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Enhancing the Protection of the Environment in Relation to Armed Conflicts – the Draft Principles of the International Law Commission and Beyond

Special Editors:

**Anne Dienelt &
Britta Sjöstedt**

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Britta Sjöstedt and Anne Dienelt

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

Marie Jacobsson and Marja Lehto

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Editorial

Dear Readers,

following a workshop in March 2019 hosted by the University of Hamburg as well as the Lund University and the subsequent open call for paper last summer, we are delighted to publish this issue on *Enhancing the Protection of the Environment in Relation to Armed Conflicts – the Draft Principles of the International Law Commission and Beyond*. The nine articles of this Special Issue illuminate the topic in-depth as well as in breadth and let the reader experience different perspectives on the protection of the environment during armed conflict. After more than one year of working on this issue we can finally present these selected articles to you. We are especially grateful for the introduction of the Special Rapporteurs Marie Jacobsson and Marja Lehto, who provided a unique insight into the creation of the Draft Principles for the Protection of the Environment in Relation to Armed Conflicts.

GoJIL would particularly like to thank the Special Editors Dr. Anne Dienelt and Dr. Britta Sjöstedt, who offered us the opportunity to work together and supported us at all times, both in terms of content and organization, which ultimately made this issue come together. As experts in the field of this issue, the Special Editors introduce the topic and provide an overarching conceptualization of all articles in their Editorial Note.

Thus, there remains room to reflect upon past volumes, as this issue marks the beginning of the tenth volume published. Founded in 2007 on the initiative of dedicated students, GoJIL's first issue was published in 2009. We could not agree more with the Editors that in the first ever Editorial Note depicted the environment in which the idea of the journal has grown:

“As many regions of the world are shaken by conflict and humanitarian crisis, as the global economy is threatened by the collapse of the financial markets, and as environmental degradation is not a territorially limited phenomenon any more, the desire for international legal rules becomes stronger. This calls upon scholars to explore the potential of international law for the solution of these problems on a global scale.”

In light of the continuing challenges and the need for global approaches to solving them, we have always remained true to this motivation. Including this issue, GoJIL has released 194 articles and other publications in twenty-three issues that address current developments in public international law. Several of these articles published have been read and referred to by other international law scholars in many prestigious publications. Including our current call for papers, we have held ten Student Essay Competitions that encourage young scholars to become involved in the academic debate early on. Additionally, GoJIL has organized twelve scholar conferences which enabled exchange between established scholars, practitioners, and students.

GoJIL owes this success to the members of its Advisory Board and Scientific Advisory Board who have provided the Editorial Board with their indispensable advice and support throughout these years. We would also like to thank our Native Speaker Board for the longstanding collaboration and contribution to all of our issues. We would further like to express our gratitude to the committed students who founded the GoJIL, all former editors-in-chief as well as Editorial Board members. Their dedication has given new generations of students the chance to participate in and to further develop this unique project.

We could not have imaged a more fitting occasion to celebrate this anniversary than with one of the founding members of the GoJIL, Dr. Anne Dienelt, now being one of the special editors of this issue.

And finally, we hope that the thoroughly selected articles provide for yet another worthwhile read to our readership.

The Editors

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- All members of the Journal's Advisory Board
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Enhancing the Protection of the Environment in Relation to Armed Conflicts – the Draft Principles of the International Law Commission and Beyond*

Special Editors

Britta Sjöstedt^{**} and Anne Dienelt^{***}

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** Britta Sjöstedt is a senior lecturer at the Faculty of Law, Lund University.

*** Anne Dienelt is a senior research fellow and senior lecturer at the Institute for International Affairs at the Faculty of Law, University of Hamburg.

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A. Introduction

In 2011, the UN International Law Commission (ILC) took up the topic *Protection of the Environment in Relation to Armed Conflicts*.¹ The decision was triggered by a joint report issued by the UN Environment Programme and the Environmental Law Institute in 2009 recommending the ILC to “[...] examine the existing international law for protecting the environment during armed conflicts [...] [including] how it can be clarified, codified and expanded [...]”.² Since the inclusion of the item on the ILC’s agenda, the Commission has published five reports³ by the two special rapporteurs, Dr. Marie Jacobsson (2011-2016) and Dr. Marja Lehto (2017-). In 2019, the plenary adopted 28 Draft Principles on first reading.⁴ The ILC has touched on highly controversial issues such as reprisals,⁵ corporate liability,⁶ indigenous peoples’ rights,⁷ among others. Nevertheless, it was clear from the beginning that the ILC would not be able to exhaustively deal with the topic for two main reasons. First, the Commission has a limited mandate that is restricted to “[...] initiate studies and make recommendations for the purpose of [...] encouraging the progressive development of international

¹ See the syllabus of the 2011 recommendation of the Working-Group on the long-term program of work, *Report of the International Law Commission to the Sixty-Third Session, Annex E. Protection of the Environment in Relation to Armed Conflicts*, M. G. Jacobsson, UN Doc A/66/10, 26 April-3 June and 4 July-12 August 2011.

² UNEP, ‘Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law’ (2009), 53, available at https://wedocs.unep.org/bitstream/handle/20.500.11822/7813/-Protecting%20the%20Environment%20During%20Armed%20Conflict_An%20Inventory%20and%20Analysis%20of%20International%20Law-2009891.pdf?sequence=3&isAllowed= (last visited 27 April 2020).

³ *Preliminary Report of the Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts* by M. G. Jacobsson, UN Doc A/CN.4/674, 30 May 2014; *Second Report of the Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts* by M. G. Jacobsson, UN Doc A/CN.4/685, 28 May 2015; *Third Report of the Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts* by M. G. Jacobsson, UN Doc A/CN.4/700, 3 June 2016; *First Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts* by Marja Lehto, UN Doc A/CN.4/720, 30 April 2018; *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts* by Marja Lehto, UN Doc A/CN.4/728, 27 March 2019.

⁴ This 2019 version of the Draft Principles and their order of all Draft Principles are the basis for all citations of the Draft Principles in this special issue.

⁵ See Draft Principle 16.

⁶ See Draft Principles 10 and 11.

⁷ See Draft Principle 5.

law and its codification [...]”.⁸ Enhanced legal protection of the environment, as one of the purposes of the Draft Principles,⁹ must therefore be based on existing customary international law and its progressive development. The Commission decided to also include recommendations to account for the uncertain legal status of some of the Draft Principles.¹⁰ Second, some related issues touch upon controversial and political matters, as mentioned earlier. Consequently, the ILC has been reluctant to include some of these issues in its workflow.¹¹ Therefore, the adoption of the Draft Principles should be regarded as a starting point for shaping and developing the legal framework for environmental protection in relation to armed conflicts.

As a part of that process, Hamburg University and Lund University organized an international workshop in March 2019 in Hamburg. Several members of the ILC, including two special rapporteurs, academic legal experts, and practitioners, attended the workshop to discuss the Draft Principles. The discussion also focused on some issues not covered by the ILC, such as the implications for gender and climate security. The engaging dialogue in Hamburg has inspired the publication of this Special Issue of the Goettingen Journal of International Law (GoJIL) to ensure that the outcomes and ideas of the workshop reach a wider audience. It has also contributed to maintaining the momentum of this topical area of international law by inviting contributions from researchers not present during the workshop in Hamburg.¹²

B. Insights from the ILC

In the *Introductory Note*, Marja Lehto and Marie Jacobsson, the two special rapporteurs on the topic, provide valuable insights on the Commission’s work. They chronologically introduce the process of including the topic on the Commission’s agenda, its relation to other topics dealt with by the ILC, and

⁸ *Charter of the United Nations*, 26 June 1945, 1 UNTS XVI, Art. 13 para. 1 lit. a.

⁹ See Draft Principles 2.

¹⁰ Cf. for example, Draft Principles 10 and 11.

¹¹ For instance, questions relating to “weapons” were deliberately excluded, see *Summary Record of the 3188th Meeting*, UN Doc A/CN.4/3188, 30 July 2013, 122, para. 37, available at https://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3188.pdf&lang=EFS (last visited 27 April 2020).

¹² The Hamburg Workshop and this Special Issue connect with the previous workshop hosted by Lund University in 2012 at the very beginning of the ILC’s project. For the first workshop’s outcomes, see R. Rayfuse (ed.), *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict* (2014).

how the Draft Principles have evolved into a set of 28 Draft Principles. The two special rapporteurs explain the rationale for decisions on the approach and contents of the Draft Principles. For instance, the decision to expand the topic to include all phases of an armed conflict allowed the ILC to deal with the topic from a more general international legal perspective. This broad approach shows that the ILC does not see itself as a forum to revise and adjust the sensitive law of armed conflict. The topic is rather suited for the ILC as it goes beyond this specialised field of international law. Furthermore, Jacobsson and Lehto explain how the Draft Principles relate to other initiatives under international law, such as the Global Pact for the Environment,¹³ the updated environmental guidelines of the International Committee of the Red Cross (ICRC),¹⁴ and the 2016 policy paper of the Office of the Prosecutor of the International Criminal Court.¹⁵ They conclude that the international legal landscape relating to the environment and armed conflicts has changed since 2011 when the ILC embarked on the topic. From being a highly specialized issue mainly regulated by the law of armed conflict, the *Environmental Modification Convention* (ENMOD) and international criminal law incorporating the narrow scope of Articles 35(3) and 55 of the *Additional Protocol I* (AP I)¹⁶ and Article 8(b)(iv) *Rome Statute*,¹⁷ the protection of the environment in relation to armed conflicts now covers a broader field including peacekeeping operations, corporate liability, human rights law, indigenous peoples' rights, and environmental peacebuilding.

For more insights from the ILC, Stavros-Evdokimos Pantazopoulos (*Reprisals Against the Natural Environment*) analyzes the contentious Draft Principle 16. This principle replicates the language of Article 55(2) AP I and prohibits “[a]ttacks against the natural environment by way of reprisals [...]”. He inquires whether the Commission was correct to phrase Draft Principle

¹³ Global Pact for the Environment, available at <https://globalpactenvironment.org/> (last visited 08 May 2020).

¹⁴ *Guidelines for Military Manuals and Instruction on the Protection of the Environmental in Times of Armed Conflict*, UN Doc 49/323, 19 August 1994, Annex. An update to the Guidelines is said to be published in 2020.

¹⁵ Office of the Prosecutor at the International Criminal Court, ‘Policy paper on case selection and prioritisation’, 15 September 2016, paras 7 & 40, available at https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf (last visited 27 April 2020).

