phrase "States and international organizations" to read "States, international organizations and other relevant actors".[218] While this addition would align the provision with draft principle 8, the Special Rapporteur does not consider it necessary given the specific focus of draft principle 7.

75. ICRC and Switzerland drew attention to other international obligations that may be binding on States and international organizations participating in a peace operation. ICRC suggested that peace operations deployed in armed conflict that are party to the armed conflict be distinguished clearly in the commentary from other peace operations, given that the former have obligations under the law of armed conflict. ICRC expressed a concern regarding "elements in the commentary that could be read as falling below existing obligations under international humanitarian law", such as the use of the modal verb "should" in paragraphs (4) and (7).[219] Switzerland suggested that a without prejudice clause be added to the draft principle so as to

[213] Canada, *ibid.*, on draft principle 7; Germany, *ibid.*; Netherlands, *ibid.*; United States, *ibid.*; Japan, *ibid.*

[214] Statement of the Chair of the Drafting Committee, Mr. Pavel Šturma, 9 August 2016, p. 8.

[215] See, for instance Security Council resolution 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.

[216] 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 to: 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. Both NATO documents are available at https://www.nato.int/cps/en/natohq/news_185000.htm?selectedLocale=en.

[217] United Kingdom, A/CN.4/749, on draft principle 2.

[218] Japan, *ibid.*, on draft principle 7.

[219] ICRC, *ibid.*, on draft principle 7.

safeguard other international obligations, in particular as the concept of "peace operations" has been defined broadly.[220]

76. ESCAP drew attention to the need to ensure the integrity of environmental experts immediately after the conflict has ended, during a ceasefire and at the beginning of peace operations, to allow environmental fact-finding missions to determine whether any environmental damage has occurred and assess the course of action.[221] The joint civil society submission suggested that the commentary highlight the need to undertake effective public consultations, particularly with affected persons and communities, concerning remedies for environmental damage in the course of peace operations.[222] Germany sought further clarification of the concept of "peace operation".[223]

(b) Recommendation of the Special Rapporteur

77. In light of the comments and considerations above, the Special Rapporteur suggests a small change, which she regards as a linguistic improvement, to the draft principle. The Commission may also wish to make additions to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course. As amended, draft principle 7 would read as follows:

Principle 7
Peace operations

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

8. Principle 8
Human displacement

States, international organizations and other relevant actors should 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.

(a) Comments and observations

78. Draft principle 8 received general support from Ireland, Lebanon, the Netherlands, and Switzerland[224] as well as from Algeria, Greece, Lebanon, Mexico, Peru, Sierra Leone, Sudan and Ukraine.[225] ICRC,[226] IUCN[227] and UNHCR also welcomed the draft principle. ICRC recalled that both the ICRC Guidelines and the ICRC report, *When Rain Turns to Dust* recognize the environmental effects of

[220] Switzerland, *ibid*., on draft principle 7.
[221] ESCAP, *ibid*., on draft principle 7.
[222] Joint civil society submission (footnote 16 above), p. 11.
[223] Germany, A/CN.4/749, on draft principle 7.
[224] Ireland, *ibid*., general comments and observations; Lebanon, *ibid.*, on draft principle 8; Netherlands, *ibid*., general comments and observations; Switzerland, *ibid*., on draft principle 8.
[225] Algeria (A/C.6/74/SR.31, para. 51); Greece (A/C.6/74/SR.28, para. 49); Mexico (A/C.6/74/SR.29, para. 112); Peru (A/C.6/74/SR.31, para. 2); Sierra Leone (A/C.6/74/SR.29, para. 64); Sudan (A/C.6/74/SR.29, para. 61); Switzerland, A/CN.4/749, on draft principle 8; Ukraine (A/C.6/74/SR.26, para. 125).
[226] ICRC, A/CN.4/749, on draft principle 8.
[227] IUCN, *ibid*., on draft principle 8.

conflict-related displacement.[228] According to UNHCR, "[r]ecognizing a right to a healthy environment in times of conflict can advance the protection of refugees, other displaced people and their host communities".[229]

79. Most of the comments regarding the wording of the draft principle concerned its geographical scope. UNEP pointed out that the movement of displaced peoples often contributes heavily, both directly and indirectly, to environmental damage. UNEP therefore suggested that the phrase "where persons displaced by armed conflicted are located" be replaced by a broader formulation encompassing the areas of transit: "areas relating to both the movement and relocation of displaced persons".[230] Lebanon[231] and Ukraine[232] made a proposal to the same effect. Furthermore, the joint civil society submission suggested expanding the scope of the draft principle to cover areas crossed by displaced persons. The suggested formulation referred to "appropriate measures to prevent and mitigate environmental degradation in both urban and rural areas where persons displaced by armed conflict are located and areas through which these persons transit".[233]

80. The United States pointed out that there may be cases, in which the persons displaced will not cause environmental degradation, and suggested replacing the word "take" with "consider taking". The United States also suggested moving the reference to provision of relief and assistance from the end of the draft principle to the beginning. The United Kingdom suggested aligning the wording of the draft principle with that of draft principle 7.[234]

81. The Special Rapporteur regards the issue of the environmental effects of conflict-related displacement in transit States as an important one and recommends that the Commission consider an addition along the lines of the suggestions above. Regarding the suggestion to add the word "consider", the Special Rapporteur recalls that the draft principle addresses a problem that has been recognized as one of the principal pathways to environmental damage and degradation in non-international armed conflicts.[235] While there may be individual cases in which no particular measures are required, this eventuality should be adequately covered by the word "appropriate". As for the proposed change of the order of the sentence, the Special Rapporteur recalls that a proposal to this effect was made and discussed in the Commission, which concluded that the text of the draft principle should remain unchanged.[236] Finally, as indicated earlier, the Special Rapporteur is in agreement with the proposal to use more consistent wording in draft principles 2, 6, 7, and 8.

82. A number of suggestions have been made regarding the commentary. The United States suggested that the commentary refer to relief activities under international

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[228] ICRC, *ibid*., on draft principle 8; ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflicts* (see footnote 17 above), paras. 3 and 151–152. See also *When Rain Turns to Dust: Understanding and responding to the Combined Impact of Armed Conflicts and the Climate and Environment Crisis on People's Lives,* (Geneva, 2020), available at https://www.icrc.org/en/publication/4487-when-rain-turns-dust.

[229] UNHCR, A/CN.4/749, general comments and observations.

[230] UNEP, *ibid*., on draft principle 5.

[231] Lebanon (A/C.6/74/SR.30, para. 105).

[232] Ukraine (A/C.6/74/SR.26, para. 125).

[233] Joint civil society submission (footnote 16 above), p. 12.

[234] United Kingdom, A/CN.4/749, on draft principle 2.

[235] D. Jensen and S. Lonergan, "Natural resources and post-conflict assessment, remediation, restoration and reconstruction: lessons and emerging issues", in D. Jensen and S. Lonergan (eds.), *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding* (Abingdon: Earthscan from Routledge, 2012), pp. 411–450, at p. 414. See also United Nations Environmental Assembly resolutions 2/15 (see footnote 17 above), eleventh preambular para. and para. 1, and 3/1 of 6 December 2017 (*ibid*.), tenth and fifteenth preambular paras.

[236] See A/CN.4/SR.3465.

humanitarian law.[237] The Russian Federation, too, referred to obligations under Additional Protocol II to the Geneva Conventions,[238] in particular the measures to be taken in the event of displacement in order that the civilian population might be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. The Russian Federation expressed the view that these obligations "should take priority over any concerns regarding the possible environmental effects of conflict-related human displacement."[239] ICRC, furthermore, recalled the relevant obligations of States and non-State armed groups parties to an armed conflict under international humanitarian law related to displacement and to the provision of relief and assistance to displaced persons and local communities. It would be important in the view of ICRC, to clarify in the commentary that the draft principle not be understood as falling below these existing obligations in situations of armed conflict.[240] The Special Rapporteur finds such a clarification useful. It could possibly also address the concern of the Russian Federation.

83. The reference in the draft principle to "other actors" has also generated comments. The Nordic countries proposed that non-State armed groups be mentioned in the commentary when explaining the term "other relevant actors".[241] A similar proposal has been made by ELI,[242] as well as in the joint civil society submission.[243] The Czech Republic expressed a general wish for more clarification of how "other relevant actors would comply with the principle and cooperate with State representatives".[244] Referring to her comment above in relation to draft principle 5 concerning the prevalence of situations in which non-Sate armed groups control a territory, the Special Rapporteur sees merit in mentioning this issue in the commentary.

(b) Recommendation of the Special Rapporteur

84. In light of the comments and considerations above, the Special Rapporteur suggests adding to the text of draft principle 8 a mention of areas affected by the movement of displaced persons. She further suggests aligning the reference to "appropriate measures" with draft principle 7. The Commission may also wish to consider making changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

Principle 8
Human displacement

States, international organizations and other relevant actors should take appropriate measures to prevent, mitigate and remediate environmental harm 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.

[237] United States, A/CN.4/749, on draft principle 8.
[238] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, United Nations, *Treaty series*, vol. 1125, No. 17512, p. 609 (Additional Protocol II).
[239] Russian Federation, A/C.6/74/SR.31, para. 34.
[240] ICRC, A/CN.4/749, on draft principle 8.
[241] Sweden (on behalf of the Nordic countries), *ibid.*, on draft principle 8.
[242] ELI, *ibid.*, general comments and observations.
[243] Joint civil society submission (footnote 16 above), p. 12.
[244] Czech Republic, A/CN.4/749, on draft principle 8.

9. 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 for internationally wrongful acts.

(a) Comments and observations

85. The draft principle has received general support from the Nordic countries, Algeria, Italy, Lebanon and Thailand.[245] In addition, Germany, Ukraine, Austria and Italy specifically welcomed the recognition in the draft principle of the compensability under international law of pure environmental damage and the intrinsic value of the environment.[246] Similarly, IUCN welcomed the draft principle and commended the Commission for recognizing the bases of responsibility for environmental damage adopted by the International Court of Justice,[247] "which referred to 'the principle of full reparation' as requiring compensation for damage caused to the environment 'in and of itself'".[248] Slovakia and Switzerland nevertheless questioned the usefulness of the draft principle.[249]

86. Regarding the wording of the draft principle, the United States considered that paragraph 1 should clarify that international responsibility follows from acts that damage the environment in and of itself only, if such damage is caused by an internationally wrongful act. This could be achieved either by adding the word "such" after the word "including" or by adding to the end of paragraph 1 the words "caused by such act".[250] Further suggestions were made regarding paragraph 2, which contains a general "without prejudice" clause. Austria, France, Italy and Switzerland did not see a need for such a clause.[251] France noted that its "phrasing seems ambiguous and could be read as recognition of a special regime of responsibility for internationally wrongful acts that cause damage to the environment".[252] Italy pointed out that it is "clear from paragraph 1 that the rules of State responsibility appl[y] to the specific context of environmental harm in armed conflict". Moreover, as indicated in the commentary to draft principle 1, "the draft principles as a whole covered all three temporal phases: before, during, and after armed conflict".[253] The Special Rapporteur remains of the view that the current wording of paragraph 1 is clear but suggests including further clarifications in the commentary to address the concern of the United States. As far as the "without prejudice" clause in paragraph 2 is concerned, the Special Rapporteur recalls that it was originally proposed as part of a slightly different draft principle that did not contain current paragraph 1 but contained,

[245] Algeria (A/C.6/74/SR.31, para. 51); Austria (A/C.6/74/SR.27, para. 97); Italy (A/C.6/74/SR.28, para. 25); Lebanon (A/C.6/74/SR.30, para. 105); Sweden (on behalf of the Nordic countries), A/CN.4/749, on draft principle 9; Thailand (A/C.6/74/SR.29, para. 96).
[246] Germany, A/CN.4/749, on draft principle 9; Ukraine (A/C.6/74/SR.26, para. 125).
[247] See *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Reports 2018*, p. 15, at para. 41.
[248] IUCN, A/CN.4/749, on draft principle 9.
[249] Slovakia (A/C.6/74/SR.28, para. 31); Switzerland, *ibid.*, on draft principle 9.
[250] United States, A/CN.4/749, on draft principle 9.
[251] Austria, statement of 31 October 2019, available at http://statements.unmeetings.org/media2/23328809/-e-austria-statement.pdf; France, A/CN.4/749, on draft principle 9; Italy (A/C.6/74/SR.28, para. 25); Switzerland, *ibid*., on draft principle 9.
[252] France, A/CN.4/749, on draft principle 9.
[253] Italy (A/C.6/74/SR.28, para. 25).

instead, a paragraph that later became the basis for current draft principle 26.[254] She agrees that its usefulness in the current context of draft principle 9 is not evident.

87. One of the issues raised with respect to the commentary concerns the relevance of several legal frameworks for the application of paragraph 1. France expressed concern about a possible interpretation of draft principle 9 and the commentary, according to which "damage to the environment done in the context of an armed conflict can entail the international responsibility of a State even if the damage results from an act of war that is in compliance with international humanitarian law and the law of the use of force".[255] Cyprus supported the view that State responsibility "can be triggered in cases of environmental harm within the context of belligerent occupation on the basis of several legal frameworks, including the law of armed conflict and the law of international human rights."[256] OHCHR was concerned that the draft principle would seem to overlook situations in which a "State might be appropriately held responsible, including in relation to its obligations under international human rights law".[257] The joint civil society submission took a similar view.[258] El Salvador referred to the general principles of international environmental law, according to which "responsibility may be engaged even when acts are not prohibited, if those acts have the potential to cause harm to third parties".[259]

88. In the Special Rapporteur's view, these comments shed light on different aspects of the subject matter of draft principle 9. Regarding France's concern, the Special Rapporteur recalls that draft principle 9 refers to "[a]n internationally wrongful act of a State, in relation to an armed conflict". In accordance with the temporal scope of the draft principles, "in relation" covers also the time before and after an armed conflict, in addition to the time during an armed conflict. Furthermore, the concept of armed conflict includes situations of occupation as a specific subcategory of international armed conflicts. The Commission has further established that international human rights law and international environmental law retain their relevance in armed conflicts.[260] When specific provisions of international human rights law or international environmental law contradict the law of armed conflict, however, in matters regulated by the law of armed conflict, and in particular regarding the conduct of hostilities, the *lex specialis* nature of the latter set of rules comes into play. IUCN, for instance, has suggested that States parties to an armed conflict "observe, outside combat zones, all national and international environmental rules by which they are bound in times of peace".[261] Regarding the observations of El Salvador and ICRC, the Special Rapporteur refers to a number of comments above seeking further clarification about the application of international environmental law during armed conflict. This is a question that has relevance for several draft principles and could be addressed in an introduction to Part Three.[262]

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[254] See the comments of Greece and Lebanon suggesting clarifying that draft principle 26 is without prejudice to the rules of State responsibility, Greece (A/C.6/74/SR.28, para. 53); Lebanon (A/C.6/74/SR.30, para. 105).

[255] France, A/CN.4/749, on draft principle 9.

[256] Cyprus, *ibid*., on draft principle 9.

[257] OHCHR, *ibid*., on draft principle 9.

[258] Joint civil society submission (footnote 16 above), p. 12.

[259] El Salvador, A/CN.4/749, on draft principle 9. See also the ICRC comment on draft principle 22, questioning the limitation of the no harm principle (due diligence) to situations of occupation: ICRC, *ibid*.

[260] Draft principles … 2019, commentary to draft principle 13, para. (5).

[261] IUCN, Draft International Covenant on Environment and Development (5th ed., 2000), art. 40 (Military and hostile activities), para. 1 (a), available at https://sustainabledevelopment.un.org/content/documents/2443Covenant_5th_edition.pdf.

[262] For the Special Rapporteur's proposal regarding an introduction to Part Three, see section 14 (a) below.

89. A further set of comments concerns a mention in paragraph (4) of the commentary of the *lex specialis* nature of the rules of the law of armed conflict, which extend the responsibility of the State to all acts of its armed forces during an armed conflict. Germany noted that the rule referred to in paragraph (4) "rather seems an application of the general rule of State responsibility for internationally wrongful acts".[263] The Czech Republic made a similar comment[264] and Switzerland sought further clarification of whether such responsibility indeed extends to private acts.[265] The Special Rapporteur refers to the preparatory works of the Hague Convention that clearly reveal the intention behind article 3 concerning Sate responsibility "to make a State responsible for all violations of the Hague Regulations committed by members of its armed forces, even where those violations were completely unauthorized private acts".[266] Article 91 of Additional Protocol I repeats the content of article 3 of the Hague Convention and was also "clearly intended to have the same broad scope".[267] On the one hand, article 3 and article 91 restate the established principle that a State is responsible for the acts of its officials, In this sense, the rule "corresponds to the general principles of the law of international responsibility", as stated in the ICRC commentary to article 91.[268] On the other hand, the two provisions go beyond the general rule codified in the articles on State responsibility, which only applies to acts conducted in an official capacity.[269] While this is a special feature of the law of armed conflict, and a special rule which has sometimes been regarded as *lex specialis*,[270] the Special Rapporteur does not see the use of this term as necessary and suggests revising the commentary accordingly.

90. A number of comments have been made concerning reparation, which, according to Thailand, is "the most important element of accountability".[271] Switzerland underlined the importance of moral and symbolic reparations, especially where remediation is wholly or partially impossible, or damage has been caused to

[263] Germany, A/CN.4/749, on draft principle 9.
[264] Czech Republic, *ibid*., on draft principle 9.
[265] Switzerland, *ibid*., on draft principle 9.
[266] 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, *in* , J.B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1915), p. 100, at p. 277 (Hague Regulations), art. 3. Quotation from C. Greenwood, "State responsibility and civil liability for environmental damage cause 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. 401–402.
[267] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977 (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3. See (Additional Protocol I), art. 91, commentary (1987), para. 3645. See also International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports* 2005, p. 168, at p. 242, paras. 213–214: "The conduct of individual soldiers and officers of the UPDF is to be considered as the conduct of a State organ. In the Court's view, by virtue of the military status and function of Ugandan soldiers in the DRC, their conduct is attributable to Uganda. The contention that the persons concerned did not act in the capacity of persons exercising governmental authority in the particular circumstances, is therefore without merit. … According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces."
[268] ICRC commentary to Additional Protocol I to the Geneva Conventions (1987), pp. 1053–1054.
[269] Articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001* and corrigendum, paras. 76–77, commentary to art. 7, para. (4). See also General Assembly resolution 56/83 of 12 December 2001, annex.
[270] See, e.g., M. Sassóli, "State responsibility for violations of international humanitarian law", *International Review of the Red Cross*, vol. 84 (2002), pp. 401–434.
[271] Thailand A/C.6/74/SR.29, para. 96.

protected areas of cultural importance.[272] Malaysia pointed to compensation as "a preferable and more logical form of reparation for environmental damage", as "it [is] often difficult, if not impossible, to restore the environment to the condition it had been in before it was damaged".[273] Colombia suggested that the constituent elements of the concept of reparation be mentioned in the commentary.[274] IUCN suggested that more of the specifications given by the International Court of Justice in the *Certain* Activities case be included in the commentary.[275] The Commission may wish to reflect some of these comments in the commentary to draft principle 9. The Special Rapporteur will make proposals to this effect in due course.

91. Further comments highlighted the need for a mechanism for the implementation of responsibility.[276] Malaysia suggested that the Commission should "conduct a study on an enforcement mechanism to ensure that States were held accountable for their wrongful acts, in relation to armed conflicts, that caused damage to the environment".[277] Finally, the joint civil society submission recommended that the commentary highlight the need to channel the granted reparations to the affected individuals and communities and to undertake effective consultations with persons and communities affected at all stages of the decision-making process concerning the provision of remedies.[278] Regarding the issue of implementation mechanism, the Special Rapporteur refers to the overview given in her second report, showing that relevant practice specifically concerning wartime environmental damage is fairly limited.[279] While conducting a more general review in the context of the present topic would not be possible, the Special Rapporteur refers to a topic on the Commission's long-term programme of work entitled "Reparations to individuals for gross violations of international human rights law and serious violations of international humanitarian law".[280]

92. Several comments raised the issue of the responsibility of non-State actors for conflict-related environmental harm, whether regarding individual criminal responsibility, the responsibility of non-State armed groups or the responsibility of international organizations. Switzerland recommended that "the idea of individual criminal responsibility for certain violations of international humanitarian law in relation to the environment" be included in draft principle 9.[281] Spain saw it as "striking that the draft principles do not address issues concerning the suppression of international crimes related to the protection of the environment during armed conflict".[282] The United States expressed concern about the lack of attention in the draft principles for other non-State actors apart from business enterprises, "such as insurgencies, militias, criminal organizations, and individuals, who have obligations under international humanitarian law".[283] The Czech Republic made a similar comment.[284] OHCHR recommended, "[g]iven the significant impact/damage that private actors may cause to the environment" that the Commission "consider

[272] Switzerland, A/CN.4/749, on draft principle 9.
[273] Malaysia, A/C.6/74/SR.30, para. 73.
[274] Colombia, A/CN.4/749, on draft principle 9.
[275] IUCN, *ibid*., on draft principle 9.
[276] Cuba, A/C.6/74/SR.29, para. 116; Malaysia, A/C.6/74/SR.30, para. 73; Mexico, A/C.6/74/SR.29, para. 110. See also joint civil society submission (footnote 16 above), p. 5.
[277] Malaysia, A/C.6/74/SR.30, para. 73.
[278] Joint civil society submission (footnote 16 above), pp. 12–13.
[279] A/CN.4/728, paras 105–150. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Order of 8 September 2020, I.C.J. Reports 2020*, p. 264.
[280] A/74/10, annex B.
[281] Switzerland, A/CN.4/749, on draft principle 10.
[282] Spain, *ibid*., general comments and observations.
[283] United States, *ibid*., on draft principle 10.
[284] Czech Republic, *ibid*., on draft principle 9.

inclusion of the notion of individual responsibility for international crimes causing harm to the environment in the draft principles".[285] A similar suggestion is included in the joint civil society submission regarding draft principle 11.[286] While welcoming the inclusion of the principle of State responsibility, IUCN urged the Commission to consider an additional draft principle on how to ensure the responsibility and liability of members of non-State armed groups.[287] Finally, UNEP suggested that the commentary to draft principle 9 mention the 2016 policy paper on case selection of the Office of the Prosecutor of the International Criminal Court.[288]

93. Switzerland furthermore expressed the view that the draft principles should address in more detail the responsibility and accountability of non-State armed groups concerning damage to the environment.[289] Similarly, Ukraine was concerned "that the draft principles did not fully address the responsibility and liability of non-State armed groups for damage caused to the environment as a result of armed conflict".[290] Colombia pointed out that it would be "necessary to take into account the actors involved, including considering the presence of a variety of (non-State) actors and/or organizations, which may be the principal causes of the damage to natural resources".[291] OHCHR, too, suggested that the responsibility of non-State armed groups be addressed in the draft principles and commentaries.[292] ELI sought clarification about the applicability of a number of draft principles, including draft principle 9, to non-State actors.[293]

94. Finally, OHCHR suggested amending draft principle 9 to refer more generally "to the law on responsibility under international law, without necessarily excluding the possibility that, for instance, an international organization or other analogous subject of international law, could also be responsible for a wrongful act in certain circumstances".[294] The joint civil society submission referred to draft principle 7, which "indicates that international organizations assume some obligations, in particular, in situations of peace operations" and suggested that the responsibility of international organizations for environmental damage in relation to armed conflicts, including damage that results in human rights violations, be addressed in the commentary.[295] Similarly in the context of draft principle 7, Morocco sought clarification regarding "the criteria that might be used to assign potential responsibility to international organizations and each of the States participating in such operations".[296]

95. The Special Rapporteur agrees that different actors and activities in the context of an armed conflict may cause or contribute to environmental damage. This has been acknowledged by the Commission in several draft principles that address not only States but also "parties to an armed conflict", international organizations, or "relevant actors". Individual criminal responsibility for environmental damage during an armed conflict is recognized in the Rome Statute[297] and was highlighted in the policy paper

[285] OHCHR, *ibid.*, on draft principle 9.
[286] Joint civil society submission (footnote 16 above), p. 14.
[287] IUCN, A/CN.4/749, on draft principle 9.
[288] UNEP, *ibid.*, on draft principle 9; International Criminal Court, Office of the Prosecutor, "Policy paper on case selection and prioritization", 15 September 2016.
[289] Switzerland (A/CN.4/749), on draft principle 9.
[290] Ukraine, A/C.6/74/SR.26, para. 126.
[291] Colombia, A/CN.4/749, on draft principle 9.
[292] OHCHR, *ibid.*, on draft principle 9.
[293] ELI, *ibid.*, general comments and observations.
[294] OHCHR, *ibid.*, on draft principle 9.
[295] Joint civil society submission (footnote 16 above), p. 11.
[296] Morocco, A/C.6/74/SR.30, para. 7.
[297] 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 (b) (iv).

of the Office of the Prosecutor.[298] The ICRC Guidelines include a rule concerning the repression of war crimes that concern the natural environment.[299] A proposal has furthermore 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,[300] and an international panel appointed by the *Stop Ecocide* campaign has issued a draft definition of the crime of ecocide.[301] While the international responsibility of non-State armed groups is an evolving area, there is thus a legal framework for the establishment of the responsibility of members of non-State armed groups.[302] Regarding the responsibility of international organizations, reference can be made to the Commission's 2011 articles on that topic.[303]

96. While it would hardly be manageable to propose the inclusion of a comprehensive regime of international responsibility in the set of draft principles, the Special Rapporteur believes that the comments and observations referred to above give reason to revisit draft principle 9. The Special Rapporteur proposes to include in the draft principle a saving clause stating that paragraph 1 is without prejudice to the existing or evolving rules of international law concerning individual criminal responsibility, or responsibility of other non-State actors – including international organizations, for conflict-related environmental damage. Such a provision could, in light of the comments referred to above, replace current paragraph 2. The Commission may furthermore wish to consider including in the commentary a brief overview of the relevant legal developments. The Special Rapporteur will make proposals to this effect in due course.

(b) Recommendation of the Special Rapporteur

97. In light of the comments and considerations above, the Special Rapporteur suggests that draft principle 9 be amended to read as follows:

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 existing or evolving rules of international responsibility of non-State actors, including individual criminal responsibility and the responsibility of international organizations, for environmental damage caused in relation to armed conflict.

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[298] International Criminal Court, Office of the Prosecutor, "Policy paper on case selection and prioritization", para. 41.

[299] ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflicts* (see footnote 17 above), Rule 28.

[300] 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-cpi.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.

[301] 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.

[302] See also the Special Rapporteur's second report, A/C.4/728, paras. 51–56.

[303] Articles on the responsibility of international organizations, General Assembly resolution 66/100 of 9 December 2011, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook …2011*, vol. II (Part Two), paras. 87–88.

10. Principle 10
Corporate due diligence

States should take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area of armed conflict or in a post-armed conflict situation. Such measures include those aimed at ensuring that natural resources are purchased or obtained in an environmentally sustainable manner.

(a) Comments and observations

98. A number of comments address draft principles 10 and 11 together. Such general comments are described in this section and are not repeated under draft principle 11.

99. The two draft principles received general support from the Netherlands, Germany, the Nordic Countries, Sierra Leone, Sudan and Ukraine.[304] Slovakia supported draft principle 10.[305] The Netherlands welcomed the "focus on environmental damage external to hostilities", such as damage to vulnerable nature areas resulting from the illegal exploitation of natural resources, pointing out that these draft principles "play an important role in the development of law in this area".[306] The Nordic countries pointed out that the two provisions "may serve as catalysts for legislative measures and good practices".[307] Draft principles 10 and 11 were also welcomed by ICRC, IUCN, ELI and OHCHR.[308] IUCN underlined the importance of corporate due diligence and liability, "as demonstrated by the previous adverse impacts of the exploitation of natural resources during conflicts".[309] Belarus and the Russian Federation questioned the need for the two draft principles,[310] and Israel[311] suggested their deletion.[312]

100. Several comments were made regarding the scope of the two draft principles, first of all concerning the phrase "in an area of armed conflict or in a post-armed conflict situation". The United States pointed out that conduct in an area of armed conflict might not necessarily relate to armed conflict, and suggested aligning the scope of the two draft principles with that of the topic by using the phrase "in relation to armed conflict".[313] OHCHR took the view that the reference to an "area" could lead to "some ambiguity as to the timing and scope of the determination of such area" and suggested using the phrase "in the context of an armed conflict".[314] The joint civil society submission sought clarification as to whether the term "area of armed conflict" refers to "areas where active hostilities are taking place or to areas falling within the territorial scope of [international humanitarian law's] application".[315] Also

[304] Germany, A/CN.4/749, on draft principle 10; Netherlands , *ibid*., general comments and observations; Sierra Leone, A/C.6/74/SR.29, para. 65; Sudan, A/C.6/74/SR.29, para. 61; Sweden (on behalf of the Nordic countries), A/CN.4/749, general comments and observations; Ukraine, A/C.6/74/SR.26, para. 126.