¹⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

¹⁷ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3 [Rome Statute].

16 in the context of international and non-international armed conflicts as *de lege lata*. As a former assistant to Marie Jacobsson, Pantazopoulos was present during the lengthy discussions in the Drafting Committee on reprisals in 2015. The opinion of the Drafting Committee of the ILC on the principle was divided with respect to two issues. First, some members opposed that Article 55(2) AP I should be read as a reflection of international customary law, since several States made reservations regarding the provision when adopting AP I.¹⁸ Second, several members disagreed whether the provision would be applicable to non-international armed conflicts as it is not mirrored in *Additional Protocol II* (AP II).¹⁹ The ILC's decision to place Draft Principle 16 in the context of both classifications of an armed conflict and to phrase it in terms of *lex lata* appears to have propelled the progressive development of international law within the ILC's mandate. However, reactions of States during the discussions in the Sixth Committee of the UN General Assembly in November 2019²⁰ have demonstrated the unclear legal status of Draft Principle 16. Thus, the wording of Draft Principle 16 might not be maintained after the second reading by the Commission in 2021.

C. Non-State Actors in the Draft Principles

There is a general challenge in international law given that it centers on States, even though more and more other actors entering the international arena. This is particularly evident in relation to environmental protection at the global level, which relies heavily on non-State actors. The ILC has addressed this issue by including draft principles focusing on corporations and indigenous peoples within its mandate to codify and develop international law with obligations for States. Several delegations in the Sixth Committee welcomed the inclusion of

¹⁸ See for example, 'Declarations and Reservations upon Ratification of Additional Protocol I', 28 January 1998, 2020 UNTS 77-8, Section (m) regarding Article 51-55, also available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 (last visited 27 April 2020).

¹⁹ See *Protection of the Environment in Relation to Armed Conflicts, Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau*, International Law Commission to the Sixty-seventh session, 10 July 2015, 10 & 11, available at https://legal.un.org/docs/?path=../ilc/documentation/english/statements/2015_dc_chairman_statement_peac.pdf&lang=EF (last visited 10 May 2020).

²⁰ *Report of the International Law Commission on the work of its Seventy-first Session*, UN Doc A/CN.4/734, 12 February 2020, para. 116, available at <https://www.undocs.org/en/A/CN.4/734> (last visited 8 May 2020).

non-State actors in the Draft Principles and the commentaries.²¹ However, there is still a deficit in regard to the inclusion of non-State actors.

Elaine (Lan Yin) Hsiao (*Protecting Protected Areas in Bello: Learning from Institutional Design and Conflict-Resilience in the Greater Virunga and Kidepo Landscapes*) highlights the lack of references to non-State actors in protecting the environment while examining Draft Principles 4 and 17 on the designation of protected zones in relation to armed conflicts. Hsiao analyzes two case studies of areas subject to transboundary protection that have been formalized into multilateral agreements to carry out conservation activities also in times of armed conflicts. On this basis, Hsiao highlights some of the gaps in the ILC's work on the designation of protected zones. Her insights from extensive fieldwork show that most of the conservation work taking place during armed conflict is mobilized on a grassroots level that can transform into agreements between States. While international obligations can be helpful in this process, they do not guarantee success. For successful implementation, local communities have to be involved at an early stage, in particular as many State actors are absent in conservation work during armed conflicts. Therefore, Hsiao shows that the inclusion of the right to local participation in the Draft Principles could have prevented the exclusion of local communities in protected areas. This is of importance given that many protected areas are established without prior consultation of local communities, which may obstruct protection during armed conflict and further exacerbate the exclusion of local communities.

Two contributions examine the Draft Principles related to corporations, namely Draft Principles 10 and 11 on corporate due diligence and corporate liability. Daniëlla Dam-de Jong and Saskia Wolters (*Through the Looking Glass: Corporate Actors and Environmental Harm Beyond the ILC*) welcome the strengthening mechanisms for environmental protection in conflict and post-conflict settings concerning corporate actors, as corporate social responsibility plays an important role when enhancing environmental protection in armed conflicts. In conflict or post-conflict settings, corporate activities can have a significant impact on the environment, for example in the context of illegal exploitation of natural resources. After exploring the links between corporations and environmental harm in conflicts, Dam-de Jong/Wolters consider State obligations under the law of armed conflict and human rights law. They also assess the extraterritorial aspects of States' due diligence obligations in this regard. Last but not least, the authors briefly examine the OECD Framework on Business and Human Rights. In their conclusions, Dam-de Jong/Wolters support

²¹ *Ibid.*, para. 100.

the integrated approach taken by the Commission combining international environmental law and human rights law.

Marie Davoise (*Widening the Scope of Jurisdiction, Expanding the Web of Liability: Could Environmental Abuses in Armed Conflict be Addressed Through Business and Human Rights?*) also examines Draft Principles 10 and 11. However, her examination of environmental damage and armed conflict adds a third aspect that she focuses on, namely the on-going debate on Business & Human Rights. She examines how far State responsibility, international criminal law, and transnational tort litigation are able to address and impact of businesses in the context of environmental harm during armed conflict. She also considers issues at the domestic level by assessing case studies from the United Kingdom, Canada, the Netherlands, and the United States. Davoise argues in terms of a cross-fertilization of these fields. She highlights the prospects of a future treaty on business and human rights and its positive impact on environmental protection in relation to armed conflicts.

D. Bridging Fields of International Law to Enhance Environmental Protection

While Dam-de Jong/Wolters and Davoise focus on corporations, they also link together different areas of international law. Such a “bridging” is the focus of several contributions in this issue relating to the efforts of the ILC to link together and harmonize various fields of international law.²² While bridging serves to unify international law, it may also enhance environmental protection in relation to armed conflicts.

Karen Hulme (*Enhancing Environmental Protection during Occupation through Human Rights Law*) investigates how human rights can further environmental protection in situations of occupation. Draft Principles 20-22 extend environmental protection to situations of occupation, in particular in protracted occupation. Hulme develops guidelines for how these principles can be applied in practice by distilling the core “environmental human rights” that must be respected during occupation. In doing so, she examines the close relationship between the implementation of human rights and environmental

²² See *Report of the International Law Commission to the Sixty-Third Session, Annex E. Protection of the Environment in Relation to Armed Conflicts*, M. G. Jacobsson, Syllabus of the 2011 recommendation of the Working-Group on the long-term program of work, *supra* note 1, para. 215.

protection given that States must often respect environmental law to comply with basic human rights law.

Dieter Fleck (*The Martens Clause and Environmental Protection in Relation to Armed Conflicts*) also touches on the issue of how to preserve the unity of international law and expands environmental protection in relation to armed conflicts by bridging the law of armed conflict, international environmental law and human rights law under the application of the Martens Clause. For this purpose, he revisits the Clause to identify whether and, if so, how it might open the door to uncodified sources of international law also beyond the law of armed conflict. This approach can contribute to closing the gap of existing treaty law with respect to the indeterminacy of environmental protection in armed conflicts. The Martens Clause aims at ensuring that conduct complies with the “dictates of public conscience” in armed conflict, even in the absence of an explicit prohibition in the law itself. Fleck thoroughly examines the use of the Clause under several instruments and considers some case law. He argues that the Clause can contribute to enhanced environmental protection in armed conflicts, complementing ILC’s Draft Principle 12 on an environmental Martens Clause and responding to some of the questions raised by States in the Sixth Committee.²³ He also explores how such a principle could be applied in practice, and finds that the Martens Clause’s reference to the “dictates of public conscience” entails a responsibility of States to protect the rights of future generations. The general reference to the dictates of public conscience includes environmental concerns and thus justifies customary international environmental law, including best practices for environmental protection when applying the law of armed conflict. The use of international environmental law could, for instance, contribute to the clarification of imprecise terms and standards within the law of armed conflicts, such as the proportionality principle and the duty to take precautions in attacks that leave a high level of discretion to the actor in question.

On a similar note, Michael Bothe (*Precaution in International Environmental Law and Precaution in the Law of Armed Conflict*) shares some initial thoughts on the challenges of protecting the environment (and rights of future generations) in situations that are covered by several areas of international law. *In concreto*, while damage to the environment might be considered lawful under the law of armed conflict, the same damages would not be acceptable under international environmental law. These challenges can be addressed in the context of debates on the fragmentation of international law. Interestingly, the

²³ Report of the International Law Commission on the work of its Seventy-first Session, *supra* note 20, para. 112.

ILC has not addressed any means of harmonization in the Draft Principles on this topic, or more specifically, the systemic treaty interpretation that is highlighted in the Fragmentation Report²⁴. Bothe analyzes the principle of prevention and the precautionary principle or approach in international environmental law and the principle of precaution in the law of armed conflict – two bodies of international law that coexist in situations of an armed conflict. He links wartime precautions with peacetime environmental prevention and precaution by looking into the pre-conflict recommendation to designate protected zones as referred to in Draft Principle 4. To avoid norm conflicts and instead harmonize the situation, Bothe elaborates on the “systemic harmonization” that is applied by human rights courts and introduces the idea of a “commonality of interests” to preserve the unity of international law. According to this view, in the context of a “constitutionalization of public international law”, Bothe states that there are certain common values across fields of international law, such as rights of future generations, that need to be respected regardless of the body of international law applied to maintain the meaning and function of such common values.

E. Filling in the Gaps of the ILC’s Work

The final contributions deal with aspects not addressed by the ILC. Keina Yoshida (*The Protection of the Environment: A Gendered Analysis*) examines an issue that is entirely absent in the ILC’s outcome, namely a gender perspective. She highlights the work of the “Women, Peace, and Security”-Framework where environmental components were included in the recent Security Council resolutions 2242²⁵ and 2467²⁶. She also looks into the general recommendations nos. 30²⁷ and 37²⁸ of the Committee monitoring the implementation of the Convention on the Elimination of Discrimination against Women (CEDAW) including environmental concerns. These achievements point at the intersection between strengthen women’s rights and the protection of the environment

²⁴ *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, Yearbook of the International Law Commission (2006), Vol. II, Part Two, 177.

²⁵ SC Res. 2242, UN Doc S/RES/2242 (2015), 13 October 2015.

²⁶ SC Res. 2467, UN Doc S/RES/2467 (2019), 23 April 2019.

²⁷ Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), *General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations*, UN Doc CEDAW/C/GC/30, 18 October 2013.

²⁸ CEDAW, *General Recommendation No. 37 on Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change*, UN Doc CEDAW/C/GC/37, 13 March 2018.

given the lived realities of women who face the consequences of environmental degradation as well as women engaged in environmental protection. Despite the many points of intersection, the ILC omitted the issue. Specific human rights instruments concerning women were not cited, in contrast to other more general instruments and despite the fact that some also address the connection between the legal protection of natural resources and the environment in all temporal phases of an armed conflict in line with the Commission's work. Yoshida stresses the missed opportunity concerning the involvement of a critical mass of women in peace agreements; she would have liked to see more on the importance of women's participation, especially in post-conflict situations.

Kirsten Davies, Jürgen Scheffran, and Thomas Riddell (*Preventing a Warming War: Protection of the Environment and Reducing Climate-Conflict Risk as a Challenge of International Law*) tackle another issue not addressed in the Draft Principles, namely the securitization of climate change. The authors assess the pre-conflict phase and the climate emergency framework by analyzing climate change as a "threat multiplier" and whether international law could mitigate the impact of climate change on armed conflicts. Davies, Scheffran, and Riddell *inter alia* suggest to identify vulnerabilities in the pre-phase and to officially acknowledge climate change as a threat to international peace and security under Chapter VII of the UN Charter. They also call for the intervention of compliance mechanisms such as the UN Security Council. They renew the call to institute an International Court for the Environment to resolve climate-related disputes between States by recourse to peaceful means of dispute settlement, which could contribute to preventing outbreaks of armed conflicts related to climate change.

F. Beyond the ILC – What is Next?

States have generally commended the adoption of the Draft Principles and commentaries on first reading during the debate in the Sixth Committee in 2019.²⁹ States have had the opportunity to make comments and remarks on the topic in each annual session of the Sixth Committee since 2011.³⁰ A

²⁹ See *Report of the International Law Commission on the work of its Seventy-first Session*, *supra* note 20, para. 99.

³⁰ See *Report of the International Law Commission on the work of its Sixty-third and sixty-fifth Session: Topical summary of the discussions held in the Sixth Committee of the General Assembly during its Sixty-eighth Session*, UN Doc A/CN.4/666, 23 January 2014, para. 54, available at <https://legal.un.org/docs/?symbol=A/CN.4/666> (last visited 10 May 2020); *Report of the International Law Commission on the work of its Sixty-sixth Session: Topical summary*

recurring criticism of States relates to the general applicability of the Draft Principles to international and non-international armed conflicts, the legal status of some of the Draft Principles as well as the outcome of the project as a set of Draft Principles.³¹ With the adoption of the 28 Draft Principles and the commentaries, the Commission has proven some of its critics wrong; despite the complexity of the topic the Commission has adopted a holistic approach and succeeded in approaching the topic from the perspective of several fields of international law. Going forward, States have been asked to submit their remarks and comments on the Draft Principles by 1 December 2020. In 2021, the ILC and its members of the 2017-2021 quinquennium plan to re-convene to consider States' comments and continue with the second reading to finalize the work on the topic. After that, it is up to the Sixth Committee and the international community to proceed to further shape and develop the legal landscape on environmental protection in relation to armed conflict.

Nevertheless, the fact that the ILC has worked continuously on the topic and on several occasions asked States, international organizations and non-governmental organizations to engage, has led to increased attention and *momentum* of the topic. This is clear given the current developments in

of the discussions held in the Sixth Committee of the General Assembly during its sixty-ninth Session, UN Doc A/CN.4/678, 21 January 2015, para. 60, available at <https://legal.un.org/docs/?symbol=A/CN.4/678> (last visited 10 May 2020); *Report of the International Law Commission on the work of its Sixty-seventh Session (2015): Topical summary of the discussions held in the Sixth Committee of the General Assembly during its seventieth Session*, UN Doc A/CN.4/689, 28 January 2016, para. 5, available at <https://legal.un.org/docs/?symbol=A/CN.4/689> (last visited 10 May 2020); *Report of the International Law Commission on the work of its Sixty-eighth Session (2016): Topical summary of the discussions held in the Sixth Committee of the General Assembly during its Seventy-first Session*, UN Doc A/CN.4/703, 22 February 2017, para. 43, available at <https://legal.un.org/docs/?symbol=A/CN.4/703> (last visited 10 May 2020); *Report of the International Law Commission on the work of its Sixty-ninth Session (2017): Topical summary of the discussions held in the Sixth Committee of the General Assembly during its Seventy-second Session*, UN Doc A/CN.4/713, 26 February 2018, para. 73, available at <https://legal.un.org/docs/?symbol=A/CN.4/713> (last visited 10 May 2020); *Report of the International Law Commission on the work of its Seventieth Session (2018): Topical summary of the discussions held in the Sixth Committee of the General Assembly during its Seventy-third Session*, UN Doc A/CN.4/724, 12 February 2019, para. 30, available at <https://legal.un.org/docs/?symbol=A/CN.4/724> (last visited 10 May 2020).

³¹ See e.g. *Report of the International Law Commission on the work of its Sixty-eighth Session (2016): Topical summary of the discussions held in the Sixth Committee of the General Assembly during its Seventy-first Session*, *ibid.*, para. 43.

international law, such as the update of the 1994 guidelines by the ICRC³² announced for 2020, the *Geneva List of Principles on the Protection of Water Infrastructure*,³³ the push for including environment-related concerns on the agenda of the Security Council,³⁴ as well as the UN Environment Assembly adopting resolutions on the topic since 2016.³⁵ There are also several other initiatives, such as the 2020 International Union on the Conservation of Nature (IUCN) Congress Motion to address conflicts and biodiversity,³⁶ or the Environmental Peacebuilding Association highlighting the need to address environmental concerns in peace processes.³⁷ These ongoing initiatives and the ILC's work have contributed to re-shaping the law in this area.

The need to protect the environment is an increasingly pressing issue given its vulnerability, which has led several actors to start to act. The ILC's work on the topic has shown that Environmental International Law protecting the environment continues to apply in times of armed conflicts. Ecosystems are already exposed in peacetime. More damage to the environment in relation to

³² See *Guidelines for Military Manuals and Instruction on the Protection of the Environmental in Times of Armed Conflict*, *supra* note 14.

³³ Geneva Water Hub, 'Geneva List of Principles on the Protection of Water Infrastructure' available at <https://www.genevawaterhub.org/resource/geneva-list-principles-protection-water-infrastructure> (last visited 10 May 2020).

³⁴ Two Arria-formula meetings have been organized in 2018 and 2019 in New York by an NGO called PAX, see PAX, 'Arria-Formula on the "Protection of Environment During Armed Conflict"' (7 November 2018), available at https://s3-eu-west-1.amazonaws.com/upload.teamup.com/908040/dTEnwwoQieOfMIgqXlBR_Concept%20Note%20Arria%20Formula%20on%20the%20Protection%20of%20Environment%20During%20Armed%20Conflict.pdf (last visited 10 May 2020), and a concept note for the 2019 event, see, PAX, 'Arria-Formula On "Protection Of The Environment During Armed Conflict"' (9 December 2019), available at https://s3-eu-west-1.amazonaws.com/upload.teamup.com/908040/fQInefsnTP6mF2OF0zur_Arria-Formula%20Meeting%20on%20PERAC%20-%20Concept%20Note.pdf (last visited 10 May 2020).

³⁵ See UNEP, *2/15 Protection of the Environment in Areas Affected by Armed Conflict*, UN Doc UNEP/EA.2/Res.15, 4 August 2016, available at http://wedocs.unep.org/bitstream/handle/20.500.11822/11189/K1607252_UNEPEA2_RES15E.pdf?sequence=1&isAllowed=y (last visited 10 May 2020); UNEP, *3/1 Pollution Mitigation and Control in Areas Affected by Armed Conflict or Terrorism*, UN Doc UNEP/EA.3/Res.1, 30 January 2018, available at <http://wedocs.unep.org/bitstream/handle/20.500.11822/31016/k1800167.english.pdf?sequence=2&isAllowed=y> (last visited 10 May 2020).

³⁶ See IUCN World Conservation Congress Marseille 2020, *052 – Protection of the Environment in Relation to Armed Conflict*, 19 March 2020, available at <https://www.iucncongress2020.org/motion/052> (last visited 10 May 2020).

³⁷ See Environmental Peacebuilding Association, available at <https://environmentalpeacebuilding.org/> (last visited 10 May 2020).

armed conflicts is likely to further accelerate this process. Therefore international law needs to be strengthened in order to avoid long-lasting and potentially irreparable environmental damages before, during and after armed conflicts. As highlighted above, the current work of the ILC is a good beginning. It has already helped to provide some clarity and offered several new paths – both legal and quasi-legal – that address various aspects of environmental protection in relation to armed conflicts.

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

Marie Jacobsson* and Marja Lehto**

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* Marie Jacobsson, Ambassador and Principal Legal Adviser on International Law at the Swedish Ministry for Foreign Affairs (MFA) and Associate Professor of International Law, University of Lund. The views expressed in the introductory note are those of the author and do not necessarily reflect the positions of the MFA.

** Marja Lehto, Ambassador and Senior Expert of International Law at the Ministry for Foreign Affairs of Finland (MFA), Adjunct Professor of International Law at the University of Helsinki. The views expressed in the introductory note are those of the author and do not necessarily reflect the positions of the MFA.

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

A. Background

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

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

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

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

² *Ibid.*, 53.

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

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

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

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

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

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

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

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

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

⁶ *Ibid.*, Article 7.

⁷ *Ibid.*, Annex.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³ *Ibid.*, 80, para. 265, Proposal for a “Draft principle on III-IV Remnants of war at sea:
1. States and international organizations shall cooperate to ensure that remnants of war do not constitute a danger to the environment, public health or the safety of seafarers.
2. To this end States and organizations shall endeavour to survey maritime areas and make the information freely available.”

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

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

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

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

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

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

C. The Work by the Commission 2017 - 2019

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

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

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

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

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

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

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

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

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

¹⁸ *Ibid.*, 149.

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

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

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

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

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

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

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

²³ According to Article 43 of the Hague Regulations, “The [...] occupant [...] shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety [...] in the country”. The authentic French text of Article 43 uses the expression “*l'ordre et la vie publics*”, and the provision has been accordingly interpreted to refer not only to physical safety but also to the “social functions and ordinary transactions which constitute daily life, in other words to the entire social and economic life of the occupied region”. See M. McDougal & F. P. Feliciano, *Law and Minimum World Public Order*.