[305] Slovakia, A/C.6/74/SR.28, para. 32.

[306] Netherlands, A/CN.4/749, general comments and observations.

[307] Sweden (on behalf of the Nordic countries), *ibid*., on draft principle 10.

[308] ICRC, *ibid*., on draft principle 10; IUCN, *ibid*.; ELI, *ibid*.; OHCHR, *ibid*.

[309] IUCN, *ibid*., on draft principle 10.

[310] Belarus, A/C.6/74/SR.28, para. 16; Russian Federation, A/C.6/74/SR.31, para. 33.

[311] Israel, A/CN.4/749, on draft principle 10.

[312] The United States also suggested deleting the draft principles or, alternatively, taking into account other relevant non-State actors, in addition to business enterprises, *ibid*., on draft principle 10. For this concern and a suggested way to address it, see under draft principle 9, paras. 92–97 above.

[313] United States, A/CN.4/749, on draft principle 10.

[314] OHCHR, *ibid*., on draft principle 10.

[315] Joint civil society submission (footnote 16 above), p. 13.

finding the phrase “area of armed conflict and [] a post-armed conflict situation” to be unclear, IUCN suggested using instead the formulation adopted in the Organisation for Economic Co-operation and Development (OECD) Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, namely “areas affected by conflict”. This notion could be explained to cover post-conflict situations and areas under occupation.[316]

101. Regarding the temporal scope of draft principles 10 and 11, ELI suggested that their scope be extended to pre-conflict, high-risk scenarios. Including the phrase “in a high-risk situation”, or similar language, in the two draft principles would in the Institute’s view better align them with the overall scope of the draft principles. It would also better reflect the scope of the relevant instruments of reference adopted by the United Nations, OECD and the European Union.[317] Furthermore, Spain sought clarification regarding the applicability of draft principles 10 and 11 in situations of occupation. While it should be understood, Spain pointed out, that draft principles 10 and 11 apply *mutatis mutandis* in situations of occupation, this should be stated explicitly.[318] The joint civil society submission made a proposal to the same effect.[319] Cyprus expressed its understanding that draft principle 11 would apply in situations of occupation.[320]

102. It seems evident to the Special Rapporteur that the Commission intended the scope of the two draft principles to cover armed conflicts, including situations of occupation, as well as post-armed conflict situations. The question is about the wording that would best indicate this scope. The Special Rapporteur recalls that the question was raised in the Drafting Committee “whether the phrases ‘area of armed conflict’ and ‘post-armed conflict situation’ were precise enough for the purposes of the draft principle, since they were not defined nor used elsewhere in the draft principles. In particular, some members raised the concern that such phrases were unclear, as they could relate either to a geographical notion or to a period in time”.[321] In light of the comments above, it seems that the current wording, in particular the reference to “an area of armed conflict” may indeed be unclear and could be replaced by a broader phrase.

103. Regarding the suggestion to extend the scope of draft principles 10 and 11 to high-risk situations, the Special Rapporteur agrees that it would be consistent with the temporal scope of the topic. There are also precedents as well as established language for this purpose. The Guiding Principles on Business and Human Rights use the term “conflict-affected areas” and underline the importance of engaging at the earliest stage possible with business enterprises.[322] The OECD guidance refers to conflict-affected and high-risk areas and points out that “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”.[323] The European Union regulation refers to “conflict-affected and high-risk areas” and defines them as “areas in a state of armed conflict or fragile post-conflict as well as areas witnessing weak

[316] IUCN, A/CN.4/749, on draft principle 10.
[317] ELI, *ibid*., on draft principle 10.
[318] Spain, *ibid*., on draft principle 10.
[319] Joint civil society submission (footnote 16 above), pp. 13–14.
[320] Cyprus, A/CN.4/749, on draft principle 11.
[321] Report of the Chair of the Drafting Committee, Mr. Claudio Grossman Guiloff, 8 July 2019, p. 9.
[322] Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (A/HRC/17/31, annex), principle 7 (Supporting business respect for human rights in conflict-affected areas). The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.
[323] OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 3rd ed. (Paris, 2016), p. 8. Available at http://dx.doi.org/10.1787/9789264252479-en.

or non-existent governance and security, such as failed States, and widespread and systematic violations of international law, including human rights abuses".[324] Reference can furthermore be made to the Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains, which also apply to conflict-affected and high-risk areas.[325] The Special Rapporteur therefore finds merit in the proposed addition.

104. Comments have furthermore been made on the personal scope of the two draft principles. Switzerland and Austria suggested making it clear that draft principles 10 and 11 apply to private military and security companies.[326] Switzerland also suggested that the Commission consider a separate draft principle on private military and security companies. The suggested wording reads as follows: "States and international organizations that use private military and security companies shall ensure that measures are taken to protect the environment, in accordance with their international obligations in relation to armed conflicts".[327] ICRC did not question the applicability of the draft principles to private military and security companies but suggested clarifying in the commentary the relevant obligations under international humanitarian law, and to indicate that such existing obligations are not restricted or impaired by the draft principles. "This is particularly relevant", ICRC pointed out, "taking into account that private military security companies … may be empowered to exercise elements of governmental authority in situations of armed conflict and they may themselves become parties to an armed conflict".[328] Japan, furthermore, sought clarification regarding the relationship between the draft principles and the law of armed conflict.[329]

105. In the Special Rapporteur's view, it is evident that draft principles 10 and 11 apply to private military and security companies, understood as "private business entities that provide military and/or security services, irrespective of how they describe themselves".[330] At the same time, taking into account the special features of such services, also highlighted by ICRC, there would seem to be reason to include in the commentary a specific mention of private military and security companies as well as their relevant obligations.[331]

106. A number of other comments relate to the notion of human health. Germany and Japan sought clarification regarding the concept of human health in the context of environmental protection.[332] Other comments referred to the impact environmental damage has on a wide range of human rights. OHCHR suggested emphasizing the responsibility of business enterprises, when acting in conflict-affected areas, to respect human rights.[333] According to IUCN, the phrase "in relation to human health" appeared to be unnecessarily narrow in view of the development of the right to a healthy environment which has been recognized by most States in the world. IUCN

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[324] Regulation 2017/821 of the European Parliament and of the Council 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*, L 130 (2017), on supply chain due diligence for certain conflict minerals, p. 1, art. 2 (f).

[325] China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters, *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains* (2015). Available at http://mneguidelines.oecd.org/chinese-due-diligence-guidelines-for-responsible-mineral-supply-chains.htm.

[326] Austria, A/C.6/74/SR.27, para. 98; Switzerland, A/CN.4/749, on draft principle 10.

[327] Switzerland, A/CN.4/749, on draft principle 10.

[328] ICRC, *ibid*., on draft principle 10.

[329] Japan, *ibid*., on draft principle 10.

[330] 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), p. 9.

[331] See also the second report of the Special Rapporteur, A/C.4/728, paras. 93–103.

[332] Germany, A/CN.4/749, on draft principle 10; Japan, *ibid*., on draft principle 10.

[333] OHCHR, *ibid*., on draft principle 10.

suggested replacing this phrase by a general reference to human rights.[334] Similarly, the joint civil society submission suggested that draft principle 10 refer to the relationship between environmental protection and all human rights.[335] The Special Rapporteur recalls that, according to the commentary, "[t]he phrase 'including in relation to human health' underlines the close link between environmental degradation and human health as affirmed by international environmental instruments, regional treaties and case law, the work of the Committee on Economic, Social and Cultural Rights, as well as of the Special Rapporteur on human rights and the environment".[336] Reference can furthermore be made to OECD Guidelines on multinational enterprises, which highlight "the need to protect the environment, public health and safety".[337] While the connection between the environment and human health is thus more than evident, the Special Rapporteur takes the view that recent developments, in particular the broad recognition of the right to a safe, clean, healthy and sustainable environment both at the national[338] and international[339] levels give additional support to the draft principle, as does the broad agreement on the need for business enterprises to respect human rights, including in conflict-affected and high-risk areas.

107. OHCHR furthermore considered that the phrase "operating in or from their territories" should be complemented with a mention of jurisdiction in order to take into account that, under international human rights law, States have a positive obligation to ensure the human rights of persons in their territory or under their jurisdiction.[340] Limiting the application of draft articles 10 and 11 to entities operating in or from the territory of a State would, according to the OHCHR, risk "excluding other relevant connections between company and States that may implicate a State's obligations under international human rights law".[341] The Special Rapporteur recalls in this regard that the term "in or from their territories" is also used in the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.[342] It appears that the phrase has been interpreted in the OECD practice to cover both territory and jurisdiction.[343] It would therefore seem possible to retain the term as such and to explain in the commentary that it is not intended to exclude the situations to which OHCHR refers.

108. Finally, a comment regarding the terminology also applies to both draft principle 10 and draft principle 11. The Nordic countries suggested that the term "business enterprises", in line with the United Nations Guiding Principles on Business and Human Rights, be used in the draft principles instead of the current term "corporations and other business enterprises".[344] A similar suggestion is included in the joint civil society submission.[345] The Special Rapporteur does not see a substantive difference

[334] IUCN, *ibid*., on draft principle 10.
[335] Joint civil society submission (footnote 16 above), p. 13.
[336] Draft principles … 2019, commentary to draft principle 10, para. (10).
[337] OECD, *OECD Guidelines for Multinational Enterprises* (2011), chap. VI (Environment), pp. 42–43. Available at www.oecd.org/corporate/mne.
[338] D.R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver, UBC Press, 2012), pp. 46–63.
[339] See document A/HRC/48/L.23/Rev.1.
[340] OHCHR, A/CN.4/749, on draft principle 10.
[341] OHCHR, *ibid*.
[342] OECD, *Due Diligence Guidance …*, p. 9.
[343] 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. 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.
[344] Sweden (on behalf of the Nordic countries), A/CN.4/749, on draft principle 10.
[345] Joint civil society submission (footnote 16 above), p. 13.

between the two formulations, but acknowledges that "business enterprises" is simpler and has the advantage of being used in the United Nations Guiding Principles. Changing the term would obviously also affect the titles of the two draft principles.

109. Further comments addressing the two draft principles together concern their normative nature. A number of comments only took note of the non-binding nature of the draft principles, as indicated in the text of the draft principles and the commentaries.[346] In other comments, the positive contribution that these provisions could make to the progressive development of international law was emphasized. The Nordic countries pointed out that the two draft principles belonged to an area of law under rapid development and could serve "as catalysts for legislative measures and good practices".[347] The Netherlands believed that the draft principles would play an important role in the development of law in this area.[348] Romania noted that the draft principles "reflected and consolidated a growing set of norms that could be used to tackle environment-related corporate wrongdoing in the context of armed conflict".[349] ELI stated that the two draft principles "provide important normative guidance as international law and State practice continue to evolve in this space".[350] IUCN, referring specifically to draft principle 10, pointed to "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".[351] France, however, expressed the view that the two draft principles did not reflect even an emerging custom.[352] The Special Rapporteur is of the view that the commentary gives an adequate account of the relevant treaty obligations, as well as State practice underpinning the two draft principles. Reference can furthermore be made to the customary prohibition of pillage.[353] Further clarifications may nevertheless be added to the commentary to address the concern of France.

110. A few comments have been made specifically regarding draft principle 10. The United Kingdom questioned the need for States to take "legislative and other measures" and proposed to refer to "appropriate legislative or other measures".[354] A similar comment was made by Malaysia.[355] The Special Rapporteur recalls that the current formulation was adopted taking into account that "it is usual that international instruments relying on implementation at the national level refer explicitly to legislative measures, and seeking to ensure corporate due diligence would usually require legislative action".[356]

111. The second sentence of draft principle 10 deals with "supply chain due diligence" stating that "such measures include those aimed at ensuring that natural resources are purchased or obtained in an environmentally sustainable manner". OHCHR mentioned in this context general comment No. 24 (2017) of the Committee on Economic, Social and Cultural Rights which refers to "due diligence requirements to prevent abuses of Covenant rights in a business entity's supply chain and by

[346] Canada, A/CN.4/749, on draft principle 10; Germany, *ibid.*; Israel, *ibid.*
[347] Sweden (on behalf of the Nordic countries), *ibid.*, on draft principle 10.
[348] Netherlands, *ibid.*, general comments and observations.
[349] Romania, A/C.6/74/SR.28, paras. 3–4.
[350] ELI, A/CN.4/749, general comments and observations.
[351] IUCN, *ibid.*, on draft principle 10.
[352] France, *ibid.*, on draft principle 10.
[353] Draft principles … 2019, see draft principle 18 and commentary.
[354] United Kingdom, A/CN.4/749, on draft principle 10.
[355] Malaysia, A/C.6/74/SR.30, para. 74.
[356] Draft principles … 2019, commentary to draft principle 10, para. (7).

subcontractors, suppliers, franchisees, or other business partners".[357] The joint civil society submission suggested that a mention of "use" be added to the draft principle to "explicitly include further activities relating to natural resources that can lead to negative environmental impacts, such as processing, trading, refining, etc.".[358]

112. Colombia sought clarification "as to what may or may not be required of a private party operating in an armed conflict zone".[359] Germany made a similar comment seeking clarification of "the foundation and boundaries of potential further obligations on business enterprises".[360] The joint civil society submission suggested mentioning, as constituent elements of the notion of due diligence, "the obligation of business enterprises to respect and take into account applicable rules of [international humanitarian law], international human rights law and international environmental law when they operate in an area of armed conflict, in situations of occupation, and in a post-armed conflict situations".[361] IAEA furthermore pointed out that adoption of relevant international safety standards, such as the IAEA Safety Standards, could assist affected States with regulating the activities of relevant corporations operating on their territory, especially where there are no legislative and regulatory framework for the protection of the environment from hazardous materials such as radioactive material.[362]

113. The Special Rapporteur notes that many of these questions have been addressed in the commentary. The Commission may nevertheless wish to add further clarifications taking into account the comments received. The Special Rapporteur will make proposals to this effect in due course.

(b) Recommendation of the Special Rapporteur

114. On the basis of the comments and considerations above, the Special Rapporteur suggests making to the draft principle and its title a few changes that align its scope and terminology with existing instruments, without changing the essential content. In addition the Special Rapporteur proposes to extend the scope of the draft principle to high-risk situations. As amended, draft principle 10 would read as follows:

Principle 10
Due diligence of business enterprises

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

11. Principle 11
Corporate liability

States should take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories can be held liable for harm caused by them to the environment, including in relation to human health, in an area of armed conflict or in a post-armed conflict situation. Such

[357] OHCHR, A/CN.4/749, on draft principle 10; see also 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. 16.
[358] Joint civil society submission (footnote 16 above), p. 13.
[359] Colombia, A/CN.4/749, on draft principle 10.
[360] Germany, *ibid*., on draft principle 10.
[361] Joint civil society submission (footnote 16 above), p. 13.
[362] IAEA, A/CN.4/749, on draft principle 10.

measures should, as appropriate, include those aimed at ensuring that a corporation or other 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.

(a) Comments and observations

115. As pointed out above, the comments and observations that are common to draft principles 10 and 11, which have been reviewed in connection to draft principle 10, are not repeated here. The changes suggested to draft principle 10 regarding the notions of "corporations and other business enterprises", and "in an area of armed conflict or in a post-armed conflict situation" also apply to draft principle 11.

116. In addition to the expressions of general support for the two draft principles referred to above, draft principle 11 was commended by a number of States.[363] Romania noted that these provisions "had the potential, if consistently applied, to secure environmental justice in times of conflict".[364] Slovenia welcomed draft principle 11 pointing out that environmental degradation has direct and indirect effects on human health, and that actions harming the environment must therefore be properly sanctioned at the national level.[365] Malaysia highlighted the relevance of the draft principle "particularly when a State's judicial system was virtually non-existent or when the Government itself was an accomplice to the alleged violations".[366]

117. The material and personal scope of draft principle 11 was commented from different angles. As far as the first sentence of the draft principle is concerned, OHCHR suggested adding a reference to contribution to environmental harm, pointing out that the Guiding Principles on Business and Human Rights consistently refer to adverse human rights impacts "caused *or* contributed to" by business enterprises. Similarly, in its general comment No. 24, the Committee on Economic, Social and Cultural Rights refers to negative impacts on the enjoyment of Covenant rights "caused or contributed to" by decisions and operations of business entities.[367] The Joint Civil Society submission contains a suggestion to the same effect.[368] IUCN furthermore noted that direct causation of harm in the affected areas was possible but "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". IUCN suggested replacing the reference to "operating" with the words "when operating or acting in or sourcing from".[369] UNEP suggested that the draft principle be extended to cover "the oftentimes occurrence of corporations aiding and abetting parties [to a conflict] in causing environmental damage or looting natural resources, particularly in internal armed conflicts to support civil war parties".[370] The Special Rapporteur wishes to point out that the United Nations Guiding Principles – which require that business

[363] Algeria (A/C.6/74/SR.31, para. 51); Azerbaijan (A/C.6/74/SR.31, para. 25); Malaysia (A/C.6/74/SR.30, para. 75); Romania (A/C.6/74/SR.28, paras. 3–4); Sierra Leone (A/C.6/74/SR.29, para. 67); Slovenia (A/C.6/74/SR.29, para. 142); Viet Nam (A/C.6/74/SR.30, para. 36). At the same time, Slovakia considered that the issue of corporate liability fell beyond the scope of the topic (see Slovakia (A/C.6/74/SR.28, para. 32)).
[364] Romania, A/C.6/74/SR.28, para. 3.
[365] Slovenia, A/C.6/74/SR.29, para. 142.
[366] Malaysia, A/C.6/74/SR.30, para. 75.
[367] OHCHR, A/CN.4/749, on draft principle 10.
[368] Joint civil society submission (footnote 16 above), p. 14.
[369] IUCN, A/CN.4/749, on draft principle 10.
[370] UNEP, *ibid.*, on draft principle 11.

enterprises avoid causing or contributing to human rights violations –[371] and draft principle 11 – which deals with the liability of such enterprises for environmental harm they or, under certain circumstances, their subsidiaries have caused – serve different purposes. Furthermore, draft principle 10, which requires that natural resources are purchased or obtained in an environmentally sustainable manner, extends the due diligence to cover the supply chain.

118. Regarding the second sentence of the draft principle, Cyprus took the view that the position of an entity in the organizational structure of a company was less important than the question whether the entity acted under the direction or control of the company. Cyprus therefore suggested adding the words "and any other affiliate entity" after the word "subsidiary" and to replace the concept of "*de facto* control" by a reference to "direction or control" in paragraph 2 of the draft principle.[372] The joint civil society submission suggested referring, instead of to "a subsidiary", to "any entity which it controls or is able to control".[373] OHCHR, commenting on the concept of *de facto* control, referred to such other routes to liability as "management or joint management of the relevant harmful activity", "provision of defective advice", "promulgating defective group-wide safety/environmental policies implemented by the subsidiary", and "taking active steps to ensure [the] implementation [of such policies] by the subsidiary".[374] UNEP suggested broadening the scope of the draft principle to refer "not only the relevant *de facto* test for subsidiaries of corporations, but also the oftentimes occurrence of corporations aiding and abetting parties in causing environmental damage or looting natural resources, particularly in internal armed conflicts to support civil war parties".[375]

119. The Special Rapporteur points out that draft principle 11, in line with the whole set of draft principles, has been cast in general terms. Regarding the question of control, the Special Rapporteur recalls that the general notion of *de facto* control was intended to be interpreted in accordance with the requirements of each national jurisdiction.[376] This is a relevant consideration taking into account that companies or other entities forming a multinational enterprise may coordinate their operations in different ways allowing for different degrees of autonomy.[377] Similarly, the general "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 corporation or other business enterprise, or the law of the State in which the harm has been caused".[378]

120. Regarding the third sentence, Germany suggested that the commentary further elaborate on the concept of "access to effective remedies" in the United Nations Guiding Principles on Business and Human Rights as well as relevant liability provisions in the international instruments referred to in the commentary on draft principle 10.[379] OHCHR also highlighted different aspects of the concept of "access to effective remedies".[380] Regarding situations, in which States are able to hold corporations and enterprises liable, as envisaged in draft principle 11, IUCN

[371] Guiding Principles on Business and Human Rights, principle 13 ("The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.").
[372] Cyprus, A/CN.4/749, on draft principle 11.
[373] Joint civil society submission (footnote 16 above), p. 14.
[374] OHCHR, A/CN.4/749, on draft principle 10.
[375] UNEP, *ibid.*, on draft principle 11.
[376] Statement of the Chair of the Drafting Committee Mr. Claudio Grossman Guiloff, 8 July 2019, p. 11.
[377] Draft principles … 2019, draft principle 11, commentary, para. (4).
[378] *Ibid.*, para. (2).
[379] Germany, A/CN.4/749, on draft principle 10.
[380] OHCHR, *ibid.*, on draft principle 10.

suggested encouraging States to allow for environmental damages to be recovered and awarded to the affected States.[381] ICRC recommended clarifying that States have obligations under international humanitarian law in relation to the activities of corporate and other business enterprises, in particular private military and security companies.[382] The Commission may wish to take these some of these suggestions into account when revising the commentary to draft principle 11. The Special Rapporteur will make proposals to this effect in due course.

121. Further comments concerned the notion of extraterritorial jurisdiction. The United States took the view that the draft principle calls upon States "to exercise extraterritorial jurisdiction over their corporations in all cases and without any qualification, such as whether the territorial State is already regulating the activity in question".[383] Israel, too, was concerned about the "extraterritorial elements" that might be implied by draft principles 10 and 11.[384] Malaysia recalled that "jurisdiction was a sensitive, complicated issue in relation to which States needed to exercise caution".[385] The Report of the Advisory Committee on Public International Law attached to the written comments of the Netherlands referred to a "broader legal development relating to the exercise of jurisdiction by strong States in connection with the activities of multinational enterprises in weaker States". Even though objections related to the sovereignty of the latter group of States can thus be raised, "such objections are far less persuasive in the context of situations of armed conflict, where national institutions often function poorly, if at all. Moreover, reconstruction is a long-term process."[386] The Special Rapporteur recalls that draft principle 11 recommends that States take measures aimed at ensuring that business enterprises "can be held liable", not that they "must be held liable" in all cases. Reference can also be made to the notion "as appropriate" in both the second and third sentences of the draft principle. The commentary furthermore makes it clear that the provision is intended to address situations in which the host State may not be in the position to effectively enforce its legislation.[387]

(b) Recommendation of the Special Rapporteur

122. In light of the above, the Special Rapporteur suggests aligning the title and the language of the first sentence of the draft principle with that of draft principle 10. No other changes to the draft principle are suggested. In line with the suggestions concerning draft principle 10, draft principle 11 would read as follows:

Principle 11
Liability of business enterprises

States should take appropriate legislative and other measures aimed at ensuring that business enterprises operating in or from their territories can be held liable for harm caused by them to the environment, including in relation to human health, in a high-risk area or an area affected by an armed conflict. Such measures should, as appropriate, include those aimed at ensuring that a corporation or other 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

[381] IUCN, *ibid*., on draft principle 10.
[382] ICRC, *ibid*., on draft principle 10.
[383] United States, *ibid*., on draft principle 10.
[384] Israel, *ibid*., on draft principle 10.
[385] Malaysia, A/C.6/74/SR.30, para. 75.
[386] Report of the Advisory Committee on Issues of Public International Law, p. 19 (hereinafter "Report of the Advisory Committee on Public International Law"), p. 20. Available at https://legal.un.org/ilc/sessions/73/pdfs/english/poe_netherlands.pdf. For the report, see also Netherlands, A/CN.4/749, general comments and observations.
[387] Draft principles … 2019, commentary to draft principle 11, para. (6).

adequate and effective procedures and remedies, in particular for the victims of such harm.

Part Three [Two]: Principles applicable during armed conflict

12. Use of terms

(a) Comments and observations

123. In 2019, the Commission indicated that it would decide at the time of the second reading whether to use the term "natural environment" or "environment" in those provisions of Part Three that draw on Additional Protocol I to the Geneva Conventions.[388] Several States and international organizations expressed their view on this question.

124. Spain took the view that the term "environment" better reflected "developments in international law in this area since the adoption of Additional Protocol I in 1977" and would be "consistent with the broad approach that the Commission has decided to take to the topic of protection of the environment in relation to armed conflicts".[389] The Nordic countries similarly referred to "the broad temporal scope of the draft principles", which would make it sensible to "to use consistently the broader term 'environment' throughout the draft principles".[390] Belgium wondered "whether the broader term 'environment' might not be preferable to the narrower term 'natural environment'", given that "[o]pen landscapes with, for example, agricultural land (a semi-natural environment) often play an important role for adjacent environmental protection zones (or nature reserves)".[391] The Report of the Advisory Committee on Public International Law attached to the written comments of the Netherlands referred to "changes in our scientific understanding of the environment" and recommended using the term "environment" throughout the draft principles.[392]

125. Morocco pointed out that "[t]here was no legal definition of the environment in international law and the … qualifier 'natural' did not appear to serve any practical purpose. In all instruments where an attempt had been made to define the environment, the natural elements of the environment had been included by default. From a terminological standpoint, it would have been preferable to use of the term 'environment' throughout the text".[393] Malaysia saw the debate "on the question of whether there should be a distinction between 'environment' and 'natural environment' [as] self-defeating. Environmental issues were not limited to the natural environment; they included human rights, sustainability and cultural heritage. Restricting the application of the draft principles to the natural environment would therefore limit their full potential."[394] Italy and Sudan as well favoured using the broader term "the environment" throughout the text.[395] Algeria and Lebanon expressed a general preference for harmonizing the terminology.[396]

126. IUCN pointed out that "the concept of natural environment is outdated" and suggested that the term "the natural environment" be replaced by the term "the environment".[397] Using the term "the natural environment" throughout Part Three would furthermore, in the view of IUCN, be inconsistent as all provisions did not

[388] *Ibid.*, commentary to the Introduction, para. (5).
[389] Spain, A/CN.4/749, general comments and observations.
[390] Sweden (on behalf of the Nordic countries), *ibid.*, general comments and observations.
[391] Belgium, *ibid.*, general comments and observations.
[392] Report of the Advisory Committee on Public International Law, p. 16.
[393] Morocco, A/C.6/74/SR.30, para. 4.
[394] Malaysia, A/C.6/71/SR.29, para. 29.
[395] Italy, A/C.6/70/SR.22, para. 118; Sudan, A/C.6/71/SR.28, para. 2.
[396] Algeria, A/C.6/74/SR.31, para. 53; Lebanon, A/C.6/74/SR.30, para. 104.
[397] IUCN, A/CN.4/749, general comments and observations.

directly draw on the language of Additional Protocol I to the Geneva Conventions.[398] The joint civil society submission referred to developments in international environmental law since the adoption of Additional Protocol I to the Geneva Conventions and contained a similar suggestion.[399]

127. At the same time, France preferred that the draft principles drawing on Additional Protocol I to the Geneva Conventions would contain only the term "natural environment".[400] The United Kingdom expressed a similar view holding that "introducing a new term … could lead to uncertainty and even the inclusion of elements that were not intended to come within the meaning of 'natural environment'".[401]

(b) Recommendation of the Special Rapporteur

128. The Special Rapporteur recalls that the question of the choice between the terms "the environment" and "the natural environment" was addressed in her second report, in which she recommended to use the term "the environment" consistently in all draft principles.[402] In light of the comments received, the Special Rapporteur does not see a reason to change this recommendation.

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

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.

(a) Comments and observations

129. Draft principle 12 received general support from Germany, the Nordic countries, Mexico, Peru, Spain and Switzerland.[403] Germany pointed out that "[i]t is indeed necessary to confirm the existence of rules on the protection of the environment in times of armed conflict that transcend explicit treaty provisions".[404] ICRC recalled that the same formulation was included in the ICRC Guidelines of 2020 as well as in the 1994 ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict.[405] ICRC "strongly encourage[d] the Commission to retain this formulation".[406] IUCN[407] also welcomed the draft principle.