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

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

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

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

²⁴ T. Ferraro, ‘The law of occupation and human rights law: some selected issues’, in R. Kolb & G. Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (2013), 273, 279.

²⁵ Declaration on the Human Environment, *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev. 1, 16 June 1972, 5, Principle 21; *Rio Declaration on Environment and Development*, *supra* note 16, principle 2; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, para. 101.

²⁶ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 241, para. 29. See also *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *supra* note 25, para. 101.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁹ *Ibid.*, 28-32, paras. 59-66.

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

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

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

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

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

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

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

D. Concluding Remarks

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

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

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

⁴⁴ *Ibid.*

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

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

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

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

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

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

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

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

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

Reflections on the Legality of Attacks Against the Natural Environment by Way of Reprisals

Stavros-Evdokimos Pantazopoulos*

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* Legal and Policy Analyst, Conflict and Environment Observatory; PhD candidate in Law, EUI. I would like to express my gratitude to the Institute for Education and European Culture for its generous support, which facilitated significantly the research for this paper. The views expressed herein are the author's exclusively and do not necessarily reflect the views of the Conflict and Environment Observatory, nor can they be attributed to it.

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Abstract

The paper examines the concept of belligerent reprisals and assesses the legality of attacking the environment by way of reprisals. The law of belligerent reprisals, which is linked to the principle of reciprocity, allows one belligerent State unlawfully injured by another to react by means of what under normal circumstances would constitute a violation of the *jus in bello*, so as to induce the violating State to comply with the law. The instances of lawful recourse to reprisals have been considerably limited, since their application is either explicitly prohibited against certain protected persons and objects, including against the natural environment, or is subject to stringent conditions according to customary International Humanitarian Law (IHL).

Despite its narrowing scope, the doctrine of reprisals remains a valid concept under the existing legal framework. For one, the state of affairs under customary international law with respect to reprisals directed at civilian objects (including against parts of the environment), subject to certain rigorous conditions, remains unclear. To complicate matters even further, any proposition on the status of reprisals in the context of a non-international armed conflict (NIAC) is shrouded in controversy, as there is no relevant treaty provision. In this regard, the present author endorses the approach espoused in the International Committee of the Red Cross (ICRC) Study on Customary IHL, namely to altogether prohibit resort to reprisals in the context of a NIAC.

Turning to the status of reprisals against the natural environment under customary IHL, it is argued that a prohibition of attacks against the natural environment by way of reprisals is in the process of formation with respect to the use of weapons other than nuclear ones. All things considered, the International Law Commission (ILC) was confronted with an uncomfortable situation in the context of its work on the 'Protection of the Environment in Relation to Armed Conflicts'. By sticking to the *verbatim* reproduction of Article 55(2) of Additional Protocol I, the ILC chose the proper course of action, since any other formulation would not only undercut a significant treaty provision, but might also result in the normative standard of conduct being lowered.

A. Introduction

The concept of *reprisals* is now used almost exclusively with reference to *jus in bello*.¹ Recourse to reprisals is considered a lawful means of enforcement, subject to applicable legal conditions. The law of belligerent reprisals allows one belligerent State, unlawfully injured by another, to react by means of what under normal circumstances would constitute a violation of the *jus in bello*, so as to induce the violating State to comply with the law.² Moreover, recourse to reprisals is lawful “[...] only in response to a prior violation of the law of armed conflict and not in retaliation for an unlawful resort to force”.³ As a form of self-help, belligerent reprisals are linked to the principle of reciprocity, bearing in mind, nevertheless, that “[t]he obligation to respect and ensure respect for international humanitarian law (IHL) does not depend on reciprocity”,⁴ as the

¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 246, para 46 (“The Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful”). *Report of the International Law Commission to the Fifty-Third Session*, UN Doc. A/56/10, 23 April-1 June and 2 July-10 August 2001, 128, para. 3 (“As to terminology, traditionally the term ‘reprisals’ was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach. More recently, the term ‘reprisals’ has been limited to action taken in time of international armed conflict; i.e. it has been taken as equivalent to belligerent reprisals. The term ‘countermeasures’ covers that part of the subject of reprisals not associated with armed conflict, and in accordance with modern practice and judicial decisions the term is used in that sense in this chapter.”).

² S. Oeter, ‘Methods and Means of Combat’, in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed. (2013), 115, 228; B. Zimmermann ‘Part V, Section II - Repression of Breaches of the Conventions and of this Protocol’, in Y. Sandoz, C. Swinarski & B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August of 1949* (1987), 982, paras 3426-3427; In the *List case* (The Hostages Trial) in the late 1947/48, the U.S. Military Tribunal at Nuremberg held: “A reprisal is a response to an enemy’s violation of the laws of war which would otherwise be a violation on one’s own side”. *United States v. List, et al*, Judgment, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Volume XI/2, 19 February 1948, 1230, 1248.

³ C. Greenwood, ‘The Twilight of the Law of Belligerent Reprisals’, 20 *Netherlands Yearbook of International Law* (1989), 35, 41-42.

⁴ J. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (2009), 498, Rule 140 [Henckaerts & Doswald-Beck, Rules]; see, for example, Egypt, ‘Declaration and Notification Made Upon Ratification of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)’, 9 October 1992, para. 3, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=AF3791A0FF167FFDC1256402003FB393>

International Committee of the Red Cross (ICRC) Study on Customary IHL has authoritatively clarified.⁵

Parts of the environment, the silent victim of warfare,⁶ lend themselves to being targeted by way of reprisals, given the traditional anthropocentric approach – in the sense of aiming to alleviate *human* suffering – that transverse the entire field of IHL. In abstract terms, it could be claimed that targeting a forest or a nature reserve, so as to induce the violating enemy State to comply with IHL is preferable to directing attacks at the civilian population with the same aim in mind.⁷

A real-life scenario, which has partly inspired this paper, stems from the targeting of fifteen pine trees located closely to a purported *Jaish-e-Mohammad* (JeM) terrorist camp in Balakot in Pakistan by Indian armed forces on the 26th of February 2019. Even though India has never made this proclamation, the Balakot attack could, perhaps, be viewed as a response to the 14th of February 2019 Pulwama suicide attack, in which 40 young recruits of the Central Reserve Police Force were killed, with JeM claiming responsibility.⁸ The Balakot airstrike could be interpreted as an attack against the natural environment by way of reprisals, but India has not yet employed such a line of argument. Moreover, the application of the doctrine of reprisals to this real-life case should be excluded, as the Indian armed forces have reportedly missed the target, namely members of JeM, instead of intentionally targeting the forest reserve.⁹

(last visited 27 April 2020); (“The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.”).

⁵ Henckaerts & Doswald-Beck, *Rules*, *supra* note 4, Rule 140.

⁶ See indicatively, S. Freeland, ‘Crimes Against the Environment: The Silent Victim of Warfare’ (2015), available at <https://theconversation.com/crimes-against-the-environment-the-silent-victim-of-warfare-50215> (last visited 27 April 2020).

⁷ It is remarkable that such a claim could rest on the unchallenged assumption of humans’ superiority.

⁸ India Today, ‘Exclusive: Balakot Airstrike Mission was Codenamed Operation Bandar’ (2019), available at <https://www.indiatoday.in/india/story/balakot-airstrike-codename-operation-bandar-1553450-2019-06-21> (last visited 27 April 2020).

⁹ M. Howell, G. Doyle & S. Scarr, ‘Satellite Images Show Buildings Still Standing at Indian Bombing Site’ (2019), available at <https://uk.reuters.com/article/uk-india-kashmir-pakistan-airstrike-insi/satellite-images-show-madrassa-buildings-still-standing-at-scene-of-indian-bombing-idUKKCN1QN02Z> (last visited 27 April 2020); M. Hellyer, N. Ruser & A. Bachhawat, ‘India’s Strike on Balakot: A Very Precise Miss?’ (2019), available

Taking a step back and approaching the matter from a broader perspective, it could plausibly be argued that the doctrine of reprisals against the natural environment has fallen into desuetude, given the absence of relevant practice. Having said that, the UK's consistent (and persistent) reference to the prohibition of reprisals against the natural environment in the context of the United Nations (UN) International Law Commission's (ILC) relevant work¹⁰ should dispel any doubts about the putative fall of reprisals into disuse.

Against this background, the present paper examines the concept of belligerent reprisals and the legality of employing them against the environment¹¹ and is divided into five main sections, with three of them addressing the legality of reprisals within IHL and the remaining two dealing with recourse to reprisals against the environment. More specifically, the second section of the paper is dedicated to the treaty prohibitions of reprisals, while the third section considers the limitations attached to the lawful recourse to reprisals under customary international law. The next section addresses the taking of reprisals in the context of a non-international armed conflict (NIAC), while the fifth section delves into the prohibition of reprisals against the natural environment. The following section deals with the work undertaken by the ILC in the context of the topic *Protection of the environment in relation to armed conflicts*, which was included in its programme of work at its sixty-fifth session (2013). The ILC's work culminated in the recent adoption on first reading of 28 Draft Principles and my analysis will focus on Draft Principle 16, which prohibits attacks against the natural environment by way of reprisals. The last section concludes.

at <https://www.aspistrategist.org.au/indias-strike-on-balakot-a-very-precise-miss> (last visited 27 April 2020).

¹⁰ *GA Sixth Committee, Summary Record of the 24th Meeting*, UN Doc A/C.6/70/SR.24, 10 November 2015, 5, para. 21; *GA Sixth Committee, Summary Record of the 28th Meeting*, UN Doc A/C.6/71/SR.28, 1 November 2016, para. 25; E. Haxton, 'Statement by Mr. Edward Haxton, Assistant Legal Adviser, Foreign & Commonwealth Office' (2019), para. 6 available at <https://papersmart.unmeetings.org/media2/23329031/-e-united-kingdom-statement.pdf> (last visited 27 April 2020).

¹¹ To be precise, reprisals are not directed against the natural environment as such. Rather, they constitute an attack targeting the natural environment by way of reprisals. I thank one of the anonymous reviewers for this point. Bearing in mind this distinction, I use the shorthand *reprisals against the natural environment* throughout this paper, as also used, for example, in the commentaries of the ILC's relevant work. See *Report of the International Law Commission to the Seventy-First Session*, UN Doc. A/74/10, 29 April-7 June and 8 July-9 August 2019, 257, commentary to Draft Principle 16, para 2.

B. Treaty Prohibitions of Reprisals

Certain belligerent reprisals are specifically outlawed by the four 1949 Geneva Conventions and Additional Protocol I, which apply to international armed conflicts (IACs). Article 46 of Geneva Convention I stipulates that “[r]eprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited”.¹² Article 47 of Geneva Convention II provides for as follows, “[r]eprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited”.¹³ For its part, Geneva Convention III prohibits recourse to reprisals against prisoners of war.¹⁴ Geneva Convention IV postulates in Article 33 that “[r]eprisals against protected persons and their property are prohibited.”¹⁵

In the same vein, Article 4(4) of the Hague Convention on Cultural Property provides that High Contracting Parties “[...] shall refrain from any act directed by way of reprisals against cultural property”.¹⁶ In addition, pursuant to Article 3(2) of Protocol II of the Convention prohibiting Certain Conventional Weapons, “[i]t is prohibited in all circumstances to direct weapons to which this Article applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians.”¹⁷

Additional Protocol I has significantly expanded the scope of the traditional prohibitions of reprisals.

1. Article 20 forbids reprisals against persons and objects protected in Part II (dealing with wounded, sick, shipwrecked, medical and

¹² *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, Art. 46, 75 UNTS 31 [Geneva Convention I].

¹³ *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, Art. 47, 75 UNTS 85 [Geneva Convention II].

¹⁴ *Convention (III) Relative to the Treatment of Prisoners of War*, 12 August 1949, Art. 13(3), 75 UNTS 135 [Geneva Convention III], (“[m]easures of reprisal against prisoners of war are prohibited”).

¹⁵ *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Art. 33(3), 75 UNTS 287 [Geneva Convention IV].

¹⁶ *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954, Art 4(4), 249 UNTS 240 [Hague Convention on Cultural Property].

¹⁷ *Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices*, 10 October 1980, Art 3(2), 1342 UNTS 168 [Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices].

religious personnel, medical units and transportation, etc.).¹⁸ The principal purpose of this provision is to cover persons and objects not protected from reprisals by Geneva Conventions I and II, especially civilian wounded and sick as well as civilian medical establishments, vehicles, etc.

2. Article 51(6) prohibits attacks against the civilian population or civilians by way of reprisals.
3. Article 52(1) states that civilian objects shall not be the object of reprisals.
4. Article 53(c) does not permit making historic monuments, works of art or places of worship – constituting the cultural or spiritual heritage of peoples – the object of reprisals.
5. Article 54(4) protects objects indispensable to the survival of the civilian population from being made the object of reprisals.
6. Article 55(2) prohibits attacks against the natural environment by way of reprisals.
7. Article 56(4) rules out making works or installations containing dangerous forces (namely, dams, dykes and nuclear electrical generating stations) – even where they are military objectives – the object of reprisals.

In light of the above-cited treaty prohibitions, the concept of belligerent reprisals maintains its validity within the law of armed conflict, especially with regard to the choice of means and methods of warfare, employed against enemy combatants and military objectives.¹⁹ Nevertheless, it should be underlined that the ambit of reprisals has been considerably limited. The recourse to reprisals is

¹⁸ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, Art. 20, 1125 UNTS 3 [Additional Protocol I].

¹⁹ D. Turns, 'Implementation and Compliance', in E. Wilmshurst & S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007), 354, 367. See also C. Pilloud & J. Pictet, in Sandoz, Swinarski & Zimmermann, *supra* note 2, 627, para. 1985; A. D. Mitchell, 'Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law', 170 *Military Law Review* (2001), 155, 169; S. Darcy, 'The Evolution of the Law of Belligerent Reprisals', 175 *Military Law Review* (2003) 184, 250 [Darcy, Evolution of the Law of Belligerent Reprisals] ("For States parties to those treaties, during an international armed conflict, the only remaining scope for permissible belligerent reprisals is in the choice of weapons or means of warfare employed against an enemy's armed forces and military objectives"). According to Dinstein, treaty law does not abrogate "[...] the possibility of employing prohibited weapons against

either explicitly prohibited against certain protected persons and objects,²⁰ or is subject to stringent conditions under customary IHL, to which the next section turns.

C. Limitations on the Lawful Recourse to Reprisals

As treaties do not provide for such limitations, the limitations attached to the lawful recourse to reprisals are found in customary international law. Pursuant to the ICRC Study on Customary IHL, “[w]here not prohibited by international law, belligerent reprisals are subject to stringent conditions”.²¹ Dinstein acknowledges the existence of five pertinent conditions,²² which coincide with the findings of the ICRC Study. The said limitations are the following:

(i) Protests or other attempts to secure compliance of the enemy with the law of armed conflict must be undertaken first (unless the fruitlessness of such steps ‘is apparent from the outset’²³).

(ii) A warning must generally be issued before resort to belligerent reprisals.²⁴

enemy combatants by way of belligerent reprisals.” Y. Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 3rd ed. (2016), 293-294.

²⁰ Because “[...] there is no justification for the violation of such protected persons or objects to become a means of enforcement”. S. Vöneky, ‘Implementation and Enforcement of International Humanitarian Law’, in Fleck, *supra* note 2, 647, 660, para. 1408.

²¹ Henckaerts & Doswald-Beck, Rules, *supra* note 4, 513, Rule 145.

²² Dinstein, *supra* note 19, 290, para. 806.

²³ *Ibid.* See also F. Kalshoven, *Belligerent Reprisals*, 2nd ed. (2005), 340 [Kalshoven, Belligerent Reprisals], “[...] protests, warnings, appeals to third parties and other suitable means must have remained without effect, or so obviously been doomed to failure that there was no need to attempt them first.”

²⁴ Upon ratification of Additional Protocol I, the United Kingdom stated that in the event of violations of Articles 51–55 of Additional Protocol I by the adversary, the United Kingdom would consider itself entitled to take measures otherwise prohibited by these Articles, noting, however, that this would be the case “[...] only after [a] formal warning to the adverse party requiring cessation of the violations has been disregarded”. UK, ‘Declarations and Reservations Upon Ratification of Additional Protocol I’, 28 January 1998, 2020 UNTS 77-8, section (m) Re: Article 51-55. See also *Prosecutor v. Kupreškić*, Judgement, IT-95-16-T, 14 January 2000, para. 535 [“It should also be pointed out that at any rate, even when considered lawful, reprisals are restricted by [...] the principle whereby they must be a last resort in attempts to impose compliance by the adversary with legal standards (which entails, amongst other things, that they may be exercised only after a prior warning has been given which has failed to bring about the discontinuance of the adversary’s crimes) [...]”].

(iii) The decision to launch belligerent reprisals cannot be taken by an individual combatant, and must be left to a higher authority.²⁵

(iv) Belligerent reprisals must always be proportionate to the original breach of the law of armed conflict.²⁶

²⁵ The condition at hand is found in many military manuals. See among others, the U.S. Naval Handbook, according to which “[t]he President alone may authorize the taking of a reprisal action by U.S. forces”. Department of the Navy, *The Commander’s Handbook on the Law of Naval Operations* (2017), 6.2.4.3. Pursuant to the Australian manual of the law of armed conflict, “[a]s reprisals entail state responsibility, they must be authorised at the highest level of government”. Australia, *The Manual of the Law of Armed Conflict* (2006), 13.18. The Canadian manual of the law of armed conflict provides for the following, “[i]t must be authorized by national authorities at the highest political level as it entails full State responsibility. Therefore, military commanders are not on their own authorized to carry out reprisals.” National Defence Canada, *The Law of Armed Conflict at the Operational and Tactical Levels* (2001), 1507.2 and 6h. See also *Prosecutor v. Kupreškić*, *supra* note 24, para. 535; *Prosecutor v. Martić*, IT-95-11-T, Judgement, 12 June 2007, para. 466.

²⁶ In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ held that “[...] in any case any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality”. *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, 246, para. 46. Interestingly, two competing theories of proportionality claim applicability within the reprisals doctrine: according to the first, reprisals should be proportionate to the original violation, while, pursuant to the second, reprisals must be proportionate to the desired goal, namely the enforcement of the law of armed conflict. P. Sutter, ‘The Continuing Role for Belligerent Reprisals’, 13 *Journal of Conflict and Security Law* (2008) 1, 93, 100-102. However, State and judicial practice point towards the acceptance of the former theory. See Australia, *The Manual of the Law of Armed Conflict*, *supra* note 25, 3.18; National Defence Canada, *The Law of Armed Conflict at the Operational and Tactical Levels*, *supra* note 25, 1507.3, 1507.6; Italy, *Manuale di diritto umanitario* (1991), Vol. I, para. 23, cited in J.-M. Henckaerts & L. Doswald-Beck (eds), *Customary International Humanitarian Law: Volume II: Practice* (2005), 3338, para. 218 [Henckaerts & Doswald-Beck, *Practice*]; Ministry of Defence of the United Kingdom, *Manual of the Law of Armed Conflict* (2004), 421, 16.17; Department of the Navy, *supra* note 25, 6.2.4.1; Ordinanza del Giudice per l’Udienza Preliminare presso il Tribunale Militare di Roma, 07.12.1995, Sect. 4 [*Hass and Priebke case*, Judgement in Trial of First Instance]; Sentenza della Corte Militare di Appello di Roma, 07.03.1998 [*Hass and Priebke case*, Judgement on Appeal]; Sentenza della Corte Suprema di Cassazione, 16.11.1998 [*Hass and Priebke case*, Judgement in Trial of Third Instance] cited in Henckaerts & Doswald-Beck, *Practice*, 3341, paras 233-5; *Prosecutor v. Kupreškić*, *supra* note 24, para. 535. As Kalshoven notes, proportionality as a condition for lawful recourse to reprisals amounts to the absence of obvious disproportionality, which means that belligerents are left with a certain freedom of discretion, subject to being restrained by the requirement of reasonableness. Kalshoven, *Belligerent Reprisals*, *supra* note 23, 341-2.