130. No change was suggested to the text of the draft principle but two States commented on its title. While supporting the draft principle as such, the Netherlands submitted that "it should not be given the title 'Martens Clause'".[408] Canada, too,

[398] IUCN, *ibid*., on draft principle 13.
[399] Joint civil society submission (footnote 16 above), pp. 3–4.
[400] France, A/CN.4/749, general comments and observations.
[401] United Kingdom, *ibid*., general comments and observations.
[402] See second report of the Special Rapporteur, A/CN.4/728, paras. 194–197.
[403] Germany, A/CN.4/749, on draft principle 12; Mexico, A/C.6/74/SR.29, para. 112; Peru, A/C.6/74/SR.31, para. 3; Spain, A/CN.4/749, on draft principle 12; Sweden (on behalf of the Nordic countries), *ibid*.; Switzerland, *ibid*.
[404] Germany, A/CN.4/749, on draft principle 12.
[405] ICRC, *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict*, contained in A/49/323, annex.
[406] ICRC, A/CN.4/749, on draft principle 12.
[407] IUCN, *ibid*., on draft principle 12.
[408] Netherlands, *ibid*., on draft principle 12.

"would remove reference to the Martens Clause from this draft principle".[409] The Special Rapporteur recalls that the current title of the draft principle, which specifically refers to the protection of the environment in relation to armed conflict, was formulated in the Drafting Committee "in order to bring clarity to the provision, and in light of the scope of the present topic".[410] In her view, the title quite accurately indicates the specific focus of the draft principle. It should also be pointed out that an environmental Martens Clause, with the same formulation and a similar title as in draft principle 12, is included in the ICRC Guidelines of 2020.[411] A reference can furthermore be made to the strong recommendation of ICRC to retain the draft principle in its current formulation cited above.

131. Most of the comments and observations related to draft principle 12 addressed the commentary. The United Kingdom suggested revising the commentary "to reflect the international humanitarian law-specific nature of the principle of humanity". While not disagreeing "that the environment is a concern of human beings", the United Kingdom sought clarification regarding how this concern related to "the core interpretation of the principle as pertaining to the prohibition of means and methods of war which are not necessary for the attainment of a definite military advantage, and the causing of unnecessary suffering".[412] Canada made a similar comment.[413] The United Kingdom furthermore found the reference to international human rights law as "overly expansive" and as "not recogniz[ing] the *lex specialis* nature of international humanitarian law".[414] Israel took the same view.[415]

132. Germany expressed a different concern regarding the term "principles of humanity", namely that "the concepts of humanity and nature might become blurred". Germany suggested clarifying in the commentary "that the 'principle[] of humanity' is understood as encompassing recognition of the importance of protecting the natural environment only inasmuch as it relates to the anthropocentric view, i.e. to the intrinsic link between the survival of civilians and combatants and the state of the environment in which they live", while the "dictates of public conscience" could be understood to refer to the need to protect the natural environment in and of itself.[416]

133. Also commenting on the phrase "principles of humanity", the United States pointed out that "the Martens Clause does not provide for 'principles of humanity' to operate directly as international law". The United States made the same comment also regarding the concept of the "dictates of the public conscience". Rather, "the application of the Martens Clause to the environment is warranted because principles of international law may provide protection to the natural environment and may also authorize actions that could affect the natural environment".[417] France and Israel expressed a similar concern that the commentary would present the Martens Clause as an autonomous source of law.[418]

134. The Special Rapporteur agrees with the understanding of the principle of humanity put forward to the United Kingdom, as one of the two cardinal principles of international humanitarian law. The reference to "principles of humanity" in the

[409] Canada, *ibid*., on draft principle 12.
[410] Statement of the Chair of the Drafting Committee, Mr. Claudio Grossman Guiloff, 8 July 2019, p. 14.
[411] ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflicts* (see footnote 17 above), Rule 16 – The Martens clause with respect to the protection of the natural environment.
[412] United Kingdom, A/CN.4/749, on draft principle 12.
[413] Canada, *ibid*., on draft principle 12.
[414] United Kingdom, *ibid*., on draft principle 12.
[415] Israel, *ibid*., on draft principle 12.
[416] Germany, *ibid*., on draft principle 12.
[417] United States, *ibid*., on draft principle 12.
[418] France, *ibid*., on draft principle 12; Israel, *ibid*., on draft principle 12.

Martens Clause is nevertheless 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".[419] In practice, the two concepts are often used interchangeably.[420] 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 Yugoslavia[421] and the Commission on Human Rights.[422] The interpretation given by Germany to "principles of humanity" and "dictates of public conscience" as elements of the Martens Clause does not seem different from how their role has been explained in the commentary. Regarding the comments reflected in paragraph 133, it is recalled that it was not the Commission's intention to take a position on the various interpretations regarding the legal consequences of the Martens Clause.[423] In the Special Rapporteur's view the commentary is consistent with this intention. Further clarifications may nevertheless be included in the commentary.

135. The Czech Republic sought clarification regarding the application of the Martens Clause to the protection of the environment as progressive development of international law.[424] IUCN noted that it was "clear from developments in human rights and environmental law that the 'dictates of public conscience' must today include the protection of the environment". At the same time, IUCN suggested addressing in the commentary the rights of future generations.[425]

(b) Recommendation of the Special Rapporteur

136. No change is recommended to draft principle but the Commission may wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

14. Principle 13 [II-1, 9]
General protection of the natural environment during armed conflict

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

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

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

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[419] *Corfu Channel case, Judgment of April 9th, 1949, I.C.J. Reports 1949*, p. 4, at 22. See also ICRC, commentary to Geneva Convention I (2016), art. 63, para. 3291.

[420] 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 University Press 2012), pp. 4 and 6. The link of these concepts to human rights has been recognized both in practice and in doctrine. See, for instance, International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Zejnil 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.

[421] *Celebici case* (see previous footnote), para. 149.

[422] Commission on Human Rights, Promotion and protection of human rights: fundamental standards of humanity, Report of the Secretary-General (E/CN.4/2006/87).

[423] Draft principles … 2019, commentary to draft principle 12, para. (3).

[424] Czech Republic, A/CN.4/749, on draft principle 12.

[425] IUCN, *ibid*., on draft principle 12.

(a) Comments and observations

(i) General comments

137. As the opening provision of Part Three, draft principle 13 has attracted a great number of comments and observations, which touch both on its drafting and on more general issues. One group of general comments concern the need to include in a more comprehensive manner relevant rules of the law of armed conflict in the draft principle or elsewhere in Part Three. Further comments focus on the complementarity between the law of armed conflict and of other rules of international law, in particular international environmental law and international human rights law. Comments were also made regarding the distinction between an anthropocentric and an intrinsic approach to the protection of the environment from war-related harm.

138. In the first group of comments, Switzerland suggested adding an explicit reference "to the customary prohibition to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment".[426] ICRC, too, "strongly recommend[ed]" the same addition, "based on articles 35, paragraph 3, and 55, paragraph 1, of Additional Protocol I and established as a rule of customary international law".[427] Other relevant provisions of the law of armed conflict that were mentioned in this context pertain to the protection of objects indispensable to the survival of the civilian population,[428] to the protection of works and installations containing dangerous forces[429] as well as to the prohibition of the destruction of property.[430] IUCN suggested that an additional draft principle could make specific reference to all these rules, which are generally seen as customary by nature.[431] Switzerland suggested that the rule prohibiting the destruction of property, except in cases of imperative necessity of war, would be included in the set of draft principles. Switzerland recalled in this regard that "[t]his rule prohibits any destruction of an adversary's property, including the natural environment, whether the damage is extensive, long-lasting and severe or results from an 'attack'".[432] UNEP, referring to the ICRC customary humanitarian law study, made a comment to the same effect. UNEP also suggested that the rule, according to which "launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited" be reflected in the draft principles.[433] The Czech Republic expressed a general concern about the confirmation of "some of [the] existing rules on a selective basis" and raised the question about the criteria for citing certain rules and not others, mentioning specifically "the limited choice of the methods and means of warfare causing damage to the natural environment".[434]

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[426] Switzerland, *ibid*., on draft principle 13.
[427] ICRC, *ibid*., on draft principle 13.
[428] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977 (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3 (Additional Protocol I), art. 54; Additional Protocol II, art. 14.
[429] Art. 56 of Additional Protocol I and art. 15 of Additional Protocol II.
[430] Hague Regulations, art. 23 (g); Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 973 (Convention IV), p. 287, art. 147.
[431] IUCN, A/CN.4/749, on draft principle 13.
[432] Switzerland, *ibid*., on draft principle 13.
[433] UNEP, *ibid*., on draft principle 13. Also, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. I, *Rules* (Cambridge, Cambridge University Press, 2005).
[434] Czech Republic, *ibid*., on draft principle 13.

139. In the second group, several comments of general nature concerned the complementarity of other rules of international law with the law of armed conflict. The Nordic countries welcomed paragraph (5) of the commentary, which refers to the law of armed conflict as *lex specialis*, while also noting that other rules of international law, such as international environmental law and international human rights law, retained their relevance in armed conflicts.[435] Israel suggested deleting the reference to international environmental law and human rights law.[436] In more specific comments, the Commission was invited to clarify the interplay between international environmental law and the law of armed conflict. According to Spain, it would be desirable to have more integration between the international environmental law and the law of armed conflict as the two areas of law upon which the text of the draft principles draws.[437] Switzerland, too, invited the Commission to explain "the relationship between the law of armed conflict and international environmental law".[438] UNEP suggested that draft principle 13 and the commentary clarify the continued application of obligations under multilateral environmental agreements.[439] Italy made a similar comment regarding the applicability of international environmental agreements.[440] Austria expressed the view that "the relationship between the law of armed conflict and environmental law [was] not made sufficiently clear" in draft principles 13, 14 and 15 or in the commentaries.[441] Greece, too, sought for "more information … on how and to what extent the general principles of environmental law operated in wartime, and how they interacted with *jus in bello* rules.[442] OHCHR suggested that the Commentaries clarify that not all uses of force occurring during a state of armed conflict will necessarily be regulated by the law on the conduct of hostilities. In particular, "[w]here there is no nexus to the armed conflict, the use of force affecting the rights of individuals is entirely regulated by international human rights law".[443]

140. In the third group, comments were made concerning the general approach to the protection of the environment in relation to armed conflicts. Israel suggested addressing in the commentary the anthropocentric tradition of the law of armed conflict "in the sense that under customary international law, an element of the natural environment constitutes a civilian object only when it is used or relied upon by civilians for their health or survival". As a related point, Israel suggested referring to the natural environment not as a single concept but, rather "as a collection of individual elements", some of which may constitute civilian objects, while others may be military objectives and still others neither of the two.[444] The United States, too, suggested clarifying in the commentary "that the natural environment is not always a 'civilian object' but receives the protection afforded civilian objects insofar as it constitutes a civilian object".[445]

141. Spain underlined "the importance and general nature of [the] affirmation of the inherently civilian nature of the natural environment" in the commentary and suggested incorporating mention of it in the text of the draft principles.[446] A similar view, without a proposal for textual changes, was expressed by Germany. More

[435] Sweden (on behalf of the Nordic countries), *ibid.*, on draft principle 13.
[436] Israel, *ibid.*, on draft principle 13.
[437] Spain, *ibid.*, general comments and observations.
[438] Switzerland, *ibid.*, on draft principle 13.
[439] UNEP, *ibid.*, on draft principle 13.
[440] Italy, A/C.6/74/SR.28, para. 24.
[441] Austria, statement of 31 October 2019, available at http://statements.unmeetings.org/media2/23328809/-e-austria-statement.pdf. See also Austria, A/C.6/74/SR.27, para. 98.
[442] Greece, A/C.6/74/SR.28, para. 50.
[443] OHCHR, A/CN.4/749, on draft principle 11.
[444] Israel, *ibid.*, general comments and observations.
[445] United States, *ibid.*, on draft principle 13.
[446] Spain, *ibid.*, on draft principle 13.

specifically, Germany "appreciate[d] that draft principles 13 and 16 imply an intrinsic value of the natural environment in and of itself, recognizing that attacks against the natural environment are prohibited unless it has become a military objective, as are reprisals against the natural environment".[447] Switzerland, as well, expressed the view that "the natural environment, consisting of its various parts, enjoys the general protection accorded to civilian objects under international humanitarian law".[448] The United Kingdom pointed out that the protection of civilian objects under Additional Protocol I applies to all objects, which are not military objects.[449] The Nordic countries, furthermore, were "content to note that the draft principles recognize a strong link between the protection of civilians and the protection of the environment. This connection is essential in understanding how international humanitarian law protects the environment".[450] Indonesia, underlining the importance of the draft principles in Part Three, pointed out that parties to an armed conflict "had an obligation to make a prudent distinction between civilian and military objectives, in order to minimize the impact of such conflict on the environment".[451]

142. The Special Rapporteur does in no way question the relevance for environmental protection of a wide range of provisions of the law of armed conflict currently not reflected in the draft principles. At the same time, she is not convinced that it would be necessary, or feasible at the stage of second reading, to add much new substance to Part Three. It should be recalled that the draft principles, also in Part Three, are of a general nature. They explicitly refer to certain rules and principles of the law of armed conflict "as way of example and should not be perceived as representing an exhaustive list".[452] A more comprehensive compilation of the rules of the law of armed conflict providing protection to the environment can be found in the recently updated ICRC Guidelines, which contain 32 rules with commentaries.[453] The ICRC Guidelines and the current set of draft principles can be seen as complementary to each other, much due to their different focus and scope.[454]

143. The Special Rapporteur nevertheless believes that the inclusion of a provision reflecting article 35, paragraph 3, of Additional Protocol I, on the prohibition of methods or means of warfare intended or expected to cause widespread, long-term and severe damage to the natural environment, would be warranted. As the only other treaty-based rule of the law of armed conflict providing direct protection to the environment, this provision is closely linked to paragraph 2 of draft principle 13. Its inclusion was also "strongly recommended" by ICRC. The provision has specific value as an absolute limit to the environmental harm caused in the conduct of hostilities.

144. Regarding the other provisions mentioned above, the Special Rapporteur suggests making reference to them in a general commentary that would form an introduction to Part Three of the draft principles. Such an introduction could clarify that there are other provisions of the law of armed conflict providing general or

[447] Germany, *ibid*., on draft principles 13.
[448] Switzerland, *ibid*., on draft principle 13.
[449] United Kingdom, *ibid*., on draft principle 5.
[450] Sweden (on behalf of the Nordic countries), *ibid.*, general comments and observations.
[451] Indonesia A/C.6/74/SR.31, para. 26.
[452] Statement of the Chair of the Drafting Committee, Mr Mathias Forteau, 30 July 2015, p. 9, commenting on draft principle 14. See also draft principles … 2019, commentary to draft principle 14, para. (3): ("However, this reference should not be interpreted as indicating a closed list, as all other rules under the law of armed conflict which relate to the protection of the environment in relation to armed conflict remain applicable and cannot be disregarded.") While these comments were made in relation to draft principle 14, they hold true for the whole of Part Three.
[453] ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict* (see footnote 17 above).
[454] *Ibid*., see e.g., paras. 13, 22 and 23.

indirect protection to the environment. The introduction could also include some general clarifications regarding the applicability during an armed conflict of other rules of international law, in particular international environmental law and international human rights law, as requested in a number of comments. Such a general commentary, which would correspond to the existing introduction to Part Four, could furthermore add balance to the structure of the set of draft principles. The introduction could further include clarifications regarding the applicability of the draft principles in Part Three to situations of occupation. Such an introduction could address a number of concerns expressed in the comments and observations received.

145. Regarding the comments referred to in paragraphs 140 and 141, the Special Rapporteur has no difficulty in acknowledging that the anthropocentric approach is inherent in the law of armed conflict, even though steps have been taken towards the protection of the environment in and of itself. At the same time, with the increased knowledge about the environmental effects of armed conflicts, the interconnectedness of the protection of the civilians and the protection of the environment has been widely recognized.[455] The view of the natural environment as a civilian object enjoys general support[456] and has been endorsed in the Commission's work on this topic from the beginning.[457]

146. Finally, in accordance with the section on the use of terms above, the terminology used in draft principle 13 is aligned with the terminology used throughout the set of draft principles.

(ii) Paragraph 1

147. Paragraph 1 of the draft principle was commented by the United States and Israel. The United States suggested replacing the phrase "shall be respected and protected" by the formulation "shall receive respect and protection". The suggested change would highlight "a distinction between protections received by the natural environment and existing humanitarian law protections afforded to persons".[458] Israel suggested a similar formulation, and commented also on the general reference to "the natural environment", and suggested replacing it with a reference to "the elements of the natural environment".[459]

148. ESCAP furthermore suggested that an additional provision on the respect for wildlife be included in draft principle 13. Such a provision "should explicitly embrace the protection of wildlife and minimize any animal casualties during armed conflict". ESCAP pointed out that animal life was important as such and also referred to "the role it plays within an ecosystem as an integral part of the environment".[460]

149. The Special Rapporteur recalls that the current wording was chosen, inter alia, to reflect the language used in the Legality of the Threat or Use of Nuclear Weapons advisory opinion, in which the International Court of Justice notes that the environment should be respected and protected.[461] Moreover, it was noted that the concepts of "respect" and "protect" are widely used in the law of armed conflict as

[455] United Nations Environmental Assembly resolutions 2/15 and 3/1 of 6 December 2017 (see footnote 17 above) ; Protection of civilians in armed conflict, Report of the Secretary-General, S/2021/423; Protection of civilians in armed conflict, Report of the Secretary-General, S/2020/366.

[456] ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict* (see footnote 17 above), para. 18. See also paras. 19–21.

[457] Statement of the Chair of the Drafting Committee, Mr. Mathias Forteau, 30 July 2015, p. 8.

[458] United States, A/CN.4/749, on draft principle 13.

[459] Israel, *ibid*., on draft principle 13. The same comment applies to paragraph 2 of draft principle 13.

[460] ESCAP, *ibid*., general comments and observations.

[461] Statement of the Chair of the Drafting Committee, Mr. Mathias Forteau, 30 July 2015, pp. 6–7. See also *Legality of the Threat or Use of Nuclear Weapons* (see footnote 49 above), paras. 29–31.

well as in international environmental law and international human rights law.[462] It may also be pointed out that the draft principles refer consistently to "the environment" as a single concept. Accordingly, the Special Rapporteur does not see a need to reformulate paragraph 1. Regarding the protection of wildlife, the Special Rapporteur agrees with ESCAP on the importance of the issue. While the general nature of the draft principle would not easily allow for mentioning specific components of the environment, the Special Rapporteur believes that the plight of animals and their need for protection during armed conflict, in particular in the case of "endangered species near extinction, including forms of life below water" as pointed out by ESCAP,[463] could be addressed in the commentary.

(iii) Paragraph 2

150. A number of comments concerned the customary nature, or lack thereof, of paragraph 2, as well as its applicability in non-international armed conflicts. Such comments were also related to article 55, paragraph 1, of Additional Protocol I to the Geneva Conventions, which provides the basis for paragraph 2, and article 35, paragraph 3, of Additional Protocol I. The United States called the provisions of Additional Protocol I prohibiting "'methods or means of warfare intended or expected to cause widespread, long-term and severe damage to the environment' … too broad and ambiguous and not part of customary international law".[464] France, too, expressed the view that these provisions lack customary value and referred to the interpretative declaration it made when ratifying Additional Protocol I regarding, *inter alia*, the right of self-defence and the use of nuclear weapons.[465] Israel and Canada expressed a similar position.[466] With regard to the commentary, the United Kingdom referred to the Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* and underlined the importance of the Court's conclusion that environmental obligations could not deprive States of their right of self-defence.[467] Switzerland and ICRC considered the two provisions as having reached a customary status.[468] According to ICRC, the obligation based on articles 35, paragraph 3, and 55, paragraph 1, of Additional Protocol I has been established as a rule of customary international law in international armed conflicts and arguably also in non-international armed conflicts.[469]

151. France and Canada denied furthermore that the obligation of care would be applicable in non-international armed conflicts.[470] Ireland and the Netherlands sought further clarification about the applicability of the obligation in such conflicts.[471] ELI sought clarification as to whom paragraph 2 applied. The Institute posed the question whether there was "no international law preventing non-State armed groups from causing long-term, widespread, and severe damage to the environment", and whether "non-state armed groups [could] attack the natural environment even where it is not a military objective".[472] IUCN furthermore suggested that "[r]equiring non-State armed groups to adhere to the general duty of vigilance towards the environment

[462] Statement of the Chair of the Drafting Committee, Mr. Mathias Forteau, 30 July 2015, p. 7.
[463] ESCAP, *ibid*., general comments and observations.
[464] United States, A/CN.4/749, on draft principle 13.
[465] France, *ibid*., on draft principle 13.
[466] Israel, *ibid*., on draft principle 13; Canada, *ibid*.
[467] United Kingdom, *ibid*., on draft principle 13.
[468] Switzerland, *ibid*., on draft principle 13; ICRC, *ibid*.
[469] ICRC, *ibid*., on draft principle 13.
[470] France, *ibid*., on draft principle 13; Canada, *ibid*.
[471] Ireland, *ibid*., on draft principle 13; Netherlands, *ibid*.
[472] ELI, *ibid*., general comments and observations.

could be viewed as part of State obligations to respect and protect the environment outlined in draft principle 13, paragraph 1".[473]

152. As far as the content and drafting of paragraph 2 are concerned, Spain suggested that it would be worded disjunctively, along the lines of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques,[474] to read widespread, long-lasting "or" severe.[475] A similar comment was made in the joint civil society submission.[476] Switzerland held that there was "a more general obligation to take due account of the natural environment during military operations", based on the understanding that the environment enjoys the general protection accorded to civilian objects under the law of armed conflict, as well as on other more specific obligations related to "constant care" and "all feasible precautions".[477] Greece pointed out that the duty of care stated in paragraph 2 of the draft principle "should be considered together with the 'no harm' principle in customary international environmental law, given that both contained a due diligence standard".[478] IUCN, too, pointed out that the "general duty of taking 'care' or due diligence towards the environment during armed conflict" would serve as "a conflict-specific application of the environmental law principle of prevention or the 'no harm' principle".[479]

153. Ireland, the Netherlands and ICRC sought further clarification regarding the content of the triple threshold of "widespread, long-term and severe". Ireland suggested that the commentary provide clarification of how these terms are to be interpreted and applied, "and particularly whether relevant scientific knowledge and/or areas of international law other than international humanitarian law are relevant in this respect".[480] The Netherlands made a similar comment suggesting "interpreting the standard of 'widespread, long-term and severe' in light of the most recent academic discourse with regard to the different functions of ecosystems, taking into account recent case law. For example, the commentary could refer to the need to interpret this phrase in accordance with the latest scientific insights into the various functions of ecosystems, as the International Court of Justice did in [its judgment on compensation in] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* …".[481] ICRC suggested that "reference could be made to elements that should inform a contemporary understanding of 'widespread', 'long-term' and 'severe'", taking into account the explanations contained in the ICRC Guidelines.[482]

154. The United States suggested that the commentary provide examples of what constitutes the required care, or what constitutes a lack of care. Such examples should be drawn from existing State practice.[483] IUCN, as well, suggested that the commentary shed light on the 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", as well as the steps to be

[473] IUCN, *ibid*., on draft principle 13.
[474] 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.
[475] Spain, *ibid*., on draft principle 13.
[476] Joint civil society submission (footnote 16 above), p. 15.
[477] Switzerland, A/CN.4/749, on draft principle 13.
[478] Greece, A/C.6/74/SR.28, para. 50.
[479] IUCN, A/CN.4/749, on draft principle 13.
[480] Ireland, *ibid*., on draft principle 13.
[481] Netherlands, *ibid*., on draft principle 13.
[482] ICRC, *ibid*., on draft principle 13.
[483] United States, *ibid*., on draft principle 13.

taken in this regard.[484] UNODA suggested that consideration should be given to "policies and practices, short of legal prohibitions, applicable to certain methods or means of warfare which may cause widespread, long-term and severe damage to the natural environment", mentioning, in particular, "the effects of the use of armaments and ammunitions containing depleted uranium" as relevant in this context.[485]

155. The Special Rapporteur agrees that the question about the customary nature of the obligation of care is closely linked to the legal status of articles 55, paragraph 1, and 35, paragraph 3, of Additional Protocol I to the Geneva Conventions. This question is also relevant for the proposed new paragraph reflecting article 35, paragraph 3, on the prohibition of methods or means of warfare intended or expected to cause widespread, long-term and severe damage to the natural environment. It should be recalled in this regard that the prohibition contained in article 35, paragraph 3, has proved effective in preventing the kind of catastrophic damage it was intended to address. The damage caused to the environment by the invasion and occupation of Kuwait by Iraq in 1990–1991 has often been cited as the first and so far the only incident after the adoption of Additional Protocol I in 1977 having possibly reached the triple threshold of "widespread, long-term and severe". The environmental devastation caused in this context was condemned across the world, including by the Security Council, which took unprecedented measures to address the need for the restoration and compensation of environmental damage.[486] All this would seem to point to the general acceptance of this ultimate limit. Obviously, as the Commission has pointed out, ascertaining of general practice in the case of prohibitive rules, where it may "be difficult to find much affirmative State practice (as opposed to inaction)" is "likely to turn on evaluating whether the inaction is accepted as law".[487]

156. Regarding the applicability of the prohibition to nuclear weapons, as the main point of contention, State views can be found in the declarations given regarding the scope of application of articles 35, paragraph 3, and 55 of Additional Protocol I, or article 8, paragraph 2 (b) (iv) of the Rome Statute.[488] Reference can also be made to the statements and comments transmitted to the International Court of Justice in relation to the advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*.[489] ICRC has concluded on this basis that "it appears that the United States is a 'persistent objector' to the customary rule, and France, the United Kingdom and the United States are persistent objectors with regard to the application of the customary rule to the use of nuclear weapons. It should be noted that there is a certain amount of practice contrary to this rule, and there are diverging views of its customary nature.[490]

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[484] IUCN, *ibid*., on draft principle 13.

[485] UNODA, *ibid*., on draft principle 13.

[486] For the establishment of the United Nations Compensation Commission, see Security Council resolution 687 (1991), paras. 16 and 18. See also second report of the Special Rapporteur, A/CN.4/728, paras. 133–150.

[487] Draft conclusions on identification of customary international law, conclusion 3, commentary, para. (4).

[488] 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. The declarations regarding the Rome Statute are available in United Nations, *Treaty Series*, vol. 2187, No. 38544, pp. 614–616, 622–623 and 633, as well as at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en#EndDec.

[489] The declarations made at the International Court of Justice are available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470. For a more comprehensive account, see the second report of the Special Rapporteur, Ms. M. Jacobsson (A/CN.4/685), paras. 129–132.

[490] ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict* (see footnote 17 above), para. 48 (Rule 2, commentary).

157. The Special Rapporteur recalls that draft principle 13, paragraph 2, contains a general obligation, the relevance of which is not limited to the extreme situations in which the use of nuclear weapons, according to the International Court of Justice, might be justified.[491] The provision is intended to apply to all kinds of armed conflicts. The same would be true for the proposed new paragraph. Adding the prohibition to draft principle 13 would be a way to recall that there is an absolute limit to environmental harm caused in conflict, in addition to an ongoing obligation of care. The two paragraphs would furthermore honour the only treaty provisions in the law of armed conflict that provide direct protection to the environment during armed conflict.

158. The Special Rapporteur also recalls that the Commission adopted paragraph 2 of draft principle 13 on first reading on the understanding that it is applicable in both international and non-international armed conflicts.[492] This understanding is obviously related both to the normative nature of the care obligation and to its content. Regarding the content of the duty of care, the Commission has described it as "a duty on the parties to an armed conflict to be vigilant of the potential impact that military activities can have on the natural environment".[493] In other words, reference is made to an ongoing obligation requiring parties to an armed conflict to assess the potential environmental impact of their planned actions. The Special Rapporteur agrees that related concepts of international environmental law may well give an understanding of what steps could be taken to fulfil this obligation, while a better understanding of the threshold of "widespread, long-term and severe damage" would indicate the level of protection required. She sees merit in the proposals to address these issues in the commentary.