(v) Once the enemy desists from its breach of the law of armed conflict, belligerent reprisals must be terminated.²⁷

D. Reprisals in a Non-International Armed Conflict

The legal status of reprisals in the context of a NIAC has attracted great controversy.²⁸ Notwithstanding the fact that there were proposals to include specific prohibitions of reprisals in NIACs during the Diplomatic Conference that led to the adoption of the Additional Protocols,²⁹ Additional Protocol II does not enclose any reference to reprisals.³⁰ Following a permissive approach pursuant to the *Lotus* decision of the Permanent Court of International Justice,³¹ this lacuna seems to permit great freedom at States' disposal and potentially to those non-state armed groups that have the operational capacity to engage in such reprisal action. Nonetheless, as Kalshoven has astutely observed "[...] an absence of prohibitions does not necessarily mean permissibility, let alone advisability".³²

Most authors argue that the prohibition of reprisals in the context of a NIAC derive from specific treaty provisions, namely common Article 3 of the Geneva Conventions and Article 4 of Additional Protocol II.³³ It could also be

²⁷ Australia, *The Manual of the Law of Armed Conflict*, *supra* note 25, 13.18; National Defence Canada, *The Law of Armed Conflict at the Operational and Tactical Levels*, *supra* note 25, 1507.3, 1506b; *Hass and Priebke case*, Judgement on Appeal, *supra* note 26, para. 24, cited in Henckaerts & Doswald-Beck, *Practice*, *supra* note 26, 3354, para. 313; *Prosecutor v. Kupreškić*, *supra* note 24, para. 535.

²⁸ For example, the possibility of reprisals being applicable during a non-international armed conflict could be entirely ruled out by virtue of their exclusive application to inter-state relations. S. V. Jones, 'Has Conduct in Iraq Confirmed the Moral Inadequacy of International Humanitarian Law? Examining the Confluence between Contract Theory and the Scope of Civilian Immunity During Armed Conflict', 16 *Duke Journal of Comperatative & International Law* (2006) 2, 249, 292-293.

²⁹ Henckaerts & Doswald-Beck, *Rules*, *supra* note 4, 528.

³⁰ *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 UNTS 609 [Additional Protocol II].

³¹ The Case of the S.S. *Lotus*, Judgment, PCIJ Series A, No 10 (1927).

³² F. Kalshoven, 'Belligerent Reprisals Revisited', 21 *Netherlands Yearbook of International Law* (1990), 43, 80 [Kalshoven, Belligerent Reprisals Revisited].

³³ See Henckaerts & Doswald-Beck, *Rules*, *supra* note 4, 526-527. According to Kalshoven, the more convincing arguments against the recourse to reprisals in the context of a NIAC are the following: "[...]their dubious efficacy, their escalating effect, the harm they do both to the people chosen as targets and to one's own standard of civilization – in one

claimed that certain prohibitions apply by analogy from the law of IAC, since the underlying cardinal principles of IHL retain their validity irrespective of the type of armed conflict.³⁴ Another line of legal reasoning, pursuant to which reprisals are prohibited in the context of a NIAC, can be drawn from international human rights law. Accordingly, given the uncertain status of reprisals under the law of NIAC, their legality should be judged by reference to the other applicable legal regime, namely international human rights law. Consequently, the human rights-based approach carries the potential to outlaw reprisals by States. On the other hand, it is self-limiting in that it cannot proscribe reprisals undertaken by non-state armed groups, since it is not well-established whether and to what extent the latter are bound by international human rights law. In this regard, the most apposite path seems to be the potential customary or *jus cogens* status of the IHL norms at stake.³⁵ On a final note, it should be mentioned that the debate concerns mostly recourse to reprisals against civilians rather than civilian objects.³⁶

In any case, relevant State practice is scarce and no safe conclusion can be drawn, even though the ICRC Study refers to an absolute prohibition on reprisals during a NIAC.³⁷ As Turns convincingly argues, the concept of reprisals is nowhere to be found under the law of NIAC and thus the ICRC Study's relevant prohibition seems to regulate a non-existent concept.³⁸ Having said that, no *opinio juris* demonstrating the existence of a customary right to resort to belligerent reprisals in a NIAC can be deduced from the relevant practice.³⁹ In addition, transposing the doctrine of belligerent reprisals from the legal regime of IAC to that of NIAC would not only be counterintuitive, as the latter was not

word their general undesirability.”, F. Kalshoven, *Reflections on the Law of War: Collected Essays* (2007), 790 [Kalshoven, *Reflections on the Law of War*]. However, the above reasons are rooted in policy and/or moral considerations, rather than being grounded on *legem latam*.

³⁴ Kalshoven, ‘Belligerent Reprisals Revisited’, *supra* note 32, 78 and N. Quéniévet, ‘The Moscow Hostage Crisis in the Light of the Armed Conflict in Chechnya’, 4 *Yearbook of International Humanitarian Law* (2001), 348, 361, cited in V. Bílková, ‘Belligerent Reprisals in Non-International Armed Conflicts’, 63 *International & Comparative Law Quarterly* (2014) 1, 31, 56, footnotes 138, 139.

³⁵ S. Darcy, *Collective Responsibility and Accountability under International Law* (2007), 180, 182 [Darcy, *Collective Responsibility and Accountability*].

³⁶ See Darcy, ‘Evolution of the Law of Belligerent Reprisals’, *supra* note 19, 205; Kalshoven, *Reflections on the Law of War*, *supra* note 33, 790.

³⁷ Henckaerts & Doswald-Beck, *Rules*, *supra* note 4, Rule 148.

³⁸ Turns, *supra* note 19, 372.

³⁹ Bílková, *supra* note 34, 54.

designed to accommodate the doctrine of belligerent reprisals, but would also appear digressive, given the mounting efforts at the international scene to limit the scope of reprisals under the law of IAC.⁴⁰

All in all, taking into account the potential of abuses against the civilian population, civilian objects and the natural environment, it is argued that the endeavour to accommodate the doctrine of reprisals within the law of NIAC should be resisted,⁴¹ and hence an absolute lack of a right to resort to reprisals in the context of a NIAC is the appropriate approach to the topic at hand, as also envisaged by the ICRC Study and in line with the lack of any treaty law reference.

E. Prohibiting Recourse to Reprisals Against the Environment

The prohibition under consideration should be considered through two different lenses: first, parts of the environment could benefit from a prohibition of reprisals where they qualify as civilian objects and to the extent States bear an obligation not to take retaliatory measures against civilian objects. Second, reprisals against the environment are explicitly forbidden as such.

As mentioned above, there are several treaty prohibitions of reprisals against specifically protected objects under the existing normative landscape.⁴² Nevertheless, by virtue of existing contrary, albeit very sparse, practice, it would be far-fetched to reach the conclusion that a rule specifically prohibiting reprisals against civilian objects in all situations – to the extent they do not qualify as civilian property that is protected under Article 33 of Geneva Convention IV – is part and parcel of customary law.⁴³

As far as an explicit prohibition of taking reprisals against the environment is concerned, Article 55(2) of Additional Protocol I establishes an absolute prohibition of attacks against the natural environment by way of reprisals.⁴⁴ This absolute prohibition is inspired by an ecocentric approach, since the protection it furnishes to the environment is independent of any potential harm inflicted on

⁴⁰ *Ibid.*, 64.

⁴¹ See *ibid.*, 65.

⁴² See above section B.

⁴³ And *vice versa*, it is equally difficult to claim with certainty that a right to resort to reprisals against civilian objects still exists by means of the (sometimes equivocal) practice of only certain States. Henckaerts & Doswald-Beck, *Rules*, *supra* note 4, 525 and instances of State practice cited therein.

⁴⁴ Art 55(2), Additional Protocol I.

human health or to the survival of the (human) population, as, for example, is required by the second sentence of Article 55(1) of Additional Protocol I.⁴⁵ In this respect, as one eminent commentator has observed “[t]he interest in preserving the natural environment [...] is shared by the whole of mankind”, and for this reason “[t]he fact that one Belligerent Party has already caused unlawful damage to the natural environment cannot possibly justify compounding the injury by the other side”.⁴⁶ Notwithstanding the above remarks, it should be clarified that Article 55(2) of Additional Protocol I does not outlaw a lawful reaction to enemy violations, but rather an unlawful attack.⁴⁷ This would include, for example, the employment of means and methods of warfare that stand in contravention of the environment-specific rules stipulated in Articles 35(3) and 55(1) of Additional Protocol I. Accordingly, the prohibition under examination does not cover attacks which have indirect impacts on the environment nor attacks directed at the environment, where the latter or parts of it qualify as military objectives.⁴⁸

This treaty provision, however, does not exhaust the issue at hand. Turning to the identification of the relevant customary law norm, the state of affairs is not entirely clear. On the one hand and as far as *opinio iuris* is concerned, certain States have included the prohibition on attacks against the natural environment by way of reprisals in their military manuals.⁴⁹ On the other hand, “[i]n 1987,

⁴⁵ The second sentence of art 55(1), Additional Protocol I reads as follows: “This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population”.

⁴⁶ Dinstein, *supra* note 19, 294, para. 817 (emphasis added). Later, the same author qualifies the quoted proposition by adding a criterion of degree: (“The present writer takes it as settled law that, should State B mount belligerent reprisals, these must not detrimentally affect human rights, the natural environment or important cultural property. But there is no reason why every inanimate civilian object must be shielded from belligerent reprisals”). *Ibid.*, 295, para. 818.

⁴⁷ M. N. Schmitt, ‘Humanitarian Law and the Environment’, 28 *Denver Journal of International Law and Policy* (1999-2000) 3, 265, 277.

⁴⁸ W. H. Boothby, *Weapons and the Law of Armed Conflict*, 2nd ed. (2016), 85.

⁴⁹ Australia, *The Manual of the Law of Armed Conflict*, *supra* note 25, 5.50 (“[a]ttacks against the environment by way of reprisal are prohibited”); National Defence Canada, *supra* note 25, 1507.4.i; Danish Ministry of Defence & Defence Command Denmark, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations* (2016), 425, para. 2.16; Germany, Bundesministerium der Verteidigung, *Joint Service Regulation (ZDv) 15/2 Law of Armed Conflict* (2013), 60, para 434; New Zealand Defence Force, *Manual of Armed Forces Law*, 2008, 17.10.4(e); Spain, Ministerio de Defensa, *Orientaciones - El Derecho de los Conflictos Armados*, Vol. I (2007), para. 3.3.c.(5); Ministry of Defence of the United Kingdom, *supra* note 26, 16.19.1, 16.19.2. The ICRC Study

the Deputy Legal Adviser of the U.S. Department of State affirmed that the U.S. did not support ‘the prohibition on reprisals in Article 51 AP I and subsequent articles’ and did not consider it part of customary law”.⁵⁰

Unsurprisingly, in its written statement submitted to the ICJ in the *Nuclear Weapons* case in 1995, the U.S. stated that:

“Various provisions of Additional Protocol I contain prohibitions on reprisals against specific types of persons or objects, including [...] the natural environment (Article 55(2)) [...]. These are among the new rules established by the Protocol that [...] do not apply to nuclear weapons.”⁵¹

More recently, the 2016 updated U.S. Law of War Manual reiterates the view that the provisions on reprisals enshrined in Additional Protocol I are counterproductive for they “[...] remove a significant deterrent that protects civilians and war victims on all sides of a conflict”, even though it goes on to highlight the importance of practical considerations “[...] that may counsel strongly against taking such measures”.⁵²

Along the same lines, Guideline 13 of the 1994 ICRC Guidelines on the Protection of the Environment in Times of Armed Conflict mentions that

further references the following: Croatia, Ministry of Defence, *Law of Armed Conflicts Compendium* (1991), 19; Hungary, *Military Manual* (1992), 35; *Hass and Priebke case*, Judgement on Appeal, *supra* note 26, para. 25; Kenya, *Law of Armed Conflict Manual*, 1997, Précis No. 4, 4; Netherlands, *Military Manual*, 1993, at IV-6, cited in Henckaerts & Doswald-Beck, *Practice*, *supra* note 26, 3473-3474, paras 1090, 1095, 1096, 1097, 1099, respectively.

⁵⁰ *Ibid.*, 3478, para. 1125, citing M. J. Matheson, ‘The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions’, 2 *American University Journal of International Law & Policy* (1987) 2, 415, 426.

⁵¹ Henckaerts & Doswald-Beck, *Practice*, *supra* note 26, 3478, para. 1125, 1126, citing Matheson, *supra* note 50, 426, together with ‘Letter dated 20 June 1995 from the Acting Legal Adviser to the Department of State, together with Written Statement of the Government of the United States of America’, 31, submitted to the *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1.

⁵² United States of America, *Department of Defense War Manual* (2015, updated 2016), 1115, 1116, 18.18.3.4, 1117, 18.18.4.

attacks against the natural environment by way of reprisals are prohibited for State parties to Additional Protocol I to the Geneva Conventions.⁵³

Moreover, the ICRC Study refers only to protected objects under the Geneva Conventions and the Hague Convention on Cultural Property,⁵⁴ thus, not including the prohibition on reprisals against the natural environment, which was introduced in Additional Protocol I. This is a clear indication that even the ICRC does not consider the prohibition on reprisals against the natural environment to form part of customary international law. The position adopted by the ICRC seems understandable given the controversy with regard to environmental reprisals.⁵⁵

Accordingly, States non-parties to Additional Protocol I are not bound by such a prohibition and quite tellingly, the USA has expressed itself against a customary prohibition.⁵⁶ Furthermore, certain State parties to Additional Protocol I have attached reservations to the provision under examination (for example the UK), which means that they are not bound by the prohibition of reprisals against the natural environment.⁵⁷

⁵³ H.-P. Gasser, 'Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict', 78 *International Review of the Red Cross* (1996) 2, 230, 235, guideline 13. The ICRC Guidelines are currently being updated and their revised version is expected to be issued in 2020.

⁵⁴ Henckaerts & Doswald-Beck, *Rules*, *supra* note 4, 523, Rule 147.

⁵⁵ Turns, *supra* note 19, 368.

⁵⁶ J. B. Bellinger III & W. J. Haynes II, 'A US government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law', 89 *International Review of the Red Cross* (2007) 2, 443, 455-457; United States of America, *Department of Defense War Manual*, *supra* note 52, 378, 6.10.3.1.

⁵⁷ UK, 'Declarations and Reservations upon Ratification of Additional Protocol I', *supra* note 24, section (m) Re: Article 51-55 ("The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise there to and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party,

Turning to the challenging issue of nuclear weapons, certain State parties to Additional Protocol I have attached reservations and declarations, mainly claiming, even if implicitly, a general exemption of nuclear weapons from its scope.⁵⁸ To be more precise, three States possessing nuclear weapons, namely France, the UK and the USA (non-party to Additional Protocol I) have steadily objected to the application of the rule in relation to the use of nuclear weapons. Taking into account that their interests are “specially affected”⁵⁹ in this regard, the environment-specific provisions of Additional Protocol I cannot be considered to reflect customary law to the extent they concern the use of nuclear weapons.⁶⁰ As a consequence, the position reflected in the ICRC Study, namely that Articles 35(3) and 55(1) of Additional Protocol I have been elevated into customary law and therefore only the above three States are not bound as far as the use of nuclear weapons is concerned,⁶¹ because they are persistent objectors,⁶²

and if that warning has been disregarded, of any measures taken as a result”). Italy has also attached a relevant reservation, pursuant to which, “Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation”. Italy, ‘Declarations Made at the Time of Ratification, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)’, 27 February 1986, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=E2F248CE54CF09B5C1256402003FB443> (last visited 4 May 2020).

⁵⁸ See *Report of the International Law Commission to the Sixty-Eighth session*, UN Doc. A/71/10, 2 May-10 June and 4 July-12 August 2016, 337, paras 4-5. These State parties are Belgium, Canada, France, Germany, Ireland, Italy, the Netherlands, Spain, and the United Kingdom. See J. Gaudreau, ‘Les réserves aux Protocoles additionnels aux Conventions de Genève pour la protection des victimes de la guerre’, 85 *International Review of the Red Cross* (2003) 1, 143, 159-162.

⁵⁹ See *North Continental Shelf (Federal Republic of Germany v. Denmark)*, Judgment, ICJ Reports 1969, 3, para. 73 (“With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that [...] a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.”).

⁶⁰ G. H. Aldrich, ‘Customary International Humanitarian Law – An Interpretation on Behalf of the International Committee of the Red Cross’, 76 *British Yearbook of International Law* (2005), 503, 516; Dinstein, *supra* note 19, 238-239; Oeter, *supra* note 2, 129, para. 403.

⁶¹ Henckaerts & Doswald-Beck, *Rules*, *supra* note 4, 154-155.

⁶² According to the persistent objector rule, “[...] a State which manifests its opposition to a practice before it has developed into a rule of general international law can, by virtue

is not correct. To this end, Scobbie insightfully notes that had the authors of the ICRC Study consistently applied the methodology they employed elsewhere with respect to the role of *pecially affected* States in the formation of customary IHL, then the corresponding rule 45 should not have been accorded customary status.⁶³ In other words, the rejection of a norm by *pecially affected* States, for our purposes nuclear-weapon States, precludes the formation of relevant customary international law from the outset. Therefore, the consistent and persistent objections of the relevant specially affected States, further evidenced through their non-signature of the recently adopted *Treaty on the Prohibition of Nuclear Weapons*,⁶⁴ has hindered the evolution of the two provisions into custom,⁶⁵ at least with regard to the use of nuclear weapons.⁶⁶ Extending this reasoning to the recourse to reprisals against the natural environment, such a prohibition does not reflect customary international law as far as the use of nuclear weapons is concerned.

Turning to the issue of conventional weapons, whereby nuclear-weapon States do not amount to *pecially affected* States, it is submitted that the prohibition of attacks against the natural environment by way of reprisals still does not reflect customary international law, but on this occasion not because of its dismissal by *pecially affected* States, as its rejection by nuclear-weapons States does not carry particular weight in this respect. Instead, Article 55(2) of Additional Protocol I does not form part and parcel of customary international law due to the up-

of that objection, exclude itself from the operation of the new rule". M. Mendelson, 'The Formation of Customary International Law', *Recueil des Cours de l'Académie de Droit International* (1998) 155, 227.

⁶³ I. Scobbie, 'The Approach to Customary International Law in the Study', in Wilmshurst & Breau, *supra* note 19, 15, 36. In Guldahl's words, "[i]t may be, however, that the authors have, perhaps inadvertently, introduced a new and additional qualification for the application of persistent objection to international humanitarian law [...]". C. Guldahl, 'The Role of Persistent Objection in International Humanitarian Law', 77 *Nordic Journal of International Law* (2008) 1, 51, 83.

⁶⁴ *Treaty on the Prohibition of Nuclear Weapons*, 7 July 2017 (not yet in force), available at https://treaties.un.org/doc/Treaties/2017/07/20170707%2003-42%20PM/Ch_XXVI_9.pdf (last visited 27 April 2020).

⁶⁵ See K. J. Heller, 'Specially-Affected States and the Formation of Custom', 112 *American Journal of International Law* (2018) 2, 191, 235 ("The most defensible position, therefore, is that a potential rule cannot pass into custom unless it is supported by a majority of specially-affected states").

⁶⁶ K. Hulme, 'Natural Environment', in Wilmshurst & Breau, *supra* note 19, 204, 233. In the case at hand, the opposition of a sufficiently important group of States has prevented a general rule coming into being at all, as the practice is not sufficiently representative. See Mendelson, *supra* note 62, 227.

to-date lack of a widespread and representative practice. Nevertheless, taking into account the increasing endorsement of this prohibition by States⁶⁷ and the mounting outlawing of reprisals, it is submitted that such a prohibition is in the process of acquiring the status of customary international law.⁶⁸

F. The ILC Draft Principle 16 on the Prohibition of Reprisals⁶⁹

Draft Principle 16 is a *verbatim* reproduction of the text of Article 55(2) of Additional Protocol I,⁷⁰ and unsurprisingly this principle became the object of controversy during the debates in the ILC. It is no coincidence that the former and the current ILC Special Rapporteurs single out Draft Principle 16 among the Draft Principles that apply during armed conflict, since it “[...] was initially by far the most difficult principle to maintain”.⁷¹ Regarding the legal status of this Draft Principle, some members of the ILC countenanced that the prohibition of reprisals reflects customary international law, whereas other members, and delegations participating in discussions before the UN General Assembly Sixth Committee⁷² were reluctant to go further than recognizing that the provision exists only as a treaty rule under Additional Protocol I. In light of the above, some members of the ILC were concerned that Draft Principle 12, which has been renumbered to Draft Principle 16, could be construed as being applicable to non-parties to Additional Protocol I, since the latter instrument has not been universally ratified. A heated debate also ensued on the applicability of Draft

⁶⁷ See *supra* note 49.

⁶⁸ Needless to say that when such a customary international law rule will be formed, it will not be binding upon the persistently objecting States.

⁶⁹ This part is based on an earlier piece regarding the work of the ILC. See S.-E. Pantazopoulos, ‘Protection of the Environment During Armed Conflicts: An Appraisal of the ILC’s Work’, 34 *Questions of International Law* (2016), 7, especially 20-21.

⁷⁰ “Attacks against the natural environment by way of reprisals are prohibited.” *Protection of the Environment in Relation to Armed Conflicts: Text and Titles of the Draft Principles Provisionally Adopted by the Drafting Committee on First Reading*, UN Doc A/CN.4/L.937, 6 June 2019, Draft Principle 16.