(iv) Paragraph 3

159. Regarding paragraph 3 of the draft principle, the proposed amendments concern, first, the phrase "may be attacked", which received comments from Israel, the United States and OHCHR, each proposing to replace this wording with the words "may be made the object of attack".[494] This wording would not only be consistent with Geneva Convention IV, article 33, and Additional Protocol I, article 134, but would also "better distinguish between intended and incidental harm to the environment".[495] OHCHR pointed out that the proposed wording would allow "for an attack to be lawful as long as it is directed against a military objective and the incidental damage to civilian objects is not excessive, reflecting principles of distinction and proportionality and removing potential ambiguity in relation to the question of wilfulness".[496] According to the United States, furthermore, "parts of the natural environment not constituting military objectives are routinely adversely affected by lawful attacks against military objectives. This type of environmental damage (e.g., small craters in the earth formed from the use of artillery) is generally not considered as part of the implementation of the principle of proportionality".[497]

160. Japan and OHCHR sought more clarification regarding the phrase "unless it has become a military objective". Japan suggested adding a sentence along the lines of article 52, paragraph 2, of Additional Protocol I, explaining that "[m]ilitary objectives are limited to those objects which by their nature, location, purpose or use make an

[491] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 49 above), para. 105, subpara. (2) E.
[492] Draft principles … 2019, commentary to draft principle 13, para. (7).
[493] *Ibid*., para. (6).
[494] Israel, A/CN.4/749, on draft principle 13; United States, *ibid*.; OHCHR, *ibid*.
[495] Israel, *ibid*., on draft principle 13.
[496] OHCHR, *ibid*., on draft principle 13.
[497] United States, *ibid*., on draft principle 13.

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.”[498] OHCHR, pointing out that these criteria have to be fulfilled in order to determine that an object, at a given time, constitutes a military objective, suggested replacing the abovementioned phrase by the words “unless it constitutes a military objective under international humanitarian law”.[499]

161. ESCAP, furthermore, proposed to add to draft principle 13 a fourth paragraph on the avoidance or minimization of any form of pollution on land or marine pollution.[500] Finally, pointing out that biological and chemical weapons “have the capacity to cause biological and ecological imbalance in the natural environment”, El Salvador suggested “to establish that only conventional weapons may be used against military objectives in a natural environment”.[501]

162. The Special Rapporteur understands paragraph 3 as a general statement of the civilian nature of the environment and wishes to retain it this way. While the term “attacked” may be seen as broad, replacing it with a more specific wording such as “be made an object of attack” would require additional changes underlining the overall civilian nature of the environment and the need for rigorous application of the proportionality rule. Regarding the latter set of comments, the Special Rapporteur points out that the definition of military objectives has been cited in the commentary to draft principle 13.[502] It should therefore be evident that the term “military objective” is used in the sense of the law of armed conflict.

(b) Recommendation of the Special Rapporteur

163. The Special Rapporteur proposes to add to draft principle 13 a new paragraph reflecting article 35, paragraph 3, of Additional Protocol I to the Geneva Conventions. Apart from this change, and replacing the term “natural environment” with the term “environment”, the Special Rapporteur does not suggest changes to the language of draft principle 13 as adopted on first reading. At the same time, the Commission may wish to consider additions to the commentary that take into account of some of the comments received. The Special Rapporteur will make proposals to this effect in due course. As amended, draft principle 13 would read as follows:

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. The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the environment is prohibited.

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

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

[498] Japan, *ibid*., on draft principle 13.
[499] OHCHR, *ibid*., on draft principle 13.
[500] ESCAP, *ibid*., on draft principle 13.
[501] El Salvador, *ibid*., on draft principle 13.
[502] Draft principles … 2019, commentary to draft principle 13, para. (10).

15. Principle 14 [II-2, 10]
Application of the law of armed conflict to the natural environment

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

(a) Comments and observations

164. While draft principle 14 also received support,[503] a number of comments were made concerning its wording. First, several States suggested the deletion of the mention of "military necessity". France pointed out that military necessity, like the principle of humanity, appears "to belong to a higher order of generality than the principles of distinction, proportionality and precaution" mentioned in the provision. While forming the basis for and clarifying more specific provisions, military necessity and the principle of humanity "do not in themselves establish specific rules governing the conduct of hostilities or prohibiting certain means or methods of warfare".[504] The United States also pointed out, in relation to the commentary, that "States have generally understood the principle of military necessity to operate through specific rules, rather than independently to impose a constraint where there already is a rule specifically at issue".[505] The Czech Republic made a similar comment.[506] ICRC expressed the concern that the inclusion of military necessity in draft principle 14 "alongside more specific rules may lend credence to the understanding that [it] can be invoked as a general exception to international humanitarian law. It is well-established that no such exception exists, unless expressly stated by a given rule".[507] Switzerland, too, noted that the mention of military necessity "raises certain questions" and, if included, should be complemented by the mention of the principle of humanity.[508] Also considering the option of mentioning both general principles, ICRC concluded that it would be "likely to create confusion".[509]

165. The mention of "precautions in attack" also attracted comments. Ireland suggested "referring simply to 'precautions' rather than to 'precautions in attack' so as to encompass both precautions in attack and precautions against the effects of attacks".[510] ICRC, too, suggested deleting the words "in attack", recalling that the obligation of precautions also applies to military operations.[511] Switzerland furthermore pointed out that the obligation to take all feasible precautions in attack "also applies to the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects" as well as to the selection of military objectives.[512] The Czech Republic and IUCN suggested specifically mentioning in the draft principle that the right of parties to an armed conflict to choose methods or means of warfare

[503] Indonesia, A/C.6/74/SR.31, para. 26; Malaysia, A/C.6/71/SR.29, para. 32; Slovenia, A/C.6/70/SR.24, para. 41.
[504] France, A/CN.4/749, on draft principle 14.
[505] United States, *ibid*., on draft principle 14.
[506] Czech Republic, *ibid*., on draft principle 13.
[507] ICRC, *ibid*., on draft principle 14.
[508] Switzerland, *ibid.*, on draft principle 14.
[509] ICRC, *ibid*., on draft principle 14.
[510] Ireland, *ibid*., on draft principle 14.
[511] ICRC, *ibid*., on draft principle 14.
[512] Switzerland, *ibid*., on draft principle 15.

is not unlimited.[513] UNODA made in this context reference to the preamble to the Treaty on the Prohibition of Nuclear Weapons,[514] which cites the same principle.[515]

166. A third element in the draft principle that received comments was the phrase "with a view to its protection". Ireland sought further clarification on what was meant with this phrase.[516] ICRC considered that the meaning of the phrase was not clear and suggested removing it. ICRC was concerned that the phrase could "be read to have the effect of conditioning, and therefore potentially weakening, the protection that is inherent in the application of the [relevant] rules".[517] The United States expressed a similar concern.[518] Israel was concerned that the phrase "alter the existing balance in the law on armed conflict between military necessity and humanitarian considerations by granting an elevated status to the latter".[519] Israel and the United States furthermore considered that the phrase was an indication of the normative nature of the draft principle, as an element of progressive development,[520] and Ireland raised a question in this regard.[521] Canada made a similar comment.[522]

167. Further comments concerned the advisability of adding new elements either to the draft principle or to the commentary. El Salvador suggested adding to the draft principles a provision on "the prohibition of acts that modify ecosystems with the aim of gaining an advantage over an adversary, such as indiscriminate burning or the use of methods that reduce the cover of forests or natural spaces."[523] UNEP took the view that the draft principle could be interpreted to include "precautions in the absence of scientific certainty about the likely effects of a weapon on the environment".[524] Greece, too, suggested that a link be established in the commentary between the rule that precautions be taken during an attack to avoid or minimize collateral damage to the environment and the due regard clause contained in rule 44 of the ICRC study on customary international humanitarian law.[525]

168. France recalled the interpretative declaration it had made on the accession to Additional Protocol I, in which it was stated that "international humanitarian law requires only that account be taken of the foreseeable effects of an attack, on the basis of the information available at the time, and that such precautionary measures as are practicable be adopted, taking into account the circumstances at the time, including humanitarian and military considerations".[526] Germany, too, submitted that the effects of an attack are to be understood in the sense of the established standards in assessing proportionality of collateral damages in international humanitarian law.[527] Colombia suggested that the scope of application of draft principles 14 and 15 be set out more clearly, "with wording that would make it possible to determine whether the principles and rules also apply to non-State armed actors".[528]

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[513] Czech Republic, *ibid*., on draft principle 13; IUCN, *ibid.*, on draft principle 14.
[514] Treaty on the Prohibition of Nuclear Weapons (New York, 17 July 2017), United Nations, *Treaty Series*, No. 56487 (volume number has yet to be determined).
[515] UNODA, *ibid.*, on draft principle 14.
[516] Ireland, *ibid*., on draft principle 14.
[517] ICRC, *ibid*., on draft principle 14.
[518] United States, *ibid*., on draft principle 14.
[519] Israel, *ibid.*, on draft principle 14.
[520] Israel, *ibid*.
[521] Ireland, *ibid*., on draft principle 14.
[522] Canada, *ibid*., on draft principle 14.
[523] El Salvador, *ibid*., on draft principle 13.
[524] UNEP, *ibid*., on draft principle 14 (italics removed).
[525] Greece, A/C.6/74/SR.28, para. 51.
[526] France, A/CN.4/749, on draft principle 14.
[527] Germany, *ibid*., on draft principle 14.
[528] Colombia, *ibid*., on draft principle 14.

169. The Special Rapporteur agrees that the notion of military necessity is of a different "order of generality" from the other principles mentioned in draft principle 14.[529] Furthermore, the inclusion of the principle of military necessity without its necessary counterpart, the principle of humanity, raises questions. For these reasons, and in light of the comments above, the Special Rapporteur suggests deleting the mention of "military necessity". The Special Rapporteur also suggests deleting the words "in attack" in order to take into account the broader scope of the principle of precautions under the law of armed conflict. Both these changes would make the draft principle more consistent with the existing law of armed conflict and remove possible sources of confusion.

170. The phrase "with a view to its protection" does not, in the Special Rapporteur's view, express more than a general objective in line with the purpose of the draft principles. It has nevertheless been found to be unclear. The fact that two opposite concerns – that it could weaken the protection, on the one hand, and that it could alter the balance between military necessity and considerations of humanity to the detriment of the former, on the other – have been expressed in its regard seem to lend some credence to this characterization. It may also be assumed that at least some of the comments and questions are related to the commentary, according to which the phrase "introduces an objective which those involved in armed conflict or military operations should strive towards, and thus it goes further than simply affirming the application of the rules of armed conflict to the environment".[530] The Special Rapporteur suggests retaining the phrase in the draft principle. The Commission may nevertheless wish to consider whether further clarifications need to be added to the commentary.

171. Regarding the proposed additional elements, the Special Rapporteur believes that some of the concerns referred to in paragraph 168 may be addressed in the commentary. At the same time, there is reason to recall that the draft principle only presents certain examples of applicable principles and rules and should not be viewed as an exhaustive list. As the commentary points out, "all other rules under the law of armed conflict which relate to the protection of the environment in relation to armed conflict remain applicable and cannot be disregarded".[531]

(b) Recommendation of the Special Rapporteur

172. In light of the comments and considerations above, as well as the necessary terminological changes, the Special Rapporteur proposes that draft principle 14 as amended would read as follows:

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.

16. Principle 15 [II-3, 11] Environmental considerations

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

[529] France, *ibid.*, on draft principle 14.
[530] Draft principles … 2019, commentary to draft principle 14, para. (12). See also Statement of the Chair of the Drafting Committee, Mr. Mathias Forteau, 30 July 2015.
[531] Draft principles … 2019, commentary to draft principle 14, para. (3).

(a) Comments and observations

173. While draft principle 15 has received support,[532] a number of concerns have also been raised. These concerns are related to the notion of "environmental considerations", the notion of "the rules of military necessity" as well as the perceived overlap with draft principle 14.

174. The notion of "environmental considerations" has been found unclear. France noted that it "does not correspond to any known and clearly defined concept in international humanitarian law and seems likely, owing to its vagueness, to create detrimental confusion as to the extent of the obligations of belligerents in situations of armed conflict, in particular with regard to the principles of proportionality and precaution".[533] Israel called it "too broad and imprecise".[534] ICRC noted that it was "vague and subject to interpretation".[535] Similar concerns were expressed by Belarus, El Salvador, Jamaica and the Russian Federation.[536] Regarding the phrase "the rules of military necessity", ICRC expressed the same concern as it did with regard to the mention of military necessity in draft principle 14, namely that it "will lend credence to the inaccurate understanding that military necessity can be invoked as a general exception to international humanitarian law, [while] it is well-established that no such exception exists, unless expressly stated by a … more specific rule".[537] Switzerland pointed out that the principle of proportionality already includes considerations of military necessity, [538] and the report of the Advisory Committee on Public International Law recalled the earlier criticism of the Netherlands regarding this notion. [539] France suggested replacing the reference to the "rules on military necessity" with a reference to the principle of precaution.[540] Switzerland and OHCHR also recalled the role of the principles of precaution and constant care.[541]

175. Most comments were made regarding the relationship between draft principles 14 and 15. Some of these comments expressed specific concerns. France was concerned about the "rewriting of the exhaustive and complex provisions of international humanitarian law concerning the principles of proportionality and precaution" and suggested merging draft principles 14 and 15.[542] The United States found draft principle 15 "unclear and duplicative of draft principle 14" and also recommended that it be merged with draft principle 14. [543] Canada and Israel suggested that draft principle 15 be deleted.[544] ICRC expressed the concern that "the rule of proportionality would be applied to the environment with a caveat" because of the vagueness of the notion of "environmental considerations". ICRC recommended that the draft principle be deleted and paragraph (5) of its commentary moved to the explanation of the principle of proportionality already contained under draft principle 14.[545]

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[532] Italy, A/C.6/70/SR.22, para. 120; Mexico, A/C.6/74/SR.29, para. 112; Norway (on behalf of the Nordic countries), A/C.6/70/SR.23, para. 107.
[533] France, A/CN.4/749, on draft principle 14.
[534] Israel, *ibid*., on draft principle 15.
[535] ICRC, *ibid*., on draft principle 15.
[536] Belarus, A/C.6/70/SR.24, para. 16; El Salvador, A/C.6/71/SR.27, para. 147; Jamaica, A/C.6/74/SR.33, para. 39; Russian Federation, A/C.6/73/SR.29, para. 129.
[537] ICRC, A/CN.4/749, on draft principle 15.
[538] Switzerland, *ibid*., on draft principle 15.
[539] Report of the Advisory Committee on Issues of Public International Law (footnote 386 above), p. 15. See also Netherlands, A/C.6/70/SR.24, para. 29.
[540] France, A/CN.4/749, on draft principle 14.
[541] Switzerland, *ibid*., on draft principle 15; OHCHR, *ibid*.
[542] France, *ibid*., on draft principle 14.
[543] United States, *ibid*., on draft principle 15.
[544] Canada, *ibid*., on draft principle 15; Israel, *ibid*.
[545] ICRC, *ibid*., on draft principle 15.

176. In other comments, draft principle 15 was seen as redundant. "While not opposing its content", Germany considered that draft principle 15 did not bring added value in relation to draft principle 14.[546] The Czech Republic suggested incorporating draft principle 15 into draft principle 14 "as it only elaborates on what is said in principle 14".[547] Switzerland pointed out that taking into account the environment already followed from the application of the principles mentioned in draft principle 14 and suggested deleting draft principle 15 or to combine it with draft principle 14.[548] Spain considered the provision "largely redundant" and suggested its deletion.[549] Japan suggested merging the two draft principles "in order to avoid repetition and redundancy".[550] Austria suggested merging draft principles 13, 14 and 15 "to add clarity and to put more emphasis on the objective of the protection of the environment".[551]

177. Ireland, too, pointed out that proper application of draft principle 14 may "obviate any need for draft principle 15 from strictly legal perspective" but supported its retention because of the potential value in expressly confirming the need to take environmental considerations into account.[552] IUCN, while noting the "apparent overlap" between the two provisions, suggested retaining and strengthening draft principle 15 by adding to it a specific mention of taking into account the "foreseeable direct and indirect … effects on the environment in the" proportionality assessment. IUCN also underlined the importance of the recognition in paragraph (5) of the commentary that "environmental considerations cannot remain static over time, they should develop as human understanding of the environment develops".[553]

(b) Recommendation of the Special Rapporteur

178. The Special Rapporteur believes that the added value of draft principle 15 largely resides in the commentary. She recalls that the inclusion of draft principle 15 as a separate provision rather than merging it with draft principle 14 or deleting it altogether was also discussed in the Commission in 2015.[554] Reference can also be made to the commentary, which underlines the close link between draft principle 15 and draft principle 14.[555] On this basis and in light of the comments and observations received, the Special Rapporteur suggests deleting draft principle 15 and incorporating the relevant parts of the commentary to the commentary of draft principle 14.

17. Principle 16 [II-4, 12]
Prohibition of reprisals

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

(a) Comments and observations

179. The prohibition of reprisals against the natural environment, irrespective of the nature of the armed conflict, has received support from a number of States. While noting that the rule reflected in draft principle 16 is not yet part of customary law,

[546] Germany, *ibid*., on draft principle 14.
[547] Czech Republic, *ibid*., on draft principle 15.
[548] Switzerland, *ibid*., on draft principle 15.
[549] Spain, *ibid*., on draft principle 15.
[550] Japan, *ibid*., on draft principle 14.
[551] Austria, statement of 31 October 2019, available at http://statements.unmeetings.org/media2/23328809/-e-austria-statement.pdf.
[552] Ireland, A/CN.4/749, on draft principle 14.
[553] IUCN, *ibid*., on draft principle 14.
[554] Statement of the Chair of the Drafting Committee, Mr. Mathias Forteau, 30 July 2015, p. 12. Note that both draft principles have since then been renumbered.
[555] Draft principles … 2019, commentary to draft principle 15, para. (3).

Germany noted that "there is no reason not to apply the prohibition of reprisals to non-international armed conflicts".[556] Switzerland, too, welcomed the explicit recognition of the prohibition of attacks against the natural environment as a form of reprisal, in both international and non-international armed conflicts.[557] Austria supported the general prohibition of reprisals in the draft principle and "believed that it should apply to all forms of armed conflicts, including those of a non-international nature, particularly given the growing difficulty of distinguishing international conflicts from non-international ones and the clear tendency to apply the same rules to both".[558] New Zealand took a similar view recalling that the Military Manual of New Zealand[559] explicitly prohibited reprisals against the natural environment.[560] Italy and the Nordic countries also welcomed the provision.[561] ICRC, as well, welcomed the draft principle and "strongly recommended" its retention.[562]

180. At the same time, some States expressed concerns regarding the prohibition and its general formulation. The United States pointed out that the prohibition of reprisals against the natural environment was a new rule introduced by Additional Protocol I, and not part of customary international law. The United States also recalled its earlier statements, according to which the "prohibition on reprisal attacks against the civilian population could be counter-productive by removing a significant deterrent that protects civilians".[563] France and the United Kingdom similarly held that the prohibition was only binding as treaty law, and recalled the interpretative declarations they had made at the time of ratifying Additional Protocol I.[564] The United Kingdom also pointed out to the existing contrary State practice, and argued that "the doctrine of *allowing* belligerent reprisal'" was part of customary international law. The United Kingdom suggested either deleting the draft principle or amending it in light of these comments.[565] Israel and Canada also took the view that the prohibition did not reflect customary international law.[566] The United States suggested reformulating the draft principle by adding the words "in accordance with the State's legal obligations".[567] France and Canada regarded the prohibition against reprisals as a treaty-based obligation applicable only during international armed conflict.[568]

181. While agreeing with the formulation of the draft principle, ICRC recommended that the commentary address more clearly "the relationship of this draft principle with other customary and treaty rules related to reprisals more generally, notably against protected objects".[569] Switzerland recalled other provisions prohibiting reprisals against certain protected objects, including civilian objects in general, objects indispensable to the survival of the civilian population and cultural objects.[570] Germany suggested that the commentary be modified to clarify to what extent the provision is a codification of existing customary law, or progressive development.[571]

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[556] Germany, A/CN.4/749, on draft principle 16. See also Germany, A/C.6/74/SR.30, para. 53.
[557] Switzerland, *ibid*., on draft principle 16.
[558] Austria, A/C.6/70/SR.24, para. 70.
[559] New Zealand, Ministry of Defence, *Manual of Armed Forces Law*, 4 vols. (2008-).
[560] New Zealand, A/C.6/70/SR.25, para. 102.
[561] Italy, A/C.6/70/SR.22, para. 120; Norway (on behalf of the Nordic countries), A/C.6/70/SR.23, para. 107.
[562] ICRC, A/CN.4/749, on draft principle 16.
[563] United States, *ibid*., on draft principle 16.
[564] France, *ibid*., on draft principle 16; United Kingdom, *ibid.*
[565] United Kingdom, *ibid*., on draft principle 16.
[566] Israel, *ibid*., on draft principle 15; Canada, *ibid*., on draft principle 16.
[567] United States, *ibid*., on draft principle 16.
[568] France, *ibid*., on draft principle 16; Canada, *ibid*.
[569] ICRC, *ibid*., on draft principle 16.
[570] Switzerland, A/CN.4/749, on draft principle 16.
[571] Germany, *ibid*., on draft principle 16.

182. The Special Rapporteur recalls the commentary to draft principle 16, which gives account of the debates in the Commission, much along the lines of the comments referred to above. According to the commentary, "various suggestions were made regarding ways in which the principle could be rephrased to address the issues in contention. However, it was ultimately considered that any formulation other than the one adopted could be interpreted as weakening the existing rule under the law of armed conflict".[572] The Special Rapporteur believes that this is still the case, and finds Germany's suggestion to further seek to clarify in the commentary the legal status of the prohibition as helpful.

(b) Recommendation of the Special Rapporteur

183. Apart from aligning the use of terms as indicated above, the Special Rapporteur does not propose reformulating draft principle 16. The Commission may nevertheless wish to change the commentary to take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

Principle 16
Prohibition of reprisals

Attacks against the environment by way of reprisals are prohibited.

18. Principle 17 [II-5, 13]
Protected zones

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

(a) Comments and observations

184. General comments as well as comments and observations related to the phrase "major environmental and cultural importance", which have been addressed above with respect to draft principle 4, are also relevant for draft principle 17. In addition, a number of comments were made concerning the scope and drafting of draft principle 17.

185. Several comments were made regarding the phrase "designated by agreement". The United States suggested referring in the draft principle to "agreement between the parties to the conflict".[573] At the same time, the reasons for limiting the immunity from attack to protected zones designated by agreement, and therefore the need for the phrase, were questioned. Estonia asked "whether protected zones that are established otherwise shall be under the same protection or not".[574] Portugal was concerned that draft principle 17 could "impair the protection of a site that would otherwise be protected" under draft principle 4 or draft principle 13 and suggested that sites designated as being of major environmental and cultural importance should be protected "regardless of how that designation as a protected zone took place".[575] The Netherlands, too, noted that the provision would appear to diminish the protection afforded to the environment under draft principle 13[576] and suggested that the relationship between the three draft principles should be harmonized.[577] ICRC was similarly concerned that the draft principle, as currently formulated, could weaken

[572] Draft principles … 2019, commentary to draft principle 16, para. (10).
[573] United States, A/CN.4/749, on draft principle 17.
[574] Estonia, statement of Estonia 5 November 2019. Available at http://statements.unmeetings.org/media2/23329053/-e-estonia-statement.pdf.
[575] Portugal, A/CN.4/749, general comments and observations.
[576] Netherlands, A/C.6/70/SR.24, para. 31.
[577] Netherlands, A/CN.4/749.

the protections provided in draft principle 4 and paragraph 3 of draft principle 13 and suggested that an express reference to these and other additional protections be added to the text of the draft principle.[578]

186. The Special Rapporteur points out that the reference to "agreement", while certainly covering agreements between parties to the conflict, also extends to agreements concluded before the conflict. In fact, 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".[579] Regarding the need for an agreement, the Special Rapporteur wishes to add that designation by agreement is needed to ensure that parties to a conflict, if bound by the agreement, have explicit information concerning the scope of their legal obligations and that there is a clear basis for imposing responsibility in case of breach. Furthermore, designating protected zones by way of agreement can be taken to offer a higher degree of protection than a unilateral designation. The Special Rapporteur further agrees that there may be a need to clarify the relationship between draft principle 17 and the other applicable draft principles. In doing so, it is important to bear in mind that draft principle 17 "seeks to enhance the protection established in draft principle 13, paragraph 3".[580] A reference to additional agreed protections, as proposed by ICRC, would seem helpful in order to ensure that the provision cannot be interpreted to lower the general level of protection.

187. The Netherlands sought further clarification on how draft principle 17 related to areas protected under multilateral environmental agreements.[581] UNEP, too, asked whether multilateral environmental agreements would be included in the concept of "agreement" understood in its broadest sense.[582] Greece suggested that the scope of draft principle 17 be "expanded to include not only sites designated by agreement, but also sites protected by decisions of relevant treaty bodies, such as the natural sites of outstanding universal value included in the World Heritage List in accordance with the 1972 Convention for the Protection of the World Cultural and Natural Heritage."[583] ESCAP furthermore drew attention to the need to designate the United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage sites, as well as marine protected areas, "whose biodiversity and ecosystems may be invaluable" as protected zones.[584]

188. The Special Rapporteur recalls that "there has to be an express agreement on the designation",[585] which she understands to mean an express agreement on the designation of an area as protected from attack during an armed conflict. At the same time, there is no doubt that certain multilateral environmental agreements are of great relevance for the designation of protected zones in accordance with draft principle 4. The Montreux Records on endangered sites under the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat,[586] the sites enlisted as World Heritage in Danger under the World Heritage Convention, as well as areas included in national biodiversity strategies and action plans in accordance

[578] ICRC, *ibid*., on draft principle 17.
[579] Draft principles … 2019, commentary to draft principle 17, para. (1).
[580] Draft principles … 2019, commentary to draft principle 17, para. (2).
[581] Netherlands, A/CN.4/749, on draft principle 17.
[582] UNEP, *ibid*., on draft principle 17.
[583] Greece, A/C.6/74/SR.28, para. 49.
[584] ESCAP, A/CN.4/749, on draft principle 4.
[585] Draft principles … 2019, commentary to draft principle 17, para. (1).
[586] Convention on Wetlands of International Importance especially as Waterfowl Habitat, (Ramsar, 2 February 1971), United Nations, *Treaty Series*, vol. 996, p. 245 (Ramsar Convention).

with the Convention on Biological Diversity would obviously fulfil the requirement of "major environmental importance".

189. The Convention for the Protection of the World Cultural and Natural Heritage furthermore 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.[587] This provision can be interpreted to require that States Parties to the Convention, if involved in an armed conflict, do not deliberately attack heritage sites. The Convention on Biological Diversity protects the biological diversity from "serious damage or threat" even where it would result from the exercise of rights and obligations deriving from other existing international agreement.[588] While for wetlands under the Ramsar Convention, there is no similar protection, it may be taken that designation as a protected zone, as provided in draft principle 4, would contribute to the effective implementation of all these conventions. The Commission may wish to add references to relevant multilateral environmental agreements in the commentary of draft principle 4 and/or draft principle 17. The Special Rapporteur will make suggestions to this effect in due course.

190. Canada held that the formulation of the draft principle was overly broad, as it "implie[d] that a whole area may become a target if it contains a military objective".[589] Colombia pointed to "a need to further delimit the scope of draft principle 17", referring to the negative impact of armed conflicts on the ecosystems of protected zones.[590] El Salvador suggested clarifying in the draft principle, along the lines of the commentary, that all or part of the protected zone was concerned.[591] The United States suggested referring to "any location within the area" enjoying protection "as long as it does not constitute a military objective".[592]

191. Japan and the United States further pointed out that an area might be designated as a protected zone in spite of the presence of, for instance, an immovable military objective, and suggested reformulating the draft principle accordingly.[593] Israel and the United States furthermore suggested replacing the word "attacked" by the phrase "made the object of attack" to take into account that a protected zone could be affected by an attack against a military objective nearby.[594]

192. The Special Rapporteur agrees that the entire zone would not necessarily lose its protection if a part of the zone contains a military objective.[595] This understanding is consistent with the commentary. Regarding the word "contain", it seems that the different wording used in draft principle 17 ("contains a military objective") compared to draft principle 13 ("has become a military objective") was chosen with the intention to enhance the general protection under draft principle 13.[596] The same seems to be true for the formulation "protected from any attack". The Special

[587] Art. 6, para. 3, of the Convention for the Protection of the World Cultural and Natural Heritage.
[588] 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").
[589] Canada, A/CN.4/749, on draft principle 17.
[590] Colombia, *ibid*., on draft principle 17.
[591] El Salvador, A/C.6/71/SR.27, para. 146.
[592] United States, A/CN.4/749, on draft principle 17.
[593] Japan, *ibid*., on draft principle 4; United States, *ibid*., on draft principle 17.
[594] Israel, *ibid*., on draft principle 17 ("be the object of attack"); United States, *ibid*., on draft principle 17 ("be made the object of attack").
[595] Draft principles…2019, commentary to draft principle 17, para. (1) ("The reference to the word 'contain' in the phrase 'as long as it does not contain a military objective' is intended to denote that it may be the entire zone, or only parts thereof.").
[596] Draft principles … 2019, commentary to draft principle 17, para. (2).

Rapporteur would not suggest changing this wording, which is consistent with the purpose of the draft principle. The Special Rapporteur furthermore agrees with Japan and the United States that parties may agree to designate an area as protected zone even though it contains a(n immovable) military objective. She proposes below to include in the commentary further considerations regarding the content of agreements concerning designation.

193. Several comments referred to the existing rules of armed conflict concerning demilitarized zones and other protected zones. The Czech Republic pointed out that a demilitarized zone "must not be used for military purposes, which means that no part of its natural environment can become a military objective". [597] IUCN pointed out that the prohibition for parties to the conflict of extending their military operations to demilitarized zones was "particularly important for the protection of the environment, especially habitats and biodiversity rich or fragile ecosystems" and suggested that wording similar to that in article 60 of Additional Protocol I be included to the draft principle.[598]

194. Switzerland referred to a substantial (material) violation of the agreement by which a demilitarized zone was designated as protected, rather than the presence or absence of a military objective, as the decisive criterion for the termination of the protection.[599] Belgium suggested mentioning in the commentary the conditions that are to be met in order for a demilitarized zone to retain its protected status. [600] Switzerland suggested furthermore that a more in-depth analysis be conducted of how the rules concerning the various types of protected zones under the law of armed conflict could enhance the protection of the natural environment.[601] IUCN suggested including in the draft principle an explicit prohibition on siting military installations inside nature reserves or other protected areas. Such a prohibition could be implied from article 58 of Additional Protocol I, which requires States to take necessary precautions to protect civilian objects under their control "against the dangers resulting from military operations", taking also into account applicable environmental law obligations.[602]

195. The Special Rapporteur recalls that the original proposal for the draft principle, in 2015, concerned the establishment of demilitarized zones.[603] It is understandable that the draft principle continues to be read in light of the provisions applicable to demilitarized zones as the closest equivalent to zones protected from attack during an armed conflict because of their environmental value. While article 60 of Additional Protocol I to the Geneva Conventions provides the legal basis for the former, the agreement to establish a zone of the latter type would ideally contain the necessary limitations to the use of the protected zone. The commentary already specifies that a designated zone may lose its protection "if a party to an armed conflict … uses the area to carry out any military activities during an armed conflict". [604] The agreement could furthermore address questions of management and governance. [605] The Commission may wish to add to the commentary further specifications regarding the content of such agreements, taking into account some of the comments received. The Special Rapporteur will make suggestions to this effect in due course.

[597] Czech Republic, A/CN.4/749, on draft principle 17.
[598] IUCN, *ibid*., on draft principle 17.
[599] Switzerland, *ibid*., on draft principle 17.
[600] Belgium, *ibid*., on draft principle 17.
[601] Switzerland, *ibid*., on draft principle 17.
[602] IUCN, *ibid*., on draft principle 17.
[603] Second report of the Special Rapporteur, Ms. M. Jacobsson, document A/CN.4/685 (2015), p. 70.
[604] Draft principles … 2019, commentary to draft principle 17, para. (2).
[605] Japan, A/CN.4/749, on draft principle 4.

(b) Recommendation of the Special Rapporteur

196. In light of the comments and considerations above, the Special Rapporteur suggests that draft principle 17 be reformulated as follows:

Principle 17
Protected zones

Including where it is an area of major cultural importance, an area of major environmental importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective, and shall benefit from any additional agreed protections.

19. Principle 18
Prohibition of pillage

Pillage of natural resources is prohibited.

(a) Comments and observations

197. Draft principle 18 received general support from Cyprus, Switzerland, Netherlands, Greece, Malaysia, Mexico, Peru, Slovenia, Sudan and Ukraine.[606] ELI, ICRC and the joint civil society submission also welcomed the provision.[607] According to Malaysia, the draft principle would be an important addition to the rules on environmental protection in armed conflicts. "Pillage of natural resources … puts enormous strain on the environment as a result of predatory practices that often led to severe damage and ultimately the depletion of resources. That, in turn, could undermine long-term livelihoods, trigger further violence and lock communities in a vicious cycle of destruction."[608]

198. Algeria, Cyprus, Greece, the Islamic Republic of Iran and Lebanon welcomed the confirmation of the applicability of the prohibition to situations of occupation.[609] Cyprus stressed "the increased environmental risk engendered from operations carried out in occupied areas with a view to exploiting natural resources".[610] ELI underlined the practical importance of draft principle 18 as well as the other draft principles related to natural resources, pointing out that since 1989, "at least 35 major armed conflicts (conflicts with more than 1,000 battle deaths) have been financed by revenues from natural resources, ranging from diamonds and timber to narcotics, fisheries, and bananas. In the last 20 years, natural resources have become a standard element of peace agreements, providing incentives to resolve the conflict while also providing a foundation for post-conflict recovery."[611]

199. No proposal was made to change the wording of the draft principle. At the same time, a number of suggestions concerned the commentary. The United States suggested revising the definition of pillage in paragraph (4) of the commentary to include the element of "movable property" as well as the notion that pillage involves

[606] Cyprus, *ibid*., general comments and observations; Greece, A/C.6/74/SR.28, para. 51; Malaysia, A/C.6/74/SR.30, para. 76; Mexico, A/C.6/74/SR.29, para. 112; Netherlands, A/CN.4/749, general comments and observations; Peru, A/C.6/74/SR.31, para. 3; Slovenia, A/C.6/74/SR.29, para. 142; Switzerland, A/CN.4/749, on draft principle 18; Sudan, A/C.6/74/SR.29, para. 61; Ukraine, A/C.6/74/SR.26, para. 127.

[607] ELI, A/CN.4/749, general comments and observations; ICRC, *ibid*., on draft principle 17; joint civil society submission (footnote 16 above), p. 16.

[608] Malaysia, A/C.6/74/SR.30, para. 76.

[609] Algeria, A/C.6/74/SR.31, para. 51; Cyprus, A/CN.4/749, on draft principle 18; Greece, A/C.6/74/SR.28, para. 51; Iran (Islamic Republic of), A/C.6/74/SR.29, para. 45: Lebanon, A/C.6/74/SR.30, para. 105.

[610] Cyprus, A/CN.4/749, on draft principle 18.

[611] ELI, *ibid*., general comments and observations.

the taking of property for private or personal use.[612] Switzerland, too, pointed out that the definition of pillage "seems to imply that the appropriation must be for private or personal use".[613] Israel noted that "in its classic and more common use 'pillage' involves the unlawful appropriation of property *by individuals* for *private use* during an armed conflict".[614]

200. The Special Rapporteur agrees that appropriation of property by individuals for private use during an armed conflict is covered under the concept of pillage, provided that the act has a connection to the armed conflict. Pillage is nevertheless a broader concept, which has traditionally also been applied to organized pillage, including pillage authorized or ordered by a party to the conflict. This was notably the case in many post-World War II trials.[615] Later, the International Criminal Tribunal for the former Yugoslavia has held that the prohibition of pillage "extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systemic economic exploitation of occupied territory".[616]

201. Germany furthermore sought clarification that "pillage only applies to natural resources that are subject to ownership and constitute property".[617] The United States found paragraph (3) of the commentary to be helpful "in clarifying that pillage must involve the taking of property and that only natural resources constituting property would be the subject of this prohibition".[618] ICRC suggested referring "more clearly in the commentary to the exceptions under which appropriation of property is lawful under international humanitarian law".[619] Israel made a proposal to the same effect.[620]

(b) Recommendation of the Special Rapporteur

202. The Special Rapporteur does not suggest any change to draft principle 18. The Commission may nevertheless wish to include in the commentary additional clarifications taking into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

20. Principle 19
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.

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[612] United States, *ibid*., on draft principle 18.
[613] Switzerland, *ibid*., on draft principle 18.
[614] Israel, *ibid.*, on draft principle 18 (emphasis in the original).
[615] See e.g. United States Military Tribunal at Nuremberg, *United States* v. *Alfried Krupp and Others (The Krupp Trial)*, Judgment, 1948, reprinted in *Law Reports of Trials of War Criminals*, vol. X: *The I.G. Farben and Krupp Trials*, 1949, p. 73; and United States Military Tribunal at Nuremberg, *United States* v. *Krauch and Others (I.G. Farben Trial)*, Judgment, 1948, reprinted in *Law Reports of Trials of War Criminals*, vol. X: *The I.G. Farben and Krupp Trials*, p. 4; Singapore, Court of Appeal, *N.V. de Bataafsche Petroleum Maatschappij and Others* v. *The War Damage Commission* (Singapore Oil Stocks Case), Decision, 13 April 1956, reprinted in *American Journal of International Law*, vol. 51, No. 4, 1957, pp. 802–815.
[616] *Prosecutor v. Zejnil Delalić and Others*, Case No. IT-96-21-T, Judgment, 16 November 1998, para. 590. See also ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, Rule 14.
[617] Germany, A/CN.4/749, on draft principle 18.
[618] United States, *ibid*., on draft principle 18.
[619] ICRC, *ibid*., on draft principle 18.
[620] Israel, *ibid*., on draft principle 18.

(a) Comments and observations

203. Draft principle 19 received general support from Malaysia[621] and Mexico,[622] as well as from UNODA[623] and ICRC.[624] Malaysia pointed out that the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques has proven relatively successful and effective in preventing the use of large-scale environmental modification tactics. At the same time, the advancement of technology and continued development of military capability by States has made the future unpredictable and underlines the importance of the draft principle.[625]

204. While most of the comments and observations were related to the commentary, some comments were made regarding the wording of the draft principle. France understood the phrase "in accordance with their international obligations" to imply that the draft principle, in the Commission's understanding, reflected an existing customary rule of international law and suggested for this reason its removal.[626] United States suggested referring to "a State" in singular to make it clear that States have different obligations.[627] Japan sought clarification on the term "environmental modification techniques" and suggested adding the phrase "as defined in article 2 of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques" after the term "environmental modification techniques".[628] Regarding the first question, the Special Rapporteur recalls that the Commission has consistently used the phrase "in accordance with their international obligations" to refer to treaty obligations that bind some but not all States.[629] The meaning of the phrase in the context of draft principle 19 has been explained in paragraph (2) of the commentary. To the extent that the comment by France is related to this explanation, it is addressed below. As for the change of the number from plural to singular, as suggested by the United States, the Special Rapporteur prefers to retain the plural form "States", which is consistent with the form used in an opening sentence throughout the draft principles. As far as the request by Japan for clarification is concerned, the Special Rapporteur refers to paragraph (1) of the commentary, which explains that the concept of "environmental modification techniques" is used in the draft principle in the same sense as in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. While it is possible to add further clarifications to the commentary, the Special Rapporteur is not convinced that there is a need to amend the draft principle.

205. Colombia suggested including in the commentary examples of the environmental modification techniques to which the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques refers.[630] The United Kingdom suggested distinguish deliberate manipulation of natural processes or use of the environment as a weapon from the effect of the use of weapons, including nuclear weapons, on the environment.[631] While the comment was

[621] Malaysia, statement of Malaysia 5 November 2019. Available at http://statements.unmeetings.org/media2/23329062/-e-malaysia-statement.pdf.
[622] Mexico, A/C.6/74/SR.29, para. 112.
[623] UNODA, A/CN.4/749, on draft principle 19.
[624] ICRC, *ibid*., on draft principle 19.
[625] Malaysia, statement of Malaysia 5 November 2019. Available at http://statements.unmeetings.org/media2/23329062/-e-malaysia-statement.pdf.
[626] France, A/CN.4/749, on draft principle 19.
[627] United States, *ibid*., on draft principle 19.
[628] Japan, *ibid*., on draft principle 19.
[629] Draft principles … 2019, *e.g*. commentary to draft principle 24, para. (4).
[630] Colombia, A/CN.4/749, on draft principle 19.
[631] United Kingdom, *ibid*., on draft principle 19.

formulated as a request to amend the draft principle, it seems rather to be related to the commentary. Israel made a similar comment.[632]

206. China and Malaysia sought clarification regarding the applicability of the draft principle to non-international armed conflicts.[633] Switzerland pointed out that "at least the use of environmental modification techniques for hostile purposes, which would meet the required threshold of damage in the territory of another State party" would fall within the scope of the draft principle, adding that "[t]he use of the environment as a weapon is prohibited in international and non-international armed conflicts".[634] UNEP suggested that the draft principle should be made applicable to non-State actors.[635] The Special Rapporteur refers to the commentary, which address the applicability of the provision to non-international armed conflicts and non-State actors.[636]

207. Different views were expressed regarding the treaty and customary obligations reflected in the draft principle. France remarked that neither draft principle 19, nor the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques reflected customary international law.[637] Israel expressed a similar view.[638] UNODA considered obligations regarding the destruction of the natural environment as a weapon to be norms of customary international law applicable in international armed conflicts and arguably also in non-international armed conflicts.[639] ICRC suggested clarifying in the commentary that "to the extent that the obligation under the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques overlaps with other customary obligations …, the draft principle would also be an obligation under customary international law".[640] The Special Rapporteur believes that the commentary gives an adequate explanation of the legal foundation of the draft principle.[641] The Commission may nevertheless wish to add to the commentary further clarifications regarding the prohibition of the destruction of the environment as a weapon. The Special Rapporteur will make proposals to this effect in due course.

(b) Recommendation of the Special Rapporteur

208. In light of the comments and considerations above, the Special Rapporteur does not suggest any change to draft principle 19.

Part Four: Principles applicable in situations of occupation

21. Principle 20 [19] General obligations of an Occupying Power

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

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

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[632] Israel, *ibid*., on draft principle 19.
[633] China, A/C.6/74/SR.27, para. 89; Malaysia, A/C.6/74/SR.30, para. 77.
[634] Switzerland, A/CN.4/749, on draft principle 19.
[635] UNEP, *ibid*., on draft principle 19.
[636] Draft principles … 2019, commentary to draft principle 19. paras. (3) and (4).
[637] France, *ibid*., on draft principle 19.
[638] Israel, *ibid*., on draft principle 19.
[639] UNODA, *ibid*., on draft principle 19.
[640] ICRC, *ibid*., on draft principle 19.
[641] Draft principles … 2019, commentary to draft principle 19, para. (2).

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.

(a) Comments and observations

(i) General comments

209. The comments and observations of a general nature concerning draft principle 20 are mostly related to all the three draft principles relative to situations of occupation, or to aspects that are common to them. In addition, a number of general comments relate to the Introduction to Part Four.

210. Appreciation for the three draft principles and the commentaries was expressed by the Nordic countries[642] as well as ICRC.[643] Cyprus underlined the importance of the protection of the environment in occupied areas[644] and Azerbaijan the importance of clearly spelling out the environmental obligations of an Occupying Power.[645] Austria welcomed the application of the three draft principles to all kinds of occupations, including those that met with no armed resistance.[646]

211. The United States expressed the concern that "the draft principles addressing situations of occupation go beyond what is required by the law of occupation, yet are framed as obligations on States rather than recommendations for progressive development".[647] Canada made a similar comment.[648] The Czech Republic noted that the legal status of the draft principles was unclear as "[t]he law of occupation contains no explicit reference to environment".[649] The Special Rapporteur's responses concerning the legal basis of each of the draft principles are provided below.

212. Different views were expressed on the need for a definition of occupation. El Salvador suggested including in the draft principles a definition of the term and to clarify its relationship with the term "belligerent occupation", "in order to provide greater legal certainty in the interpretation of the text".[650] Switzerland, in turn, cautioned against including, even in the commentary, a detailed definition of the concept of occupation, or in any event aligning such a definition closely with article 42 of the Hague Regulations.[651] The Special Rapporteur believes that the introduction contains the necessary clarifications regarding the concept of occupation as well as the preconditions for its applicability to particular situations.[652]

213. Further comments were made regarding the introduction to Part Four. Clarification was sought regarding the concept of an Occupying Power and the notion of "stable occupation" as well as the geographical scope of an occupation with regard to maritime areas. France questioned the understanding that the term "Occupying Power" would be sufficiently broad to cover situations of international territorial administration and pointed out that this characterization could not be applied "where the competent territorial State has consented to the presence and actions of armed

[642] Sweden (on behalf of the Nordic countries), *ibid*., on draft principle 20; see also Sweden (on behalf of the Nordic countries), A/C.6/73/SR.28, para. 52.
[643] ICRC, A/CN.4/749, on the introduction to Part Four of the draft principles.
[644] Cyprus, *ibid*., on draft principle 20.
[645] Azerbaijan, A/C.6/74/SR.31, paras. 20–22.
[646] Austria, A/C.6/74/SR.27, para. 98.
[647] United States, A/CN.4/749, on the introduction to Part Four.
[648] Canada, *ibid.*, on draft principle 20.
[649] Czech Republic, *ibid*., on draft principle 20.
[650] El Salvador, *ibid*., on draft principle 20.
[651] Switzerland, *ibid*., on draft principle 20.
[652] Draft principles … 2019, commentary to the Introduction to Part Four: see, in particular, para. (2).

forces".[653] Belarus took a similar view.[654] ICRC, referring to "stable occupation", recalled that "an occupation carries with it the condition of military dominion of the Occupying Power over the Occupied Territory through military means and methods".[655]

214. The Special Rapporteur has no different view of the distinct nature of an occupation. If a protracted occupation, in a stable situation, may bear some resemblance to a post-conflict situation, this is due to the nature of the environmental problems and the extent of the Occupying Powers' obligations towards the occupied population, not any change of the basic situation of military dominion. She furthermore agrees that a situation in which the territorial State consents to foreign military presence cannot be characterized as an occupation. Indeed, the Commission agreed that "although international organizations may exercise functions similar to occupying States in certain circumstances, the international administration of a territory could not easily be equated to a military occupation, and there was little practice to build on".[656] The Commission opted for the term "Occupying Power" as it was a term of art used in Geneva Convention IV and Additional Protocol I. At the same time, in relation to international territorial administration, it was seen "[to leave] the door open for any further development in this regard".[657]

215. The Nordic countries and South Africa attached importance to the mention of the environmental obligations of an Occupying Power in maritime areas.[658] Greece, however, expressed the view that the authority of the Occupying Power did not necessarily extend to maritime areas; rather "it must be determined on a case-by-case basis whether it was the Occupying Power or the territorial State that had effective control over those areas".[659] Algeria sought clarification to the extent of the jurisdiction of the Occupying Power in maritime areas.[660] The joint civil society submission argued that the law of occupation would be applicable in maritime areas whether or not the whole territory was occupied.[661] The Special Rapporteur does not think there is any question of the principle that, once established on a certain land territory, the authority of an Occupying Power, as well as the application of the law of occupation, extends to the adjacent maritime areas. At the same time, there may be reason to add further clarifications to the introduction, in particular regarding the different maritime zones.

(ii) Draft principle 20

216. Specific comments were made regarding all three paragraphs of draft principle 20, as well as on its title. ICRC suggested adding to the title the words "in relation to the protection of the environment" given that there are other general obligations of Occupying Powers beyond the ones reflected in the draft principle.[662] Even though the whole set of draft principles deals with the protection of the environment, and this is equally the focus of draft principle 20, the Special Rapporteur is willing to amend the title as suggested in order to avoid any misunderstanding.

[653] France, A/CN.4/749, on draft principle 20.
[654] Belarus A/C.6/73/SR.29, para. 77.
[655] ICRC, A/CN.4/749, on the introduction to Part Four of the draft principles.
[656] Statement of the Chair of the Drafting Committee, Mr. Charles Chernor Jalloh, 26 July 2018, p. 2.
[657] *Ibid*., p. 3.
[658] Sweden (on behalf of the Nordic countries), A/C.6/73/SR.28, para. 51; South Africa, A/C.6/73/SR.30, para. 4.
[659] Greece, A/C.6/73/SR.27, para. 10.
[660] Algeria, A/C.6/74/SR.31, para. 52.
[661] Joint civil society submission (footnote 16 above), pp. 17–18.
[662] ICRC, A/CN.4/749, on draft principle 20.

(iii) Paragraph 1

217. Lebanon viewed draft principle 20 on the general environmental obligations of an Occupying Power as being "of particular value". Pointing out that the military presence and military activities of occupying forces may have environmental effects that are long-term or become evident only after the occupation is over, Lebanon suggested that the Commission consider including in the draft principle "provisions relating to post-occupation responsibilities of occupying forces".[663]

218. The United States suggested replacing the word "shall" in paragraph 1 by "should" or, alternatively, to reformulate the text. The suggested reformulation reads as follows: "The environment of the occupied territory shall receive respect and protection in accordance with applicable international law and environmental considerations shall be taken into account in the administration of such territory as necessary to comply with applicable international law".[664] Poland "fully endorsed the statement … that the Occupying Power must respect and protect the environment of the occupied territory".[665] Portugal noted that the obligation of the Occupying Power to respect and protect the environment of the occupied territory … derived from customary and conventional law".[666] IUCN, too, expressed the view 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".[667] Austria noted that "it was unclear which additional obligations beyond respect for relevant applicable international law could be derived" from the draft principle.[668]

219. The Special Rapporteur finds the suggestion of Lebanon concerning post-occupation responsibilities as relevant to the draft principle. While it is understood that the obligations of an Occupying Power under the law of occupation derive from the effective authority over a territory and do not continue as such after the occupation has ended, the protection of the environment would undoubtedly benefit from attention being given to the period after an occupation. It has been suggested in this regard that an Occupying Power should acknowledge certain responsibilities extending to the post-occupation phase, based on the general obligation of an Occupying Power to maintain and restore public order and civil life in the occupied territory.[669] The notion of "post-occupation responsibilities" emphasizes the need for foresight on the part of the Occupying Power during the occupation, and willingness to take measures to ensure an orderly transition of power.[670] Such foresight could also entail prevention, mitigation and remediation of environmental harm. As has been pointed out by UNEP, "there can be no durable peace if the natural resources that sustain livelihoods and ecosystem services are damaged, degraded or destroyed".[671] The Special Rapporteur does not deem it necessary to include a mention of the post-

[663] Lebanon, *ibid*., on draft principle 20.
[664] United States, *ibid*., on draft principle 20.
[665] Poland, A/C.6/73/SR.28, para. 73.
[666] Portugal, A/C.6/73/SR.28, para. 90.
[667] IUCN, A/CN.4/749, on draft principle 20.
[668] Austria, A/C.6/73/SR.28, para. 59.
[669] E. Benvenisti, *The International Law of Occupation*, 2nd ed. (Oxford: Oxford University Press, 2012), p. 274; A. Roberts, "Occupation, military, termination of", *Max Planck Encyclopedia of Public International Law*, available at www.mpepil.com/.
[670] Benvenisti, *The International Law of Occupation*, p. 87, ("These considerations imply that already during the 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 University Press, 2014), pp. 428–446.
[671] UNEP, *From Conflict to Peacebuilding: The Role of Natural Resources and the Environment*, UNEP (2009).

occupation phase in the draft principle but believes that some considerations relevant to the time after an occupation could well be addressed in the commentary.

220. Regarding the proposal of the United States to use more permissive language in paragraph 1, the Special Rapporteur recalls that paragraph 1, similar to the entire draft principle, "derives from the general thrust of Article 43 of the Hague Regulations of 1907, which imposes the obligation of an Occupying Power to take care of the welfare of the population of an occupied territory".[672] Reference can also be made to article 55 of additional Protocol I to the Geneva Conventions, and obligations under human rights law, in particular relating to the right to life, right to health and right to food.[673] As for the suggested alternative wording, it may be noted that removing the active voice and the reference to "an Occupying Power" would leave it unclear to whom the obligation belongs. Furthermore, as the paragraph already contains a reference to "applicable international law", repeating this reference could risk creating confusion.

(iv) Paragraph 2

221. Most comments regarding paragraph 2 were generated by the references to "significant harm", "health and well-being" and "population of the occupied territory".

222. Switzerland considered that the reference to "significant harm" was limitative and suggested that it would be clarified in light of the general obligation under article 43 of the Hague Regulations, and other obligations concerning public health or food supply.[674] Spain regarded the paragraph as "too vague" and suggested reconsidering the inclusion of the terms "likely" and "significant".[675] OHCHR, too, suggested reconsidering the qualification "significant" to ensure that the draft principle is consistent with the duty to prevent under international human rights law.[676] The United States suggested incorporating in the paragraph a reference to "the duties [of] an Occupying Power, including the obligation to take all the measures in its power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country".[677] Germany sought further clarification regarding the standard applied.[678]

223. The second element that received comments is the notion of "health and well-being". While South Africa welcomed the use of the broader term "health and well-being" instead of enumerating the various human rights,[679] OHCHR saw the provision as unnecessarily narrow in light of the existing human rights protections and suggested extending the reference to "human rights that may not necessarily be directly related to the health or well-being of individuals".[680] The Netherlands supported the reference to health but also recalled the relevance of other human rights, such as the right to life, the right to water and the right to food.[681] IUCN recalled that a number of States 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".[682] Germany considered the whole phrase "that is likely to prejudice the health and well-being of the

[672] Statement of the Chair of the Drafting Committee, Mr. Charles Chernor Jalloh, 26 July 2018, p. 3.
[673] Draft principles … 2019, commentary to draft principle 20, para. (5).
[674] Switzerland, A/CN.4/749, on draft principle 20.
[675] Spain, *ibid*., on draft principle 20.
[676] OHCHR, *ibid*., on draft principle 20.
[677] United States, *ibid*., on draft principle 20.
[678] Germany, *ibid*., on draft principle 20.
[679] South Africa, A/C.6/73/SR.30, para. 4.
[680] OHCHR, A/CN.4/749, on draft principle 20.
[681] Netherlands, A/C.6/73/SR.29, para. 45.
[682] IUCN (A/CN.4/749), on draft principle 20.

population of the occupied territory" as redundant and possibly misleading and suggested its deletion.[683] Further comments underlined in a general manner the relevance and importance of human rights for the protection of the environment of occupied territories.[684]

224. A number of comments concerned the phrase "the population of the occupied territory". Lebanon suggested replacing the phrase with a reference to the "protected population of the occupied territory" or "protected persons of the occupied territory", to ensure consistency with article 4 of Geneva Convention IV.[685] Algeria made a similar proposal.[686] Switzerland, too sought clarification regarding the relationship of this phrase with the concept of "protected persons".[687] OHCHR underlined the importance of preserving the rights of protected people,[688] and the joint civil society submission expressed its strong preference for the term "protected population".[689] Jamaica suggested clarifying that the term "population" encompasses both present and future generations.[690]

225. The Special Rapporteur recalls that the current wording referring to "health and well-being" was chosen "[s]ince international human rights law in general was covered under the reference to 'applicable international law' in paragraph 1". It was furthermore understood that the commentary could make clear "that a number of other human rights, such as the right to life or the right to food, would also be covered by this provision".[691] The purpose of paragraph 2, as explained in the commentary, "is to indicate that significant harm to the environment of an occupied territory may have adverse consequences for the population …, in particular with respect to the enjoyment of certain human rights, such as the right to life, right to health, or right to food".[692] The recognition of an independent right to environment by more than 150 States further strengthens the link between human rights and the protection of the environment.[693] While the notion "health and well-being" also echoes the obligations of an Occupying Power under the law of occupation,[694] the paragraph would be more clearly linked to existing obligations under the law of occupation and international human rights law if it included a reference to rights. This could also address the concerns related to the normative nature of the paragraph.

226. The reference to "significant harm" can be derived from the obligations of the Occupation Power under the law of occupation, in particular article 43 of the Hague Regulations, referred to above by Switzerland and the United States, as well as from its obligations, as a temporary administrator, towards the territorial sovereign. It should furthermore be recalled that the need for a certain threshold of environmental

[683] Germany, A/CN.4/749, on draft principle 20.
[684] El Salvador, A/CN.4/749; Malaysia, A/C.6/73/SR.30, para. 72; Micronesia (Federated States of), A/C.6/73/SR.29, para. 147; Netherlands, A/C.6/73/SR.29, para. 45; Sweden (on behalf of the Nordic countries), A/C.6/73/SR.28, para. 51.
[685] Lebanon, A/C.6/73/SR.29, para. 96.
[686] Algeria, A/C.6/74/SR.31, para. 52.
[687] Switzerland, A/CN.4/749, on draft principle 20.
[688] OHCHR, *ibid.*, on draft principle 20.
[689] Joint civil society submission (footnote 16 above), p. 18.
[690] Jamaica, A/C.6/74/SR.33, paras. 35–36.
[691] Statement of the Chair of the Drafting Committee, Mr. Charles Chernor Jalloh, 26 July 2018, p. 5.
[692] Draft principles … 2019, commentary to draft principle 20, para. (5).
[693] D.R. Boyd, *The Environmental Rights Revolution …*, pp. 46–63. See also document A/HRC/48/L.23/Rev.1.
[694] T. Ferraro (ed.), *Occupation and Other Forms of Administration of Foreign Territory, Report of an Expert Meeting* (ICRC, 2012), p. 72 ("The participants were unanimously of the view that the welfare of the local population played a key role" in situations of prolonged occupation).

harm,[695] such as "significant harm",[696] in order for the relevant rights to be violated, has been recognized in regional human rights jurisprudence. As far as the combination of the two phrases, "significant harm" and "likely to prejudice the health and well-being of the population of the occupied territory" is concerned, the Special Rapporteur acknowledges that the relationship between the two notions could be further clarified. While it was not the Commission's intention, as the commentary explains, that the two phrases should be read as cumulative requirements,[697] this seems to be a possible reading of paragraph 2.

227. Regarding the phrase "population of the occupied territory", the Special Rapporteur draws attention to the commentary, which explains that the wording "has been aligned with article 55, paragraph 1, of Additional Protocol I, which refers to 'population' without the qualifying adjective 'civilian'". This omission, according to the ICRC commentary, "serves to emphasize the fact that damage caused to the environment may continue for a long time and affect the whole population without any distinction".[698] It is nevertheless recalled that in draft principle 21, the phrase "population of the occupied territory" is to be understood in the sense of "protected persons".[699] While the distinction between the two draft principles has been seen as justified, the Special Rapporteur agrees with Switzerland that giving two definitions to the same phrase is less than ideal.[700]

228. In light of the comments and considerations above, the Special Rapporteur suggests changing paragraph 2 so that the two phrases cannot be read as cumulative. She furthermore proposes two changes that would anchor the provision more closely to the existing obligations under the law of occupation and human rights law.

(v) Paragraph 3

229. Regarding paragraph 3, Brazil agreed that "the Occupying Power had an obligation to respect the legislation of the occupied territory pertaining to the protection of the environment".[701] South Africa noted that this obligation should "also include respect for and continued implementation of the international environmental law commitments of the occupied territory".[702]

230. The comments made on the wording of paragraph 3 focused on two main issues. First, it was suggested to align the paragraph closer with the wording of article 43 of the Hague Regulations. Germany, the United States, and ICRC suggested adding to the paragraph the phrase "unless absolutely prevented" in line with article 43 of the Hague Regulations.[703] Germany furthermore doubted that the reference to institutions would reflect customary international law and suggested using the word "should"

[695] European Court of Human Rights, see e.g. *Fadeyeva v. Russia*, No. 55723/00, ECHR 2005-IV, paras. 68 and 70; *Kyrtatos v. Greece*, No. 41666/98, ECHR 2003-VI (extracts), para. 52.
[696] 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.
[697] Draft principles … 2019, commentary to draft principle 20, para. (7).
[698] ICRC commentary (1987) to Additional Protocol 1, art. 55, para. 1, p. 663, para. 2134.
[699] Draft principles … 2019, commentary to draft principle 21, para. (3).
[700] Switzerland, A/CN.4/749, on draft principle 20.
[701] Brazil A/C.6/73/SR.28, para. 68.
[702] South Africa, A/C.6/73/SR.30, para. 4.
[703] United States, A/CN.4/749, on draft principle 20; Germany, *ibid*.; ICRC, *ibid*.

when referring to institutions.[704] The United States and Israel suggested deleting the mention of "institutions".[705] Israel also suggested replacing "law" with "laws".[706]

231. Second, comments were made regarding the proactive measures to protect the environment that an Occupying Power might be required to take. Malaysia took the view that paragraph 3 should "allow for greater latitude for the Occupying Power to improve the environmental laws of the occupied territory where necessary".[707] Belarus made a similar comment.[708] IUCN welcomed the clarification in the commentary that States may need to take proactive measures in protecting the environment in occupied territories, but suggested expressing this possibility also in the wording of paragraph 3.[709]

232. The Special Rapporteur recalls that the Commission opted for the phrase "law and institutions" in order to take into account, in addition to article 43 of the Hague Regulations, article 64 of Geneva Convention IV, which according to an established interpretation refers to "the whole of the law in the occupied territory".[710] The reference to "law" was also meant to cover the international obligations of the occupied State.[711] Institutions, furthermore, can be seen as "one aspect of the 'laws in force in the country'".[712] The need to respect local institutions can also be derived from the inherently provisional nature of the occupation.[713] The Commission furthermore decided to remove the words "unless absolutely prevented", which were included in the Special Rapporteur's original proposal, in order to take into account the need for proactive measures, in particular in situations of a protracted occupation. At the same time, the wording of paragraph 3, including the reference to "the limits provided by the law of armed conflict" makes it clear that the provision is not intended to fall below existing obligations. At the same time, it reflects the basic thrust of article 47 of Geneva Convention IV, namely that "changes made in the internal organization of the State must not lead to protected persons being deprived of the rights and safeguards provided for them".[714]

233. Regarding the commentary to draft principle 20, Germany sought clarification on "whether environmental harm must be prevented only from the Occupying Power's own activities or beyond that, from all activities in the occupied territory", and what role the institutions of the occupied territory would have in such prevention.[715] Reference can be made in this regard to the Occupying Power's obligation to prevent private actors from committing acts that are prohibited by the law of occupation. This "duty of vigilance" based on article 43 of the Hague Regulations has been recognized

[704] Germany, *ibid*., on draft principle 20.
[705] Israel, *ibid*., on draft principle 20; United States, *ibid*.
[706] Israel, *ibid*., on draft principle 20.
[707] Malaysia, A/C.6/73/SR.30, para. 71.
[708] Belarus, A/C.6/73/SR.29, para. 76.
[709] IUCN, A/CN.4/749, on draft principle 20.
[710] ICRC commentary (1958) to Geneva Convention IV, art. 64, p. 335.
[711] Draft principles … 2019, commentary to draft principle 20, para. (9).
[712] M. Sassóli, "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. 671; similarly M.S. McDougal and F. P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven, Yale University Press, 1961), p. 768; E.H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Washington: Carnegie Endowment for International Peace, 1942), pp. 89–90.
[713] See 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*"].
[714] ICRC Commentary (1958) to Geneva Convention IV, art. 47, p. 273.
[715] Germany, A/CN.4/749, on draft principle 20.

by the International Court of Justice,[716] as well as by the Eritrea-Ethiopia Claims Commission.[717] This obligation has relevance not only for draft principle 20 but for all three draft principles relative to situations of occupation. In addition, the obligation "to prevent" under human rights law extends to acts of non-State actors such as private persons or companies.[718]

(b) Recommendation of the Special Rapporteur

234. In light of the comments and considerations above, the Special Rapporteur suggests changes to the title and to paragraph 2 of draft principle 20. The Commission may also wish to consider adding further clarifications to the commentary which take into account some of the comments received. The Special Rapporteur will make suggestions to this effect in due course. As amended, the draft principle would read as follows:

Principle 20
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 environmental harm that is likely to prejudice the health and well-being of the protected persons of the occupied territory, or to 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.

22. Principle 21 [20]
Sustainable use of natural resources

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

(a) Comments and observations

235. Draft principle 21 received general support from Algeria, Belarus, the Netherlands, the Nordic countries, Ukraine and IUCN.[719] The Netherlands agreed "that, in relation to the environment, a modern-day interpretation of 'usufruct', as

[716] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 (see footnote 267 above), para. 158. See also para. 250.

[717] 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.

[718] Guiding Principles on Business and Human Rights, principles 11 and 15 and the commentaries thereto; OHCHR, *The Corporate Responsibility to Respect Human Rights: Interpretative Guide* (HR/PUB/12/02), p. 16; Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (A/73/163), paras. 12–14; OECD, *Due Diligence Guidance for Responsible Business Conduct* (2018), p. 16. See also, C. Methven O'Brien and S. Dhanarajan, "The corporate responsibility to respect human rights: a status review" *Accounting, Auditing & Accountability Journal*, vol. 29 (2016), pp. 542–567; R. Mares, "A Gap in the Corporate Responsibility to Respect Human Rights" *Monash University Law Review*, vol. 36 (2010), pp. 33–83.

[719] Algeria, A/C.6/73/SR.30, para. 85; Belarus, A/C.6/73/SR.29, para. 79; Netherlands, A/C.6/73/SR.29, para. 46; Sweden (on behalf of the Nordic countries), A/C.6/73/SR.28, para. 52; Ukraine, A/C.6/74/SR.26, para. 127; IUCN, A/CN.4/749, on draft principle 21.

referred to in article 55 of the Hague Regulations, would include the 'sustainable use' of resources. There should be a balance between environmental harm caused, for example, by the use of non-renewable resources and the need for society and future generations to be able to use natural resources and ecosystem services".[720] Cyprus furthermore stressed the increased environmental risk engendered from operations carried out in occupied areas with a view to exploiting natural resources.[721]

236. As far as the wording of the draft principle is concerned, the phrase "for other lawful purposes under the law of armed conflict" and the related commentary generated some comments. Austria and OHCHR suggested replacing the reference to the law of armed conflict by a more general mention of the applicable international law.[722] IUCN suggested referring to international human rights obligations, including the prohibition of discrimination as well as the effective participation in decision-making.[723] Switzerland, too, requested clarification on how the interests of the local population would be taken into account in the exploitation of natural resources.[724]

237. A number of States underlined the importance of the principles of self-determination and permanent sovereignty to natural resources in setting limits to the use and exploitation of natural resources by an Occupying Power. Lebanon suggested referring to "the right to self-determination, in relation to the exploitation and use of natural resources for the benefit of the population of the occupied area and in accordance with their wishes".[725] Cyprus suggested stating that the administration and use of the natural resources of an occupied territory by an Occupying Power, to the extent permissible, would be "with no prejudice to the permanent sovereignty of a State over its natural resources".[726] Algeria suggested stating "that any exploration or exploitation of natural resources in an occupied territory should take place in accordance with the wishes and interests of the local population, in the exercise of their right to self-determination".[727] Italy suggested explicitly mentioning in the draft principle the principles of permanent sovereignty to natural resources and the right to self-determination.[728] Azerbaijan, Greece, Malaysia, and South Africa underlined the importance of both principles in the context of draft principle 21 and the related commentary.[729]

238. Lebanon suggested replacing the reference to the "population of the occupied territory" by "protected persons of the occupied territory" or "protected population of the occupied territory".[730] Algeria preferred the term "protected persons".[731] IUCN,[732] as well as the joint civil society submission,[733] also suggested clarifying "that the locus of the 'benefit' is with the protected population within the occupied territory, as understood in Geneva Convention IV". The United States suggested clarifying the relationship between the notion of "protected persons" in the sense of article 4 of Geneva Convention IV, and the reference to "population".[734]

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[720] Netherlands, A/C.6/73/SR.29, para. 46.
[721] Cyprus, A/CN.4/749, on draft principle 18.
[722] Austria, A/C.6/73/SR.28, para. 60; OHCHR, A/CN.4/749, on draft principle 21.
[723] IUCN, *ibid.*, on draft principle 21.
[724] Switzerland, *ibid*., on draft principle 20.
[725] Lebanon, *ibid*., on draft principle 21.
[726] Cyprus, *ibid*., on draft principle 21.
[727] Algeria, A/C.6/74/SR.31, para. 52. See also Algeria, A/C.6/73/SR.30, para. 85.
[728] Italy, A/C.6/74/SR.28, para. 26.
[729] Azerbaijan, A/C.6/74/SR.31, para. 24; Greece, A/C.6/74/SR.28, para. 52; Malaysia, A/C.6/73/SR.30, para. 73; South Africa, A/C.6/73/SR.30, para. 2.
[730] Lebanon, A/C.6/73/SR.29, para. 96.
[731] Algeria, A/C.6/74/SR.31, para. 52.
[732] IUCN (A/CN.4/749), on draft principle 21.
[733] Joint civil society submission (footnote 16 above), p. 18.
[734] United States (A/CN.4/749), on draft principle 21.

239. The United States further suggested replacing the word “shall” by “should” as, in its view, the draft principle did not reflect an existing obligation under international law.[735] Canada and the Czech Republic expressed a similar concern.[736]

240. A number of comments were addressed specifically to the term “sustainable use” and its relationship with the notion of “*usufruct*”. The Nordic countries welcomed draft principle 20, “the wording of which reflected both the rights and obligations of an Occupying Power under the law of armed conflict and the importance of ensuring sustainable use of natural resources and minimizing environmental harm”.[737] Belarus[738] and Ukraine[739] supported the notion of “sustainable use of natural resources”. Algeria welcomed the principle but pointed out that it would be “important to specify the role of the occupied population in making decisions regarding the use of their natural resources”.[740] Algeria furthermore noted that “it was important to clarify the meaning of the phrase ‘sustainable use’ in order to ensure that resources were not exploited in the absence of transparent, environmental impact assessments and management plans”.[741] The Netherlands, as pointed out above, agreed that “a modern-day interpretation of ‘usufruct’, as referred to in article 55 of the Hague Regulations, would include the ‘sustainable use’ of resources.”[742] IUCN welcomed “the new phrasing of ‘sustainable use’ rather than the historic notion of usufruct”, and pointed out that both concepts were “designed to prevent the over-exploitation of natural resources, and … to safeguard the occupied State’s property and means of subsistence”. IUCN also welcomed “the specific reference to the need to ensure the minimization of environmental harm and the legal basis for this”.[743] Jamaica noted that the draft principle “sought to bring the rules of *usufruct* into line with modern realities and developments in international environmental law”.[744] Israel, however, suggested deleting both the reference to “sustainable use of natural resources” and to “minimization of environmental harm”, regarding the former phrase as unclear and the latter as “subject to and demarcated by the existing law, namely, the obligation reflected in article 55 of the Hague Regulations”.[745]

241. Austria[746] and Malaysia[747] suggested referring to “preventing of environmental harm” instead of its “minimization”. Jamaica suggested adding a third requirement to the provision in addition to sustainable use and minimization of environmental harm, namely that the relevant natural resources could only be used “in a way that [is] not prejudicial to the interests of future generations of the relevant population”. Alternatively, the commentary could clarify that the term “population” would be interpreted as encompassing both present and future generations.[748]

242. Azerbaijan, however, disagreed with the draft principle and sought clarification against its misinterpretation and abuse by an Occupying Power.[749] Algeria, too, was

[735] United States, *ibid*., on draft principle 21.
[736] Canada, *ibid*., on draft principle 20; Czech Republic, *ibid*.
[737] Sweden (on behalf of the Nordic countries), A/C.6/73/SR.28, para. 52.
[738] Belarus, A/C.6/73/SR.29, para. 79.
[739] Ukraine, A/C.6/74/SR.26, para. 127.
[740] Algeria, A/C.6/73/SR.30, para. 85.
[741] *Ibid*.
[742] Netherlands, A/C.6/73/SR.29, para. 46.
[743] IUCN, A/CN.4/749, on draft principle 21.
[744] Jamaica, A/C.6/74/SR.33, paras. 35–36.
[745] Israel, A/CN.4/749, on draft principle 21.
[746] Austria, A/C.6/73/SR.28, para. 60.
[747] Malaysia, A/C.6/73/SR.30, para. 73.
[748] Jamaica, A/C.6/74/SR.33, paras. 35–36.
[749] Azerbaijan, A/C.6/73/SR.29, para. 117.

concerned that draft principle 20 "could be understood as granting greater latitude to an Occupying Power to use the natural resources of an occupied State or territory."[750]

243. Regarding the comments in paragraph 235, the Special Rapporteur agrees that the international legal framework for situations of occupation is not exclusively provided by the law of occupation. Replacing the reference to the law of occupation by a more general reference to international law could nevertheless have the effect of making the phrase unnecessarily open-ended. It should be recalled that the purpose of this phrase is to underline that there is only a limited set of considerations that justify the exploitation of the resources of the occupied territory by the Occupying Power. At the same time, some of the relevant requirements of human rights law, such as non-discrimination and effective participation, as suggested by IUCN, could be clarified in the commentary.

244. As for the comments on the phrase "the population of the occupied territory", the Special Rapporteur recalls that, according to the commentary, the phrase is to be understood in this context as referring to "protected persons".[751] To ensure consistency with draft principle 20, however, it is suggested using the same term in both provisions.

245. Regarding the suggestions to replace the word "shall" with "should", the Special Rapporteur points out that the draft principle is based on article 55 of the Hague Regulations. "*Usufruct*" is a general concept that has been traditionally interpreted to refer to "good housekeeping",[752] according to which the usufructuary "must not exceed what is necessary or usual"[753] when exploiting the relevant resource. Both the concept of *usufruct* and that of "sustainable use of natural resources" are designed to prevent overexploitation. As confirmed by the International Court of Justice,[754] and the Commission,[755] an evolutionary interpretation of a general term in light of subsequent legal developments does not turn an established customary rule into a recommendation. The Special Rapporteur thus believes that both the verb "shall" and the references to sustainable use and minimization of harm have their place in the draft principle. In addition, she also tends to think that "minimization" is the right notion in this sentence, as "ensuring prevention" in the exploitation of natural resources could prove challenging in practice. It should be recalled that the provision only applies to situations in which an Occupying Power is permitted to use the relevant natural resources. As for the intergenerational principle, the Special Rapporteur understands it to be inherent in the concept of sustainable use.

246. A number of other comments addressed the commentary. Germany suggested clarifying the difference between the rules concerning movable and immovable public

[750] Algeria, A/C.6/74/SR.31, para. 52.

[751] Draft principles … 2019, commentary to draft principle 21, para. (3).

[752] See 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 (describing the rules of usufruct as forbidding "wasteful or negligent destruction of the capital value … contrary to the rules of good husbandry").

[753] Great Britain, War Office, *The Law of War on Land Being Part III of the Manual of Military Law* (1958), sect. 610. Similarly United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), p. 303, para. 11.86.

[754] *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 para. 53. Similarly *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at 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".

[755] Draft conclusions on subsequent agreements and subsequent practice in relation to interpretation of treaties, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 39, at pp. 24–30, commentary to draft conclusion 3 "Interpretation of treaty terms as capable of evolving over time".

property.[756] ICRC suggested mentioning the exceptions to the rule of *usufruct* under the law of occupation.[757] Israel, furthermore, suggested citing the relevant property rules in a more comprehensive manner.[758] IUCN suggested expanding the passage on the applicable international law.[759]

(b) Recommendation of the Special Rapporteur

247. Apart from the reference to "protected persons", in line with draft principle 20, the Special Rapporteur does not suggest any amendment to draft principle 21. The Commission may nevertheless wish to add further clarifications to the commentary taking into account of some of the comments received. The Special Rapporteur will make proposals to this effect in due course. As amended, draft principle 21 would read as follows:

Principle 21
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 persons of the occupied territory and for other lawful purposes under the law of armed conflict, it shall do so in a way that ensures their sustainable use and minimizes environmental harm.

23. Principle 22 [21]
Due diligence

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

(a) Comments and observations

248. Draft principle 22 received general support from Malaysia,[760] the Netherlands,[761] Poland[762] and Ukraine.[763] At the same time, a number of comments were made regarding the formulation of the draft principle and its title. Japan pointed to the need to align the terminology with the previous work of the Commission, for instance the articles on transboundary aquifers.[764] In this regard, it would be important to replace the phrase "exercise due diligence" with the words "take appropriate measures".[765] Austria, too, criticized the notion of "due diligence" and suggested aligning the draft principle with principle 21 of the Stockholm Declaration and principle 2 of the 1992 Rio Declaration on Environment and Development, which "set no restrictions on the responsibility of States to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limit of national jurisdiction".[766]

249. Several comments were made regarding the scope of application of the draft principle. The United States did not agree that the obligation of due diligence would

[756] Germany, A/CN.4/749, on draft principle 21.
[757] ICRC, *ibid*., on draft principle 21.
[758] Israel, *ibid*., on draft principle 21.
[759] IUCN, *ibid*., on draft principle 21.
[760] Malaysia, A/C.6/73/SR.30, para. 74.
[761] Netherlands, A/C.6/73/SR.29, para. 46.
[762] Poland, A/C.6/73/SR.28, para. 73.
[763] Ukraine, A/C.6/73/SR.23, para. 41.
[764] General Assembly resolution 63/124 of 11 December 2008, annex. The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54.
[765] Japan, A/C.6/73/SR.28, para. 84.
[766] Austria, A/C.6/73/SR.28, para. 61.

apply internally within the occupied State "especially when there may be combat operations that are consistent with international humanitarian law affecting the environment of occupied and non-occupied territories" and suggested replacing the words "beyond the occupied territory" with the words "another State".[767] The United States further suggested deleting the word "ensure" and adding to the draft principle the phrase "unless absolutely prevented".[768] Algeria, in turn, pointed out that domestic decisions of an Occupying Power could have implications for environmental protection in the occupied territory, and suggested specifying that an Occupying Power had to refrain from any acts on its own territory that might cause environmental harm to an occupied territory, where the two territories were adjacent.[769] ICRC furthermore questioned the limitation of the draft principle to the occupation context and suggested, to clarify that it applies to all temporal phases of an armed conflict.[770] Switzerland, too, suggested extending the draft principle "to situations other than those of occupation", along the lines of article 2, subparagraph (d) of the draft articles on prevention of transboundary harm from hazardous activities,[771] which refers to "activities carried out within the territory or otherwise under the jurisdiction or control of a State".[772] The Czech Republic sought clarification regarding the mention of due diligence only in draft principle 10 and draft principle 22.[773]

250. In light of the different comments on the notion of "due diligence", the Special Rapporteur suggests giving more thought to the wording of the draft principle. While the obligation to prevent transboundary harm is one of due diligence, the use of this term in the draft principle and in its title may be misleading. The Special Rapporteur recalls that draft principle 22 is a specific application of the general principle identified and articulated in articles on prevention of transboundary harm from hazardous activities. The general principle is applicable "to activities carried out within the territory or otherwise under the jurisdiction or control of a State". It might be advisable to use language that is closer to the articles and other earlier work of the Commission.

251. As far as the reformulation suggested by the United States is concerned, it seems to derive the obligation not to cause significant harm to the environment of other States from article 53 of the Hague Regulations: the duty of the Occupying Power to respect, unless absolutely prevented, the laws in force in the country, "which would include an obligation to respect the occupied State's obligation in this regard".[774] While the Special Rapporteur agrees that the obligation under article 53 of the Hague Regulations to respect the "laws in force" is to be interpreted to include the international obligations of the occupied State, the draft principle at hand deals with an obligation that is binding on the Occupying Power as such. The International Court of Justice has stated in this regard 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".[775] It should also 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 the Commission has explained, the obligation to prevent transboundary harm "covers situations in which a State is

[767] United States, A/CN.4/749, on draft principle 22.
[768] United States, *ibid*.
[769] Algeria, A/C.6/73/SR.30, para. 86.
[770] ICRC, A/CN.4/749, on draft principle 22.
[771] General Assembly resolution 62/68 of 6 December 2007, annex. The draft articles and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98.
[772] Switzerland, *ibid*., on draft principle 22.
[773] Czech Republic, *ibid*., in draft principle 10.
[774] United States, *ibid*., on draft principle 22.
[775] *Legal Consequences for States* (see footnote 754 above), para. 118.

exercising *de facto* jurisdiction, even though it lacks jurisdiction *de jure*, such as in cases of unlawful intervention, occupation and unlawful annexation".[776]

252. Regarding the phrase "areas beyond the occupied territory" the Special Rapporteur recalls that the Commission opted for this formulation to fill a gap that could arise if the original wording "to the environment of another State or to areas beyond national jurisdiction" was retained. More specifically, in a situation in which only a part of the territory of a State was occupied, this formulation could be interpreted to exclude the other parts of that State. Nevertheless, a preference was also expressed to retain the original text given that it is widely used in international instruments.[777] The Special Rapporteur believes that it would be possible to align the draft principle with established terminology, while explaining in the commentary that the reference to "other States" includes the occupied State in case only a part of its territory is occupied. As for the other comments, the Special Rapporteur suggests addressing them in the commentary.

(b) Recommendation of the Special Rapporteur

253. In light of the comments and considerations above, the Special Rapporteur suggests reformulating the draft principle and its title. The Commission may also wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course. As amended, draft principle 22 would read as follows:

Principle 22
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.

Part Five [Three]: Principles applicable after armed conflict

24. Principle 23 [14] Peace processes

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

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

(a) Comments and observations

254. Draft principle 23 received general support from Ireland, Malaysia, the Republic of Korea, and Slovenia.[778] IUCN also welcomed the provision, pointing out that 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".[779] The Czech Republic underlined the importance of the inclusion of non-State armed groups in the draft principle, given

[776] Draft articles on the prevention of transboundary harm from hazardous activities, commentary to draft article 1, para. (12).
[777] Statement of the Chair of the Drafting Committee, Mr. Charles Chernor Jalloh, 26 July 2018, p. 9.
[778] Ireland, (A/CN.4/749), general comments and observations; Malaysia, A/C.6/73/SR.30, para. 6; Republic of Korea, A/C.6/73/SR.30, para. 31; Slovenia, A/C.6/74/SR.29, para. 142.
[779] IUCN (A/CN.4/749), on draft principle 23.

that such groups may have information that is relevant for the reparation of environmental damage.[780] Colombia highlighted the essential role of natural resources and the environment in peace restoration and peacebuilding. Colombia also shared its experience of how reintegrated fighters have been encouraged to contribute to reparation and restoration activities.[781]

255. While most of the comments related to the commentary, some suggestions were made regarding the formulation of the draft principle. IUCN suggested amending the phrase "damaged by the conflict" in paragraph 1 to read "damaged in relation to the conflict". The suggested wording would take into account that all environmental damage is not directly caused "by the conflict".[782]

256. FAO suggested that paragraph 2 be reformulated to underline the need for cooperation across the humanitarian system, in particular between local, national and international actors, in order to "ensure a continuum of efforts to manage environmental risks and to develop sustainable development interventions".[783] State action, according to FAO, should be guided by the leadership and experience of local actors and communities, and focus on climate change adaptation, disaster risk reduction and anticipatory action.[784] IUCN, too, underlined the important role of local communities in peacebuilding processes, and recalled the relevant human rights obligations, including obligations of effective participation in decision-making and access to justice.[785]

257. The Special Rapporteur agrees that the change suggested to paragraph 1 by IUCN would make sense given the current knowledge of the indirect environmental effects of armed conflicts. The Special Rapporteur also fully agrees with the substance of the suggestion of FAO. As the suggested language would not change the subject of paragraph 2 but only to add specifications on how the facilitation should be conducted, however, the Special Rapporteur believes that the relevant content can be reflected in the commentary.

258. IUCN further suggested mentioning in the commentary people in vulnerable situations, and referred in this context to wording from a resolution of the United Nations Environmental Assembly highlighting 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.[786] OHCHR suggested mentioning in the commentary the right to full and equal participation of women in decision-making, planning and implementation as regards protection of the environment, in line with the relevant documents of the Committee on the Elimination of Discrimination against Women and the United Nations Environmental Assembly.[787] IAEA provided information on its practice related to IAEA Safety Standards, as well as its experience in assisting with remediation in post-conflict situations.[788] ICRC, finally, suggested that the notion "former parties to an armed conflict" be explained in the commentary.[789]

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[780] Czech Republic, *ibid*., on draft principle 24.
[781] Colombia, *ibid*., on draft principle 23.
[782] IUCN, *ibid*., on draft principle 23.
[783] FAO, *ibid*., on draft principle 23.
[784] FAO, *ibid*., general comments and observations.
[785] IUCN, *ibid*., on draft principle 23.
[786] United Nations Environmental Assembly resolutions 2/15 (see footnote 17 above) , preamble.
[787] OHCHR (A/CN.4/749), on draft principle 23.
[788] IAEA, *ibid*., on draft principle 23.
[789] ICRC, *ibid*., on draft principle 23.

(b) Recommendation of the Special Rapporteur

259. In light of the comments and considerations above, the Special Rapporteur suggests one amendment to paragraph 1 of the draft principle. The Commission may also wish to make changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course. As amended, draft principle 23 would read as follows:

Principle 23
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 in relation to the conflict.

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

25. Principle 24 [18]
Sharing and granting access to information

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

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

(a) Comments and observations

260. ESCAP underlined the importance of the disclosure "of any environmental information that can help determine relief and remedy, but also, any vital information that secures the integrity of the affected communities by armed conflict". ESCAP referred in this context in particular to displaced communities in need of environmental information that would make it possible to determine the feasibility of returning to conflict areas.[790] ECLAC pointed out that "sound, informed and participatory environmental management contributes to conflict prevention and resolution".[791] The Nordic countries, Ukraine, and ICRC also welcomed the draft principle.[792]

261. Regarding paragraph 1, a number of comments concerned the question whether there indeed was a general obligation to share and grant access to environmental information. Canada, the Czech Republic, France, Germany, the Netherlands and the United States expressed the view that no such obligation existed.[793] Germany nevertheless added that it understood the phrase "in accordance with their obligations" to mean that the draft principle was presented as a "restatement of (potentially) existing obligations rather than codification of a new obligation".[794] Ireland, too, shared this understanding, pointing out that "draft principle 24 does not assert a general obligation under customary international law to share and grant access

[790] ESCAP, *ibid*., on draft principle 24.
[791] ECLAC, *ibid*., general comments and observations.
[792] Norway (on behalf of the Nordic countries), A/C.6/74/SR.27, para. 82; Ukraine, A/C.6/71/SR.30, para. 4; ICRC, A/CN.4/749, on draft principle 24.
[793] Canada, A/CN.4/749, general comments and observations; France, *ibid*.; Czech Republic, *ibid*.; Germany, *ibid*., Netherlands, *ibid*., and the United States, *ibid*.
[794] Germany, *ibid*., on draft principle 24.

to information, but rather confirms that States and international organizations must comply with any relevant obligations that they may have under international law".[795] Malaysia expressed a similar view.[796] The Special Rapporteur believes that the latter group of States indeed correctly describes the intention of the Commission to base the draft principle on existing obligations of States. There may be reason to further clarify this intention in the commentary so as to avoid any misunderstanding. At the same time the Commission may wish to update and complement the text of the commentary as regards the relevant obligations. The Special Rapporteur will make proposals to this effect in due course.

262. OHCHR recalled that the right of access to information was an established principle under international human rights law, and made two remarks in this regard. First, OHCHR expressed the concern that the mention of remedial measures as well as the word "relevant" could be interpreted to restrict the scope of the existing obligation. Second, OHCHR pointed out that the right of access to information applied before, during and after an armed conflict, and not only in post-conflict situations.[797] Switzerland, too, referred to the right of access to information, and its continued application in armed conflicts.[798] The joint civil society submission likewise suggested that the draft principle should cover the period during armed conflict as remedial measures may take place while a conflict is ongoing.[799]

263. The Czech Republic suggested addressing in paragraph 1 also non-State armed groups, in addition to States and international organizations.[800] Switzerland made a similar suggestion regarding the commentary, and referred to the obligations under Amended Protocol II to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons.[801] Slovenia pointed out that non-State actors could possess and be in a position to share information to facilitate remedial measures after an armed conflict, and suggested further examining the role of such actors.[802] ICRC, too, suggested more clearly addressing in the commentary the existing obligations of non-State armed groups parties to a conflict under international humanitarian law.[803]

264. Regarding the comments reflected in paragraph 260, the Special Rapporteur recalls that paragraph 1 refers both to environmental information provided directly by States and international organizations in their mutual relations, and to allowing access by individuals to such information. International human rights law, including article 19 of the International Covenant on Civil and Political Rights,[804] is obviously relevant for the latter purpose. Paragraph 1 is a specific application of that right in the context of environmental information in relation to armed conflicts and should not be interpreted as restricting the general right.

265. As for the temporal scope of the provision, the Special Rapporteur recalls that the Commission, in 2016, added to paragraph 1 the words "after an armed conflict"

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[795] Ireland, *ibid*., general comments and observations.
[796] Malaysia, A/C.6/73/SR.30, para. 70.
[797] OHCHR, A/CN.4/749, on draft principle 24.
[798] Switzerland, *ibid*., on draft principle 24.
[799] Joint civil society submission (footnote 16 above), p. 21.
[800] Czech Republic, A/CN.4/749, on draft principle 24.
[801] Switzerland, *ibid*., on draft principle 24. For Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II, as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Geneva, 3 May 1996), see United Nations, *Treaty Series*, vol. 2048, No. 22495, p. 93.
[802] Slovenia, A/C.6/71/SR.29, para. 53.
[803] ICRC, A/CN.4/749, on draft principle 24.
[804] International Covenant on Civil and Political Rights (New York, 16 December 1964), United Nations, *Treaty Series*, vol. 999, p. 171.

in order to more clearly link the draft principle to the post-conflict phase.[805] Given that the set of draft principles adopted on first reading in 2019 also includes Part Four relative to situations of occupation, however, this phrase may be too limitative. In addition, some of the relevant obligations may also apply during an armed conflict. Furthermore, there is no reason to conclude that remedial measures could only be taken after an armed conflict. The Special Rapporteur therefore suggests using a more general term such as "in relation to an armed conflict".

266. Regarding the comments reflected in paragraph 263, the Special Rapporteur recalls that the Commission intended that paragraph 1 "applied only to States, and that non-State actors that may be parties to an armed conflict were not included within [its] scope".[806] While no reason was given to this limitation, the Special Rapporteur understands that it may reflect the uncertainty regarding the obligations of other non-State actors than international organizations. It would nevertheless be possible to refer in the commentary to those obligations that can be identified, as suggested by ICRC. In addition, the Special Rapporteur agrees that non-State actors may possess relevant environmental information in relation to an armed conflict and should be encouraged to share that information.

267. Paragraph 2 similarly generated a number of comments. The United States was, first, concerned about the word "vital", which it saw as "a high bar that would require States to share very sensitive or even damaging information" that could not be considered as "vital" to national defence or security. The United States was further concerned about the formulation of the requirement to "cooperate in good faith with a view to providing as much information as possible under the circumstances", which was formulated as an obligation. Finally, the United States was concerned that paragraph 2 as a whole seemed to suggest that paragraph 1 was binding.[807]

268. OHCHR expressed the concern that the first sentence of paragraph 2 could be understood as limiting the right of access to information beyond permissible limits set out in international human rights law. OHCHR moreover raised the question about the need for paragraph 2, given that paragraph 1 included the phrase "in accordance with their obligations under international law".[808] Belgium considered that it was incorrect to mention reasons of national defence or security in relation to international organizations and suggested that the wording of paragraph 2 be amended accordingly.[809] Belarus pointed out that it was obvious that the concepts of national defence and security were only applicable to States. "However, international organizations bore responsibility for the protection of the interests of their member States; for example, they were not permitted to convey confidential information to third parties."[810]

269. The Special Rapporteur recalls that paragraph 2 was inspired by previous work of the Commission, in particular in the topics 'Law of the non-navigational uses of international watercourses' and 'Shared natural resources (Law of Transboundary Aquifers)'.[811] The same wording can also be found in the 1997 Convention on the Non-Navigational Uses of International Watercourses.[812] At the same time, it should be recalled that the phrase "in accordance with their obligations under international law" in paragraph 1 refers to various treaty-based obligations that States and

[805] Statement of the Chair of the Drafting Committee, Mr. Pavel Šturma, 9 August 2016, p. 17.
[806] *Ibid*.
[807] United States, A/CN.4/749, on draft principle 24.
[808] OHCHR, *ibid.*, on draft principle 24.
[809] Belgium, *ibid.*, on draft principle 24.
[810] Belarus, A/C.6/73/SR.29, para. 75.
[811] Statement of the Chair of the Drafting Committee, Mr. Pavel Šturma, 9 August 2016, p. 18.
[812] Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997), United Nations, *Treaty Series,* vol. 2999, No. 52106, p. 77, art. 31.

international organizations may have concerning sharing or granting access to environmental information. Such obligations may derive, *inter alia*, from international environmental law, human rights law, or disarmament law, and the different treaties may include different conditions for the refusal to share or grant access to information. Paragraph 1, in addition, already specifies that the sharing of or granting access to information takes place in accordance with applicable international obligations. An alternative that the Special Rapporteur finds interesting would be to delete paragraph 2 and to refer in the commentary to some of the relevant treaty-based limitations, as well as to the customary obligation concerning cooperation in good faith.

270. Comments were also made concerning the commentary. OHCHR recalled that the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression had asserted that the obligation to provide access to information was applicable *mutatis mutandis* to international organizations. A right of access to information had furthermore been recognized explicitly by some international organizations.[813] IAEA provided information of its practice in this regard. Individual States had also provided the IAEA with information necessary to perform assessments and develop recommendations for relevant remedial actions.[814]

271. Lebanon sought clarification regarding the types of information to which the draft principle was applicable.[815] ESCAP, on its turn, pointed out that the relevant information "should include any potential biohazards, reporting pollution and structural damages that may jeopardize the health, nutrition, safety and security of these populations", also beyond the current obligations "under international law".[816] UNEP suggested mentioning that vulnerable groups, including women, children, and indigenous communities are accorded additional protections relating to the environment.[817] OHCHR also suggested referring to the right to full and equal participation of women in decision-making, planning and implementation as regards protection of the environment, as confirmed by the Committee on the Elimination of Discrimination against Women, as well as by the United Nations Environmental Assembly.[818]

272. ECLAC provided information on the Escazú Agreement[819] that is the first regional environmental treaty of the Latin America and the Caribbean region, and suggested mentioning this agreement whenever reference is made to the Aarhus Convention,[820] given the close relationship between the two.[821]

(b) Recommendation of the Special Rapporteur

273. In light of the comments and considerations above, the Special Rapporteur suggests a slight reformulation of paragraph 1 and deletion of paragraph 2. The Commission may also wish to consider adding to the commentary clarifications that

[813] OHCHR, A/CN.4/749, on draft principle 24.
[814] IAEA, *ibid*., on draft principle 24.
[815] Lebanon, *ibid*., on draft principle 24.
[816] ESCAP, *ibid*., on draft principle 24.
[817] UNEP, *ibid*., on draft principle 24.
[818] OHCHR, *ibid*., on draft principle 23.
[819] 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), text available from https://treaties.un.org (Status of Multilateral Treaties Deposited with the Secretary General, chap. XXVII.18).
[820] 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.
[821] ECLAC, *ibid.*, general comments and observations.

take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

Principle 24
Sharing and granting access to information

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

26. Principle 25 [15]
Post-armed conflict environmental assessments and remedial measures

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

(a) Comments and observations

274. Draft principle 25 received general support from Ireland, Lebanon, Malaysia, the Nordic countries, the Federated States of Micronesia, the Republic of Korea, Spain, Thailand, Ukraine, OHCHR and IUCN.[822] Thailand pointed out that interaction and engagement with relevant international organizations and expert bodies, "would help States [to] understand the environmental consequences of armed conflicts and determine the most appropriate preventive and remedial measures that they must take – for instance, the inclusion of environmental recovery programmes in the national development plans of the concerned State."[823] Referring to pollution and other consequences of damaged industrial sites and flooded mines in the conflict of Eastern Ukraine, Ukraine underlined the importance of the "cooperation of all parties with international agencies in order to assess and remedy damage, particularly where it posed threats".[824]

275. The specific comments focused on the words "is encouraged", which were seen as ignoring the existing obligations of States regarding cooperation and assistance in relation to conflict-related environmental harm. The Nordic countries mentioned the "strong precedent in disarmament treaties for requiring cooperation in remedial measures" and suggested using "stronger language than 'is encouraged' in draft principle 25", as well as adding an explicit reference to assistance.[825] UNODA mentioned the obligations under the Treaty on the Prohibition of Nuclear Weapons, which pertain to both remediation and assistance.[826] The joint civil society submission made a similar comment referring also to the obligations under the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction[827] and the Convention on Cluster Munitions.[828, 829]

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[822] Ireland, *ibid*., general comments and observations; Sweden (on behalf of the Nordic countries), *ibid*.; OHCHR, *ibid*., on draft principle 25; IUCN, *ibid.*; Lebanon, A/C.6/71/SR.28, para. 17; Malaysia, A/C.6/73/SR.30, para. 68; Micronesia (Federated States of), A/C.6/74/SR.29, para. 93; Republic of Korea, A/C.6/73/SR.30, para. 31; Thailand, A/C.6/74/SR.29, para. 95; Ukraine, A/C.6/71/SR.30, para. 4.

[823] Thailand, A/C.6/74/SR.29, para. 95.

[824] Ukraine, A/C.6/71/SR.30, para. 4.

[825] Sweden (on behalf of the Nordic countries), A/CN.4/749, general comments and observations.

[826] UNODA, A/CN.4/749, on draft principle 26.

[827] 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, p. 211.

[828] Convention on Cluster Munitions, Dublin (Dublin, 30 May 2008), United Nations, *Treaty Series*, vol. 2688, p. 39 (hereinafter "Cluster Munitions Convention").

[829] Joint civil society submission (footnote 16 above), p. 22.

276. ICRC pointed out that "[f]rom an international humanitarian law perspective, there are relevant obligations that impose requirements regarding cooperation. The term 'encouraged' used in this draft principle could be read to fall below these [standards]." For instance, the rules on humanitarian assistance that impose certain constraints on governments' discretion to refuse and control outside humanitarian assistance would in the view of ICRC be relevant in this regard. ICRC also referred to the obligations regarding international cooperation for mine clearance, environmental remediation and victim assistance, for instance in the Treaty on the Prohibition of Nuclear Weapons and suggested that the commentary clarify that the draft principle is without prejudice to existing obligations.[830]

277. Spain noted that "[t]he provision sets out … normative constraints that render it less exacting than the requirements of international environmental law in this area".[831] IUCN pointed out that "most environmental law treaties contain the basic requirement of protection of sites or species, or the reduction of pollution". To fulfil such obligations, States would have to undergo environmental assessments after any major incident such as an armed conflict. IUCN mentioned in this context the 1992 Convention on Biological Diversity, which requires ongoing monitoring of conservation sites and protection of biodiversity more generally, as well as the 1972 Convention for the Protection of World Cultural and Natural Heritage.[832] OHCHR furthermore suggested amending the draft principle "to reflect that under international human rights law, cooperation may, depending on the circumstances, also constitute a legal obligation". For instance, the International Covenant on Economic, Social and Cultural Rights places a general legal obligation "to take steps, individually and through international assistance and co-operation" to progressively achieve the full realization of the rights enshrined in the Covenant.[833]

278. The Special Rapporteur notes that the phrase "is encouraged" was found appropriate in draft principle 25 "[i]n light of the fact that there was scarce practice in this field".[834] While post-armed conflict environmental assessments were described as "a term of art employed by several international organizations involved in such post-conflict assessments",[835] it seems obvious that this existing practice was not understood as being based on a legal obligation. At the same time, the draft principle also contains a general reference to "remedial measures", which raises the question of its relationship to the many treaty-based obligations under the law of armed conflict, international environmental law, international human rights law and disarmament law that are relevant from the point of view of responding to the adverse environmental effects of armed conflicts. The same question was raised with regard to draft principle 26.[836] The Special Rapporteur believes that leaving this question unanswered would not adequately respond to the wish for more clarity regarding the normative nature of the draft principles. The Commission may therefore wish to clarify in the commentary that draft principle 25 is without prejudice to such existing obligations. In addition, the Special Rapporteur suggests replacing the phrase "is encouraged" by the more transparent term "should".

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[830] ICRC, A/CN.4/749, on draft principle 25.
[831] Spain, *ibid*., on draft principle 25.
[832] IUCN, *ibid*., on draft principle 25.
[833] OHCHR, *ibid*., on draft principle 25.
[834] Statement of the Chair of the Drafting Committee, Mr. Pavel Šturma, 9 August 2016, p. 12.
[835] *Ibid.*
[836] France, A/CN.4/749, on draft principle 26; Czech Republic, *ibid*., general comments and observations; Spain, *ibid*.; Sweden (on behalf of the Nordic countries), *ibid*.; UNODA, *ibid*., on draft principle 26; OHCHR, *ibid*., on draft principle 25; and Switzerland, *ibid*., general comments and observations. See also Lebanon, A/C.6/74/SR.30, para. 105 and Ukraine, A/C.6/74/SR.26, para. 129.

279. UNEP suggested adding to the draft principle a mention of "other follow-up measures" so as to "increase systematic attention to remedial measures following assessment".[837] Spain expressed concern about the limitation of the draft principle to environmental assessments carried out after an armed conflict while assessments conducted before or during the conflict could be advisable.[838] IAEA provided information of its cooperation with affected States, other parties to armed conflicts, assisting States and international organizations such as UNEP and the World Health Organization relating to depleted uranium ammunitions and nuclear installations.[839]

(b) Recommendation of the Special Rapporteur

280. In light of the above comments and considerations, the Special Rapporteur suggests reformulating draft principle 25. The Commission may also wish to make changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course. As amended, the draft principle would read as follows:

Principle 25
Post-armed conflict environmental assessments and remedial measures

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

27. Principle 26
Relief and assistance

When, in relation to an armed conflict, the source of environmental damage is unidentified, or reparation is unavailable, States are encouraged to 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.

(a) Comments and observations

281. Draft principle 26 was welcomed by Ireland, Greece, Morocco and Ukraine, as well as by OHCHR.[840] Ukraine made the general observation that "the topic of protection of the environment in relation to armed conflicts as a humanitarian issue as much as an environmental one, given the relationship between environmental quality and human health. The humanitarian consequences of environmental damage could be lasting and severe, affecting everything from public health to people's livelihoods."[841]

282. A number of comments were made regarding the wording of the draft principle, most of them relating either to the words "are encouraged", or to the broadening of the scope of the draft principle to international organizations.

283. Similarly with draft principle 25, the phrase "are encouraged" was found unclear. France expressed the concern about the normative value of the draft principle, "owing to the ambiguity resulting from the word 'encourage'".[842] The Czech Republic questioned the use of the term "encourage" in draft principle 26 while the term

[837] UNEP, *ibid*., on draft principle 25.
[838] Spain, *ibid*., on draft principle 25.
[839] IAEA, *ibid*., on draft principle 24.
[840] Ireland, *ibid*., general comments and observations; OHCHR, *ibid*., on draft principle 25; Greece, A/C.6/74/SR.28, para. 53; Morocco, A/C.6/74/SR.30, para. 8; Ukraine, A/C.6/74/SR.26, para. 128.
[841] Ukraine, A/C.6/74/SR.26, para. 128.
[842] France, A/CN.4/749, on draft principle 26.

"should" was generally employed in other recommendatory provisions, and sought clarification in this regard.[843] According to Spain, the use of the word "encourage" suggested "ultra-soft law".[844] The Nordic countries also expressed the view that the wording of the provision should be strengthened.[845] A similar comment was made by Lebanon and Ukraine.[846]

284. More specifically, this wording was seen as problematic given that States may have obligations of remediation under applicable treaties. France mentioned in this regard Amended Protocol II and Protocol V 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, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction of 1997 and the Convention on Cluster Munitions of 2008.[847] The Nordic countries made a similar point,[848] and UNODA noted that "the provisions on environmental remediation and international cooperation contained in the Treaty on the Prohibition of Nuclear Weapons will be applicable in situations in which the source of environmental damage resulting from the use of a nuclear weapon is unidentified, or reparation is unavailable".[849] OHCHR pointed out that "under international human rights law, cooperation may, depending on the circumstances, also constitute a legal obligation".[850] Such an obligation would furthermore not be dependent on the availability of reparations.[851] Switzerland sought clarification on "the possible obligations regarding international cooperation and assistance".[852]

285. As with draft principle 25, the fact that there are treaty-based obligations under the law of armed conflict, international environmental law, international human rights law, and disarmament law that are relevant from the point of view of responding to adverse environmental effects of armed conflicts should be taken into account in the formulation of the draft principle as well as in the commentary. Similarly to draft principle 25, and to ensure consistency in the draft principles, the Special Rapporteur suggests using the word "should" instead of "are encouraged" and to include in the commentary an explanation that the draft principle is without prejudice to the existing obligations States may have regarding remediation.

286. The Czech Republic viewed the limitation of the draft principle to States as a shortcoming, given that the provision is closely related to draft principles 24 and 25 which are also addressed to international organizations and parties to a conflict.[853] UNEP suggested extend the draft principle to international organizations.[854] The Food and Agriculture Organization made a similar proposal.[855] ESCAP pointed out that international organizations or other neutral third parties should be engaged in the assessment of damages and the determination of appropriate compensation and remedy.[856] The Special Rapporteur notes that the draft principle has a specific focus on relief and assistance provided by States, even though it is understood that such relief and assistance may be channelled through international organizations.[857] At the

[843] Czech Republic, *ibid*., on draft principle 26.
[844] Spain, *ibid*., on draft principle 26.
[845] Sweden (on behalf of the Nordic countries), general comments and observations.
[846] Lebanon, A/C.6/74/SR.30, para. 105; Ukraine, A/C.6/74/SR.26, para. 129.
[847] France, A/CN.4/749, on draft principle 26.
[848] Sweden (on behalf of the Nordic countries), *ibid*., general comments and observations.
[849] UNODA, *ibid*., on draft principle 26.
[850] OHCHR, *ibid*., on draft principle 25.
[851] OHCHR, *ibid*.
[852] Switzerland, *ibid*., on draft principle 26.
[853] Czech Republic, *ibid*., on draft principle 26.
[854] UNEP, *ibid*., on draft principle 26.
[855] FAO, *ibid*., on draft principle 26.
[856] ESCAP, *ibid*., on draft principle 26.
[857] Draft principles … 2019, commentary to draft principle 26, para. (5).

same time, she would not see an inconvenience in extending the draft principle to international organizations.

287. Greece and Lebanon suggested clarifying that the draft principle was without prejudice to draft principle 9 on State responsibility.[858] This would be required, according to Greece, to make it clear that where the responsible State was known but unwilling to provide compensation, it "was not relieved from its secondary obligations under the law of State responsibility once the draft the draft principle was put into motion through the action and contributions of benevolent States or international organizations".[859] Switzerland, too, referred to situations, in which the source of environmental damage is identified, or responsibility is attributed to a third State.[860] The Special Rapporteur points out in this regard that draft principle 26 was originally proposed as part of the draft principle on State responsibility. The Special Rapporteur suggests adding to the commentary a reference to draft principle 9 to avoid any misunderstanding.

(b) Recommendation of the Special Rapporteur

288. In light of the comments and considerations above, the Special Rapporteur suggests reformulating the draft principle as follows:

Principle 26
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.

28. Principle 27 [16] Remnants of war

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

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

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

(a) Comments and observations

289. Draft principle 27 received general support from Germany, the Nordic countries, Slovenia and Switzerland.[861] IUCN, too, welcomed the draft principle.[862] Switzerland

[858] Greece, A/C.6/74/SR.28, para. 53; Lebanon, A/C.6/74/SR.30, para. 105.
[859] Greece, A/C.6/74/SR.28, para. 53.
[860] Switzerland, A/CN.4/749, on draft principle 26.
[861] Germany, *ibid*., on draft principle 27; Sweden (on behalf of the Nordic countries), *ibid*., general comments and observations; Switzerland, *ibid*., on draft principle 27; Slovenia, A/C.6/74/SR.29, para. 143.
[862] IUCN, A/CN.4/749, on draft principle 27.

pointed out that remnants of war can have a significant ecological footprint, hinder the return of displaced persons, undermine sustainable development and affect human security.[863] Slovenia also referred to the impact of remnants of war on water and soil quality, and noted that "removing or rendering harmless such remnants was crucial to ensuring the safety of the public and promoting reconstruction".[864] Cyprus welcomed the application of the draft principle in areas outside of a State's territory over which a State exercises control.[865]

290. The specific comments and observations on this draft principle focused on three elements in paragraph 1: the temporal scope ("after an armed conflict"), the notion of "toxic and hazardous remnants" as well as the nature of the obligation "shall seek".

291. Regarding the temporal scope, ICRC suggested replacing the words "after an armed conflict" with the phrase "at the end of active hostilities" or "after the cessation of active hostilities". The suggested formulation would better reflect the existing law and practice under, *inter alia*, the Protocols II and V to the Convention on Certain Conventional Weapons, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction and the Convention on Cluster Munitions.[866] Switzerland considered that "some activities may already take place … immediately upon the cessation of active hostilities".[867] El Salvador noted that it might be "very restrictive" to only establish post-conflict obligations while the draft principle included references to weapons that were prohibited by the relevant treaties and "[a]n armed conflict could last for decades".[868] The Federated States of Micronesia pointed out that some remnants of war had an immediate environmental impact, "and any delay in their removal could be disastrous for the environment as well as posing a continuing hazard to the human population".[869] The joint civil society submission also suggested removing the words "after an armed conflict" pointing out that clearance should begin as early as possible.[870]

292. The Special Rapporteur understands that the formulation "[a]fter an armed conflict" was chosen by the Commission "as it better reflected the post conflict phase", and as an alternative to a more specific wording "[w]ithout delay after cessation of active hostilities", which had raised concerns.[871] While the choice of these words thus served an obvious purpose, the Special Rapporteur identifies two weaknesses in using the phrase "after an armed conflict" to define the temporal scope of the draft principle. First, this phrase seems to require a formal end to a conflict, which is problematic in view of the general trend of protracted armed conflicts[872] and the uncertainties related to the termination of an armed conflict.[873] Second, the phrase is open-ended in not specifying a particular time-limit in the aftermath of a conflict.

293. The Special Rapporteur would like to refer in this context to the international obligations that have inspired the draft principle. These obligations indicate the timeframe for removal or rendering harmless of remnants of war in terms of "as soon

[863] Switzerland, *ibid*., on draft principle 27.
[864] Slovenia, A/C.6/74/SR.29, para. 143.
[865] Cyprus, A/CN.4/749, on draft principle 27.
[866] ICRC, *ibid*., on draft principle 27.
[867] Switzerland, *ibid*., on draft principle 27.
[868] El Salvador, A/C.6/71/SR.27, para. 149.
[869] Micronesia (Federated States of), A/C.6/71/SR.28, para. 57.
[870] Joint civil society submission (footnote 16 above), p. 24.
[871] Statement of the Chair of the Drafting Committee, Mr. Pavel Šturma, 9 August 2016 pp. 13–14.
[872] See, e.g., International Institute for Strategic Studies, "The Armed Conflict Survey 2021 launch", 21 September 2021, at www.iiss.org/events/2021/09/armed-conflict-survey-2021-launch.
[873] See, for instance, D.A. Lewis, G. Blum and N.K. Modirzedah, *Indefinite War: Unsettled International Law on the End of Armed Conflict* (Harvard Law School Program on International Law and Armed Conflict, 2017). Available at https://dash.harvard.edu/handle/1/30455582.

as possible",[874] "without delay after the cessation of active hostilities",[875] as soon as possible but not later than ten years from the entry into force of the relevant instrument,[876] "as soon as possible but not later than ten years after the end of the active hostilities".[877] According to the ICRC customary humanitarian law study, State practice establishes as a norm of customary international law applicable in both international and non-international armed conflicts a rule concerning the removal, or rendering harmless or facilitating the removal of landmines "at the end of active hostilities".[878] It is worth noting that none of these sources uses such a general and indeterminate concept as "after an armed conflict". The Special Rapporteur believes that removing the words "After an armed conflict" and indicating that the measures are to be taken "as soon as possible" would provide better guidance to parties of an armed conflict while not putting an unreasonable burden on them. It should also be recalled that the Commission decided to remove "the phrase 'taken at the end of active hostilities' [from draft principle 2] on the understanding that … remedial measures could be undertaken even before the conflict ends".[879]

294. Regarding the notion of "toxic and hazardous remnants", France pointed out that Protocol V to the Convention on Certain Conventional Weapons only refers to "explosive remnants of war", and questioned the need for the new category of "toxic and hazardous" remnants of war, which it regarded as "ill-defined".[880] Switzerland "welcome[d] the fact that the draft principle is not limited to explosive remnants of war".[881] The Nordic countries suggested replacing the conjunctive "and" in the phrase "toxic and hazardous" by the disjunctive "or".[882] ICRC made a similar suggestion referring to the commentary, which explains that "'toxic' is by definition 'hazardous' ('forms a hazard to humans and ecosystems')". It would therefore, in the view of ICRC, be preferable to ensure that the formulation also covers non-toxic hazardous remnants.[883] IUCN, furthermore, made a similar suggestion pointing out that a disjunctive "or" would better "reflect[] the post-conflict obligations of States under human rights law, particularly to fulfil the obligations to respect and ensure the rights to life and health".[884] A similar suggestion was contained in the joint civil society submission.[885]

295. OPCW gave an account of the provisions of the Chemical Weapons Convention regarding abandoned chemical weapons, as well as of the related practice. The Convention includes provisions on the destruction of abandoned chemical weapons, including that "[e]ach State Party, during transportation, sampling, storage and destruction of chemical weapons, shall assign the highest priority to ensuring the safety of people and to protecting the environment". In addition, when destroyed,

[874] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, art. 5, para. 1.

[875] Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (, art. 10, para. 1; 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), *ibid.*, vol. 2399, No. 22495, p. 100, art. 4, para. 2.

[876] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, art. 5, para. 1; Cluster Munitions Convention, art. 4, para. 1 (a).

[877] Cluster Munitions Convention, art. 4, para. 1 (b).

[878] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I*: Rules* (Cambridge, Cambridge University Press, 2005), rule 83, pp. 285–286.

[879] Statement of the Chair of the Drafting Committee, Mr. Mathias Forteau, 30 July 2015, p. 4. See also draft principles … 2019, commentary to draft principle 2, para. (2).

[880] France, A/CN.4/749, on draft principle 27.

[881] Switzerland, *ibid.*, on draft principle 27.

[882] Sweden (on behalf of the Nordic countries), *ibid.*, on draft principle 27.

[883] ICRC, *ibid.*, on draft principle 27.

[884] IUCN, *ibid.*, on draft principle 27.

[885] Joint civil society submission (footnote 16 above), p. 24.

chemical weapons may not be dumped in any body of water, buried on land, or destroyed using open-pit burning.[886] IAEA reported of the role of the IAEA Safety Standards in providing for identification and quantitative assessment of hazards and risks of hazards, as well as for the remediation or removal and safe management of radioactive remnants and wastes related to radioactive and nuclear materials which may result from armed conflicts.[887] Switzerland mentioned depleted uranium as an example of "hazardous remnants of war" and sought clarification regarding the related international commitments.[888]

296. The Special Rapporteur points out that "toxic remnants" have been defined in the commentary to draft principle 27 as "any toxic or radiological substance resulting from military activities that forms a hazard to humans and ecosystems". The commentary also notes that "[t]he 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".[889] Referring to the examples given by UNODA and IAEA, the term "toxic" could cover radioactive remnants, wastes related to radioactive and nuclear materials or abandoned chemical weapons. Furthermore, contamination from oil spills or damaged or looted chemical facilities could be characterized in terms of toxic remnants. As both chemically toxic and radioactive, depleted uranium would also fall under this definition. At the same time, other materials and remnants that are not toxic could still pose a hazard to the environment. This is true, in particular, for explosive remnants but the category of "hazardous remnants" also addresses a wider range of current and future threats to the environment resulting from the debris of war or military activities. The Special Rapporteur believes that there is a need to include both categories under the draft principle, and to make this clear in the text of the draft principle.

297. Several comments were made concerning the nature of the obligation under paragraph 1, the United Kingdom sought further clarification regarding the "standard being applied in the requirement to 'seek to'".[890] Switzerland expressed a similar wish.[891] IUCN, furthermore, held that it was unclear "why States are mandated only to 'seek to' remove, and] what this obligation might entail". IUCN suggested reformulating the provision as a mandatory obligation taking into account the obligations under human rights law such as those related to the right to life.[892] France expressed the view that it was not clear "whether the treaty provisions on which the Commission based this draft principle have acquired customary value".[893] The Czech Republic, too, questioned the basis on which the Commission had concluded that the obligations referred to in the draft principle were generally binding[894] The United States suggested replacing the word "shall" in paragraphs 1 and 2 by "should" because "they do not reflect existing obligations under international law".[895]

298. The Netherlands referred to developments in international environmental law, including with regard to the "polluter pays" principle and the principle of prevention (due diligence), that could have relevance to the clearance of remnants and "may point to certain obligations for States that could possibly be considered to be of a customary international law nature".[896] Israel referred to the statement in the commentary that

[886] OPCW, A/CN.4/749, general comments and observations.
[887] IAEA, *ibid*., on draft principle 27.
[888] Switzerland, *ibid*., on draft principle 27.
[889] Draft principles … 2019, commentary to draft principle 27, para. (3).
[890] United Kingdom, A/CN.4/749, on draft principle 27.
[891] Switzerland, *ibid*., on draft principle 27.
[892] IUCN, *ibid*., on draft principle 27.
[893] France, *ibid*., on draft principle 27.
[894] Czech Republic, *ibid*., on draft principle 27.
[895] United States, *ibid*., on draft principle 27.
[896] Netherlands, *ibid*., on draft principle 24.

"different States thus have varying obligations relating to remnants of war",[897] and suggested that this be made clearer in the language of paragraph 1.[898] Spain took the view that the draft principle, "close to being a blank rule", added little to existing obligations.[899] Finally, the Nordic countries expressed the view that the Commission had "found the right balance that does not undermine existing international legal obligations, but leaves room for the development of law".[900]

299. Germany expressed the concern that paragraph 1 of draft principle 27 could be read as an obligation to act whenever remnants of war are identified, "including in the territorial sea and, with respect to warships and other State-owned vessels, even outside territorial waters". As such a burden would be inappropriate on many States, Germany suggested making clear "that an obligation to act only arises after an environmental impact assessment has concluded that action is viable, necessary and appropriate in order to minimize environmental harm".[901]

300. The Special Rapporteur refers to the explanation in the commentary, according to which the words "shall seek" constitute an obligation of conduct.[902] In other words, paragraph 1 contains a best efforts obligation for parties to an armed conflict to remove or render harmless remnants of war under their jurisdiction or control. Further examples of what this could entail in practice can be given in the commentary. Regarding the legal basis of paragraph 1, the Special Rapporteur points out that the obligation under paragraph 1 can be connected to existing obligations under disarmament treaties,[903] human rights law[904] and environmental law.[905] Reference can also be made to regional treaties such as the Revised African Convention on the Conservation of Nature and Natural Resources.[906] This is obvious also from the reference to "the applicable rules of international law" in paragraph 1.

301. Regarding paragraph 2, IAEA explained that its practice has included applying the IAEA Safety Standards as a basis for providing assistance in post-conflict situations with a view to the removal of hazardous materials.

302. Regarding paragraph 3, UNODA expressed its support to the without prejudice clause given that the duty of a State Party to Protocol V of the Convention on Certain Conventional Weapons to mark and clear, remove or destroy explosive remnants of war in affected territories under its control applies even in situations where removal may pose a higher environmental risk than leaving the remnants where they are.[907]

(b) Recommendation of the Special Rapporteur

303. In light of the comments and considerations above, the Special Rapporteur suggests two changes to the text of the draft principle concerning the temporal scope and the reference to "toxic and hazardous remnants". The Commission may also wish to make changes to the commentary taking into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course. As amended, the draft principle would read as follows:

[897] Draft principles … 2019, commentary to draft principle 27, para. (7).
[898] Israel, A/CN.4/749, on draft principle 27.
[899] Spain, *ibid*., on draft principle 27.
[900] Sweden (on behalf of the Nordic countries), *ibid*., on draft principle 27.
[901] Germany, *ibid*., on draft principle 27.
[902] Statement of the Chair of the Drafting Committee, Mr. Pavel Šturma, 9 August 2016 pp. 13–14.
[903] Draft principles … 2019, commentary to draft principle 27, para. (3).
[904] IUCN, A/CN.4/749, on draft principle 27.
[905] Netherlands, *ibid*., on draft principle 24.
[906] Revised African Convention on the Conservation of Nature and Natural Resources (11 July 2003), 7782 AU Treaties 0029, art. XV (b).
[907] UNODA, A/CN.4/749, on draft principle 27.

Principle 27
Remnants of war

1. Parties to the conflict shall seek to remove or render harmless toxic or hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment. Such measures shall be taken as soon as possible 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 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.

29. Principle 28 [17]
Remnants of war at sea

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

(a) Comments and observations

304. Draft principle 28 received general support from Germany, Ireland, the Federated States of Micronesia, and Viet Nam.[908] IUCN welcomed "the recognition by the Commission of the many long-standing issues of environmental harm due to remnants at sea".[909] IUCN also pointed out that "[s]uch 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".[910] The joint civil society submission noted that remnants of war at sea "pose a threat to marine ecosystems, an explosive and toxicological risk to seafarers and fisherfolk and are a source of pollution", and "can also obstruct economic development, notably in offshore energy and tourism".[911] Both IUCN and the joint civil society submission suggested adding to the end of the draft principle a reference to the enjoyment of human rights.

305. ICRC suggested that the commentary to this draft principle clarify whether the meaning of the phrase "remnants of war" is understood, as in draft principle 27, to be limited to "toxic or hazardous remnants of war". ICRC also suggested clarifying in the commentary that the draft principle applies before the end of an armed conflict.[912] IUCN welcomed the fact that the draft principle imposed no time limit on the need to address all remnants where they constitute a danger to the environment.[913] OPCW provided information of the implementation practice of the Chemical Weapons Convention regarding sea-dumped chemical weapons.

306. The Special Rapporteur agrees that the draft principle addresses an issue, which has both environmental and humanitarian dimensions. While the commentary already refers to "the clear link between danger to the environment and public health and

[908] Germany, *ibid*., on draft principle 27; Ireland, *ibid*., general comments and observations; Micronesia (Federated States of), A/C.6/71/SR.28, para. 56; Viet Nam, A/C.6/71/SR.29, para. 44.
[909] IUCN, A/CN.4/749, on draft principle 28.
[910] *Ibid*.
[911] Joint civil society submission (footnote 16 above), p. 24.
[912] ICRC, A/CN.4/749, on draft principle 28.
[913] IUCN, *ibid*., on draft principle 28.

safety",[914] there may be reason to add references to other human rights. Regarding the question of the temporal scope of the draft principle, the Special Rapporteur refers to the commentary of draft principle 2, according to which remedial measures may be taken even before an armed conflict has ended.[915] Given that no other indication is included in the wording of the draft principle, or in the commentary, the Special Rapporteur agrees with the understanding of ICRC concerning the applicability of the draft principle before the end of an armed conflict. Similarly, the general wording of the draft principle and the absence of any limitation to toxic and hazardous remnants in the commentary seem to indicate that the draft principle is not so limited. The Special Rapporteur further believes that the examples given by OPCW can usefully be reflected in the commentary.

(b) Recommendation of the Special Rapporteur

307. The Special Rapporteur does not suggest any amendment to the wording of the draft principle. The Commission may nevertheless wish to consider additions to the commentary taking into account the comments and considerations above. The Special Rapporteur will make proposals to this effect in due time.

III. Possible additions to the draft principles

A. Preamble

1. Comments and observations

308. ESCAP and IUCN considered that a preamble should be added to the set of draft principles. According to ESCAP, a preamble could state the spirit of the Geneva Conventions and Additional Protocols, as well as the Universal Declaration of Human Rights. ESCAP also recalled the work "towards building an arms-free and peaceful world" as "one of the goals of the United Nations", as well as the need for "immediate action to minimize the damages, including environmental impacts that may hinder post-conflict recovery work". Furthermore, a preamble could also "include references to the importance of the environment for livelihoods, food and nutrition security and maintaining the traditions and cultures, … many times intangible and irreplaceable, and enables various aspects of human rights".[916] IUCN commented "on the lack of wording referring specifically to 'nature', 'species', 'wildlife', 'habitats' or 'biodiversity'" in the draft principles. According to IUCN, a preamble could fill in this gap and could emphasize "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". IUCN further suggested that the commentary to the preamble could refer to "obligations adopted by States within key treaties".[917]

309. The Special Rapporteur recalls that the Commission's practice has not been uniform regarding whether or not to include a preamble in its final outcomes. In the past, the Commission generally presented to the General Assembly sets of draft articles without a preamble, the elaboration of which was left to the States. Some of the more recent texts intended to become a treaty, such as the draft articles on crimes against humanity and the articles on protection of persons in the event of disasters,

[914] Draft principles … 2019, commentary to draft principle 28, para. (6).
[915] *Ibid.*, commentary to draft principle 2, para. (2). See also the statement of the Chair of the Drafting Committee, Mr. Mathias Forteau, on 30 July 2015, p. 4.
[916] ESCAP, A/CN.4/749, general comments and observations.
[917] IUCN, *ibid*., general comments and observations.

nevertheless contain a preamble.[918] Regarding texts that are not intended to serve as a basis for treaty negotiations, there is similar variance as some of such texts include a preamble while others do not. The guidelines on the protection of the atmosphere, the principles on unilateral declarations of States, and the principles on the Allocation of loss in the case of transboundary harm belong to the former group,[919] while the Guide to Provisional Application of Treaties, the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the draft conclusions on identification of customary international law, and the Guide to Practice on Reservations to Treaties belong to the latter.[920] The commentary to the principles on the allocation of loss even notes that a preamble was considered "all the more pertinent" in a declaration of principles.[921] It seems that the Commission may consider case-by-case whether or not a preamble would serve a useful purpose in a particular final outcome.

310. The Special Rapporteur also recalls that the possibility of adding a preamble to the present set of draft principles has come up from time to time during the consideration of the topic. She believes that a preamble could usefully serve as an introduction to the draft principles and would provide an opportunity to recall the broader connections of the topic. At the same time, in view of the scope of the topic with 28 draft principles, questions of manageability at the time of second reading also have to be considered. In the Special Rapporteur's view, a concise and general preamble that would not try to cover the specific themes and issues addressed in the draft principles could be manageable.

2. Recommendation of the Special Rapporteur

311. In light of the comments and considerations above, the Special Rapporteur presents for the consideration of the Commission a limited number of elements to be included in a draft preamble.

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[918] Draft articles on crimes against humanity, A/74/10, para. 44; draft articles on the protection of persons in the event of disasters, *Yearbook… 2016*, vol. II (Part Two), para. 48, at art. 18.

[919] Draft guidelines on the protection of the atmosphere, Report of the International Law Commission on the work of its seventy-second session, *Official Records of the General Assembly, Seventy-Sixth Session, Supplement No. 10* (A/76/10), paras. 39–40; guiding principles applicable to unilateral declarations of States capable of creating legal obligations, *Yearbook… 2006*, paras. 176–177; principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, General Assembly resolution 61/36 of 4 December 2006, annex (the draft principles and the commentaries thereto are reproduced in *Yearbook … 2006*, vol. II (Part Two), paras. 66–67).

[920] Guide to Provisional Application of Treaties, Report of the International Law Commission on the work of its seventy-second session, *Official Records of the General Assembly, Seventy-Sixth Session, Supplement No. 10* (A/76/10), paras. 51–52; draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, Report of the International Law Commission on the work of its seventieth session, *ibid.*, *Seventy-third Session, Supplement No. 10* (A/73/10), paras. 51–52; draft conclusions on identification of customary international law, *ibid.*, paras. 65–66; Guide to Practice on Reservations to Treaties, *Yearbook … 2011*, vol. II (Part Three).

[921] Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, p. 61, commentary to the preamble, para. (1).

Preamble

Reaffirming Principle 24 of the Rio Declaration on Environment and Development;[922]

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

Aware of the need to protect all living and non-living components of the terrestrial, atmospheric, aquatic and marine environment and their interaction, healthy ecosystem functioning and biodiversity, as well as other elements that support human and ecological wellbeing;

Recalling the importance of the environment for livelihoods, food and nutrition security, maintenance of traditions and cultures, and the enjoyment of human rights;

Conscious of the need to enhance the protection of the environment in 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 States and other relevant actors take measures to prevent, mitigate and remediate harm to the environment before, during and after armed conflict.

B. New draft principles

1. Comments and observations

312. A number of suggestions have also been made regarding possible new draft principles. To the extent that such suggestions concern questions of international responsibility, they are addressed above in relation to draft principle 9. The suggestions concerning new draft principles reflecting existing rules of the law of armed conflict are considered above in relation to draft principle 13. Further proposals concern gender analysis, protection of water installations, and the definition of the environment.

313. The Nordic countries suggested "adding a draft principle that underlines that environmental damage in relation to armed conflicts may have profoundly different impact on women and men, boys and girls, due to biological factors and their societal role". The Nordic countries further pointed out that effective responses to such environmental damage "should consider the different needs and capacities of women and men, boys and girls, where a gender-analysis is a useful tool to designing gender-responsive measures to effective response".[923] UNEP made a similar comment, suggesting that the "[p]rinciples of general application should include the gender dimension with respect to armed conflicts, the environment, and peacebuilding".[924]

314. ELI suggested that the draft principles "should include a provision protecting water infrastructure before, during, and after armed conflict". The Institute pointed

[922] The proposed preambular paragraph would correspond to the preamble of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *ibid*., first preambular para.: ("*Reaffirming* Principles 13 and 16 of the Rio Declaration on Environment and the Development"). Principle 24 of the 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), resolution 1, annex I)) reads as follows: "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".

[923] Sweden (on behalf of the Nordic Countries), A/CN.4/749, general comments and observations.

[924] UNEP, *ibid*., introduction to Part Two of the draft principles.

out that recent conflicts had seen a rapid rise in the targeting of water infrastructure upon which civilian populations depend. It furthermore referred to the "substantial body of existing international law protecting water infrastructure during armed conflict, as well as before and after" under the law of armed conflict as well as international human rights law. The Institute also referred to the Geneva List of Principles on the Protection of Water Infrastructure[925] for "the key principles of international law protecting water infrastructure during conflict, as well as before and after". To illustrate how such a new draft principle could be worded, ELI provided three options: (a) "[t]o the extent that it supplies water to civilian populations, water infrastructure shall not be targeted during armed conflict."; (b) "[w]ater infrastructure shall be protected from the effects of armed conflict, with the exception of water infrastructure that exclusively provides water to military forces."; and (c) "[a]ttacks on or pollution of water infrastructure by combatants are prohibited if such attacks or pollution would render civilian drinking water installations unsafe for use."[926]

315. Turkey, too, drew attention to the need to protect both water resources and water installations, making reference to the International Law Association's 1976 resolution on the protection of water resources and water installations. Turkey also made a suggestion for a new draft principle reading as follows: "Water supply installations which are indispensable for the minimum conditions of survival of the civilian population should not be cut off or destroyed. The destruction of water installations containing dangerous forces, such as dams and dykes, should be prohibited when such destruction may involve grave dangers to the civilian population or substantial damage to the basic ecological balance".[927] Sudan noted that "water was an essential component of the environment and should therefore be addressed in specific draft principles".[928]

316. The Special Rapporteur refers to her observations above in relation to draft principles 9 and 13 regarding the feasibility of considering new draft principles at the time of the second reading, in particular as it is the last year of the quinquennium. Even where the benefit of adding a new draft principle would be obvious, it could not be done without a proper consideration in the Commission, and would not profit from the views of States before the adoption on second reading. At the same time, the Special Rapporteur agrees that gender aspects are relevant to some of the existing draft principles, and to the topic as a whole, and suggests addressing this concern in the commentaries. Similarly, regarding the protection of water installations, the issue is relevant to some of the existing draft principles and may be addressed in the commentaries.

317. Furthermore, the Czech Republic, Switzerland, UNEP and ESCAP expressed a preference for including in the draft principles a definition of the term "the environment".[929] It is to be recalled in this regard that the Commission agreed in 2019, on the basis of the recommendation of the Special Rapporteur,[930] that no definition of the environment would be included in the set of draft principles. The only issue left

[925] Geneva Water Hub, *The Geneva List of Principles on the Protection of Water Infrastructure* (Geneva, GLP, 2019). See also M. Tignino and Ö. Irmakkesen, *The Geneva List of Principles on the Protection of Water Installations: An Assessment and the Way Forward* (Leiden, Brill, 2020).
[926] ELI, A/CN.4/749, general comments and observations.
[927] Turkey, A/C.6/74/SR.29, para. 149. See also Turkey, statement of Turkey 31 October 2018, available at http://statements.unmeetings.org/media2/20305272/turkey-82-cluster-3.pdf.
[928] Sudan, A/C.6/71/SR.28, para. 2.
[929] Czech Republic, A/CN.4/749, general comments and observations; Switzerland, *ibid*.; UNEP, *ibid*.; ESCAP, *ibid*.
[930] Second report of the Special Rapporteur, A/CN.4/728, paras. 186–193.

pending at the time regarding the use of terms concerned the reference to the "environment" or the "natural environment" in Part Three.[931]

2. Recommendation of the Special Rapporteur

318. In light of the comments and considerations above, the Special Rapporteur does not make recommendations for new draft principles. The Commission may nevertheless wish to consider changes to the commentaries that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

C. Monitoring mechanism

319. The Nordic countries encouraged the Commission "to consider including a new draft principle that recommends the establishment of an international mechanism to monitor the implementation of the draft principles".[932] Spain, too, expressed the view "that it would be desirable to include in the draft text some considerations concerning the monitoring of the application of the rules and principles of international law on protection of the environment in relation to armed conflicts".[933] No further specifications regarding the exact type and objective of such a monitoring mechanism was contained in these statements. The joint civil society submission, however, contained a proposal for a new draft principle to be added in Part Two of the draft principles: "States should strengthen their cooperation on the protection of the environment in relation to armed conflicts and put in place an international mechanism to monitor the implementation of these draft principles and make recommendations based on good policies and practices".[934]

320. The Special Rapporteur refers to her comments above regarding the possibility of adding new draft principles at the time of second reading. She also notes that monitoring mechanisms have typically been established under multilateral conventions.[935] While this does not mean that mechanisms other than treaty-based mechanisms could not serve useful purposes, the functions of such other mechanisms are necessarily different and could include, for instance, collecting relevant State practice, providing a forum for exchange of information and good practices, and fostering cooperation with relevant international organizations.[936] Such functions could well be found to be in line with the objective of enhancing the protection of the environment in relation to armed conflicts. At the same time, it is not clear that the Commission is in the best position to take the initiative for the establishment of such a follow-up mechanism, in particular in the case of a final outcome that is not

[931] See chap. II, section 12, above.
[932] Sweden (on behalf of the Nordic countries), A/CN.4/749, general comments and observations.
[933] Spain, *ibid*., general comments and observations.
[934] Joint civil society submission (footnote 16 above), p. 5.
[935] See, e.g., Crimes against humanity, Information of existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission, Memorandum by the Secretariat (A/CN.4/698).
[936] See in this regard Conflict and Environment Observatory, "Feasibility study: an implementation vehicle for the International Law Commission's draft principles on the protection of the environment in relation to armed conflicts" (2020). Available at https://um.fi/documents/35732/0/CEOBS_An+implementation+vehicle+for+the+International+Law+Commission+on+the+Protection+of+the+environment+in+relation+to+armed+conflicts.pdf/197ee9ae-5f1e-2732-4ad9-1099f4b66b76?t=1614077308636.

presented as a basis for treaty negotiations.[937] This is a question that, as was pointed out with regard to the draft articles on crimes against humanity, "turns less on legal reasoning and more on policy factors, the availability of resources and the relationship of any new mechanism with those that already exist".[938] The Special Rapporteur believes that the possible follow-up to the draft principles is best left to States, international organizations and other relevant actors to consider.

IV. Final form and recommendation to the General Assembly

321. According to article 23 of its Statute, it is for the Commission to submit its final draft report on a given topic to the General Assembly, accompanied by a recommendation regarding further action. The proposed draft principles on the protection of the environment in relation to armed conflicts are a contribution to the progressive development and codification of international law, without, however, aiming at becoming a treaty. The designation of "principles" corresponds to the general nature of the provisions, which draw on different areas of international law. The term "principles" has been generally accepted, and also explicitly endorsed[939] as the form that the outcome of this work should take.

322. On this basis, the Special Rapporteur proposes that the Commission recommend to the General Assembly:

(a) To take note of the draft principles on the 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) To 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.

[937] See recommendation of the Commission on mechanisms of assistance in relation to reservations to treaties, *Yearbook* … 2011, vol. II (Part Two), para. 105. See also A. Pellet, "The ILC Guide to Practice on Reservations to Treaties: some general remarks", EJIL:Talk, 24 March 2014, available at www.ejiltalk.org/the-ilc-guide-to-practice-on-reservations-to-treaties-some-general-remarks/.

[938] Fourth report by the Special Rapporteur, Mr. Sean D. Murphy, on crimes against humanity (A/CN.4/725 and Add.1), para. 311.

[939] Netherlands, A/C.6/71/SR.29, para. 3; Republic of Korea, A/C.6/74/SR.30, para. 63; Russian Federation, A/C.6/74/SR.31, para. 30.

Annex I

Draft principles adopted by the Commission on first reading in 2019, with the Special Rapporteur's recommended changes

The text of the draft principles adopted by the Commission on first reading, with the changes proposed by the Special Rapporteur, is reproduced below.

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 conflict, including through ~~preventive~~ measures ~~for minimizing damage~~ **to prevent, mitigate and remediate harm** to the environment during armed conflict.~~ and through remedial measures.~~

Part Two [One]
Principles of general application

Principle 3 [4]
Measures to enhance the protection of the environment

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

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

Principle 4 [I-(x), 5]
Designation of protected zones

States should designate, by agreement or otherwise, areas of major environmental ~~and cultural~~ importance as protected zones, **including where those areas are of major cultural importance.**

Principle 5 [6]
Protection of the environment of indigenous peoples

1. ~~States should take a~~ **A**ppropriate measures **should be taken**, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit.

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

Principle 6 [7]
Agreements concerning the presence of military forces ~~in relation to armed conflict~~

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

Principle 7 [8]
Peace operations

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

Principle 8
Human displacement

States, international organizations and other relevant actors should take appropriate measures to prevent, ~~and~~ mitigate **and remediate** environmental ~~degradation~~ **harm** 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 for internationally wrongful acts~~.

2. The present draft principles are without prejudice to the existing or evolving rules of international responsibility of non-State actors, including individual criminal responsibility and the responsibility of international organizations, for environmental damage caused in relation to armed conflict.

Principle 10
~~Corporate d~~Due diligence of business enterprises

States should take appropriate legislative and other measures aimed at ensuring that ~~corporations and other~~ business enterprises operating in or from their territories exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in a~~n~~ **high-risk** area **or an area affected by an** ~~of~~ armed conflict ~~or in a post-armed conflict situation~~. Such measures include those aimed at ensuring that natural resources are purchased or obtained in an environmentally sustainable manner.

Principle 11
~~Corporate~~ l Liability of business enterprises

States should take appropriate legislative and other measures aimed at ensuring that ~~corporations and other~~ business enterprises operating in or from their territories can be held liable for harm caused by them to the environment, including in relation to human health, in a~~n~~ **high-risk** area **or an area affected by an** ~~of~~ armed conflict ~~or in a post-armed conflict situation~~. Such measures should, as appropriate, include those aimed at ensuring that a ~~corporation or other~~ 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 [Two]
Principles applicable during armed conflict

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

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 [II-1, 9]
General protection of the ~~natural~~ environment during armed conflict

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

2. **The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the environment is prohibited.**

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

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

Principle 14 [II-2, 10]
Application of the law of armed conflict to the ~~natural~~ environment

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

~~**Principle 15 [II-3, 11]**~~
~~**Environmental considerations**~~

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

Principle 16 [II-4, 12]
Prohibition of reprisals

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

Principle 17 [II-5, 13]
Protected zones

Including where it is an area of major cultural importance, ~~A~~ **a**n area of major environmental ~~and cultural~~ importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective, **and shall benefit from any additional agreed protections.**

Principle 18
Prohibition of pillage

Pillage of natural resources is prohibited.

Principle 19
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.

Part Four
Principles applicable in situations of occupation

Principle 20 [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 environmental harm** that is likely to prejudice the health and well-being of the ~~population~~ **protected persons** of the occupied territory**, or to 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 21 [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 persons** ~~population~~ of the occupied territory and for other lawful purposes under the law of armed conflict, it shall do so in a way that ensures their sustainable use and minimizes environmental harm.

Principle 22 [21]
~~**Due diligence**~~ **Prevention of transboundary harm**

An Occupying Power shall ~~exercise due diligence~~ **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** ~~the occupied territory~~.

Part Five [Three]: Principles applicable after armed conflict

Principle 23 [14]
Peace processes

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

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

Principle 24 [18]
Sharing and granting access to information

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

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

Principle 25 [15]
Post-armed conflict environmental assessments and remedial measures

~~Cooperation among r~~ **R**elevant actors, including international organizations, **should cooperate** ~~is encouraged~~ with respect to post-armed conflict environmental assessments and remedial measures.

Principle 26
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** ~~are encouraged to~~ 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 27 [16]
Remnants of war

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

2. The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic ~~and~~ **or** 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 28 [17]
Remnants of war at sea

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