⁷¹ This issue, M. Jacobsson & M. Lehto, ‘Protection of the Environment in Relation to Armed Conflicts – An Overview of the International Law Commission’s Ongoing Work’, 10 *Goettingen Journal of International Law* (2020) 1, 36.

⁷² *Report of the International Law Commission to the Sixty-Seventh Session (2015), Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During its Seventieth Session, Prepared by the ILC Secretariat*, UN Doc. A/CN.4/689, 28 January 2016, 14, para. 65.

Principle 16 in NIACs, bearing in mind that the entire set of the ILC Draft Principles are purported to generally apply to armed conflicts irrespective of their classification. It is quite telling that the commentaries devote three paragraphs exposing the opposing views on the issue under consideration without affording primacy to any of them.⁷³

In view of the above, it is evident that the ILC was confronted with an uncomfortable situation. To its credit, it did not shy away from the challenge, accurately clarifying that “[...] the inclusion of this draft principle can be seen as promoting the progressive development of international law, which is one of the mandates of the Commission”.⁷⁴ The concomitant implication is that the treaty rule enshrined in Article 55(2) of Additional Protocol I and its faithful reproduction in Draft Principle 16 do not reflect customary international law. Having said that, the ILC chose the proper course of action by sticking to the *verbatim* reproduction of Article 55(2) of Additional Protocol I, for any other wording would be “[...] too precarious, as it could be interpreted as weakening *the existing rule under the law of armed conflict*”.⁷⁵

G. Concluding Remarks

To sum up, the doctrine of reprisals is a valid concept under the existing legal framework, notwithstanding the fact that treaty prohibitions of reprisals against specific categories of persons and objects, including against the natural environment, have considerably limited their scope. At the same time, the state of affairs under customary international law with respect to reprisals directed at civilian objects (including against parts of the environment), subject to certain rigorous conditions, remains unclear.⁷⁶ To complicate matters even further, any proposition on the status of reprisals in the context of a NIAC seems to be wishful thinking, as there is no relevant treaty provision. In this regard, the present author endorses the ICRC Study’s approach, namely to altogether prohibit resort to reprisals in the context of a NIAC. Moving on to the status of

⁷³ See *Report of the International Law Commission to the Seventy-First session*, UN Doc. A/74/10, 29 April-7 June and 8 July-9 August 2019, 259, paras 7-9.

⁷⁴ *Ibid.*, 260, para. 10.

⁷⁵ *Report of the International Law Commission to the Sixty-Eighth Session*, *supra* note 58, 339, para. 10 (emphasis added).

⁷⁶ For a comprehensive treatment of this issue within the relevant jurisprudence of the ICTY addressing legitimacy concerns, see M. Kuhli & K. Günther, ‘Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals’, 12 *German Law Journal* (2011) 5, 1261.

reprisals against the natural environment under customary international law, it has been argued that no relevant prohibition exists regarding the use of nuclear weapons. To the contrary, an emerging customary international law prohibition of attacks against the natural environment by way of reprisals is in the process of formation with respect to the use of weapons other than nuclear ones.

Turning to recent developments in this field, the ILC may have taken the correct stance on such a delicate matter, namely by adopting Draft Principle 16 on first reading. To put it differently, if Article 55(2) of Additional Protocol I is part and parcel of customary international law, then the ILC's approach should be commended. Even if this is not the case, which is the present author's view in light of the controversy surrounding the use of nuclear weapons, the provision should be retained as it stands, since any other formulation would be an unfortunate departure from a significant treaty provision, and might result in the normative standard of conduct being lowered.

All things considered, belligerent reprisals epitomize an outdated means of enforcement under IHL, which lends itself to abuses and further escalation of violence. In light of the increasing humanization of IHL and the obvious relevance of the environment to humanity, the scope of this anachronistic form of self-help, which is intertwined with a bilateralist vision of international law, should be further constrained.

Protecting Protected Areas *in Bello*: Learning From Institutional Design and Conflict Resilience in the Greater Virunga and Kidepo Landscapes

Elaine (Lan Yin) Hsiao*

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* Elaine (Lan Yin) Hsiao, Global Challenges Fellow, Sheffield Institute for International Development, IUCN CEESP Theme on Environment and Peace.

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Abstract

It has often been cited that major armed conflicts (>1,000 casualties) afflicted two-thirds (23) of the world's recognized biodiversity hotspots between 1950 and 2000.¹ In 2011, the International Law Commission (ILC) included in its long-term work program *Protection of the Environment in Relation to Armed Conflict*.² This led to the adoption of twenty-eight Draft Principles, including designation of protected zones where attacks against the environment are prohibited during armed conflict.³ Protected zone designations apply to places of major environmental and cultural importance, requiring that they “[...] shall be protected against any attack, as long as it does not contain a military objective.”⁴ Most research on armed conflict and protected areas has focused on impacts to wildlife and less on how to protect these natural habitats from the ravages of armed conflict.⁵

This article highlights some of the gaps in the ILC Draft Principles towards protecting protected zones *in bello*. It uses transboundary protected areas (TBPAs) formalized through multilateral agreements to illustrate challenges on the ground. TBPAs are internationally designated “[...] protected areas that are ecologically connected across one or more international boundaries [...]” and sometimes even established for their promotion of peace (i.e., Parks for Peace).⁶ There is little legal research on how to design TBPA agreements for

¹ T. Hanson *et al.*, ‘Warfare in Biodiversity Hotspots’, 23 *Conservation Biology* (2009) 3, 578, 578.

² *Report of the International Law Commission to the Sixty-Third Session*, UN Doc A/66/10, 2011, 289.

³ ILC, *Protection of the Environment in Relation to Armed Conflicts, Text and Titles of the Draft Principles Provisionally Adopted by the Drafting Committee on First Reading*, UN Doc A/CN.4/L.937, 6 June 2019, Draft Principle 4.

⁴ *Report of the International Law Commission to the Seventy-First Session*, UN Doc A/74/10, 2019, 213.

⁵ A. J. Plumptre, ‘Lessons Learned from On-the-Ground Conservation in Rwanda and the Democratic Republic of the Congo’, 16 *Journal of Sustainable Forestry* (2003) 3-4, 69-88; J. H. Daskin & R. M. Pringle, ‘Warfare and Wildlife Declines in Africa’s Protected Areas’, 553 *Nature* (2018) 7688, 328-336; J. P. Dudley *et al.*, ‘Effects of War and Civil Strife on Wildlife and Wildlife Habitats’, 16 *Conservation Biology* (2002) 2, 319-329.

⁶ M. Vasilijević *et al.*, *Transboundary Conservation: A Systematic and Integrated Approach* (2015), available at <https://portals.iucn.org/library/sites/library/files/documents/PAG-023.pdf> (last visited 17 March 2020).

conflict resilience, conflict sensitivity, and ultimately positive peace.⁷ The research draws from two case studies in Africa's Great Rift Valley: the Greater Virunga Landscape (GVL) between the Democratic Republic of the Congo (DRC), Rwanda, and Uganda, and the Kidepo Landscape, which forms part of the broader Landscapes for Peace initiative between South Sudan and Uganda. Both suffer from armed conflicts of various types and present two of the only TBPA in the world that have incorporated environmental peacebuilding into their transboundary agreements.⁸ The case studies illustrate different approaches to TBPA design and the pros and cons of each modality in the context of conflict resilience and conflict sensitivity. This guides us on how to better protect protected areas *in bello*, ensuring that protected zones endure on the ground and not just in principle.

⁷ E. C. Hsiao, 'Missing Peace: Why Transboundary Conservation Areas Are Not Resolving Conflicts', News Security Beat (19 February 2019), available at <https://www.newsecuritybeat.org/2019/02/missing-peace-transboundary-conservation-areas-resolving-conflicts/> (last visited 17 March 2020).

⁸ E. C. Hsiao, *Protecting Places for Nature, People, and Peace: A Critical Socio-Legal Review of Transboundary Conservation Areas* (2018), available at <https://hdl.handle.net/2429/67561> (last visited 17 March 2020).

A. Introduction

Protected areas (PAs) are often considered the “cornerstone of biodiversity conservation”, relied upon to safekeep not only wildlife but also human security.⁹ According to the International Union for the Conservation of Nature (IUCN), PAs are “[...] a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long term conservation of nature with associated ecosystem services and cultural values”.¹⁰ Some, namely Parks for Peace, are also heralded for their potential to contribute to peace.¹¹ The IUCN applies the term Parks for Peace to transboundary protected areas (TBPAs) specially “[...] dedicated to the promotion, celebration and/or commemoration of peace and cooperation”.¹² They define TBPAs as “[...] a clearly defined geographical space that consists of protected areas that are ecologically connected across one or more international boundaries and involves some form of cooperation”.¹³ In other words, TBPAs are internationally designated PAs.

Work by the International Law Commission (ILC) on *Protection of the Environment in Relation to Armed Conflict* has led to the adoption of twenty-eight Draft Principles, including the designation of protected zones where attacks against the environment are prohibited during armed conflict.¹⁴ Protected zone designations apply to places of major environmental and cultural importance,

⁹ K. Beazley & R. Baldwin, ‘Biodiversity and Protected Areas’, 8 *Land* (2019) ix. See Website of Secretariat of the Convention on Biological Diversity Secretariat, *Protected Areas*, available at <https://www.cbd.int/protected/> (last visited 17 March 2020); M. Deguignet *et al.*, *United Nations List of Protected Areas* (2014) vi, available at https://wdpa.s3.amazonaws.com/WPC2014/2014_UN_LIST_REPORT_EN.pdf (last visited 17 March 2020); S. Stolton *et al.*, ‘Values and Benefits of Protected Areas’, in G. L. Worboys *et al.* (eds), *Protected Area Governance and Management* (2015), 145; A. H. Westing, *Transfrontier Reserves for Peace and Nature: A Contribution to Human Security* (1993).

¹⁰ N. Dudley (ed.), *Guidelines for Applying Protected Area Management Categories* (2008), 8, available at <https://portals.iucn.org/library/sites/library/files/documents/PAG-021.pdf> (last visited 16 April 2020).

¹¹ S. Ali, *Peace Parks: Conservation and Conflict Resolution* (2007), 7-10, 17; Westing, *Transfrontier Reserves for Peace and Nature: A Contribution to Human Security*, *supra* note 9.

¹² Vasilijević *et al.*, *Transboundary Conservation: A Systematic and Integrated Approach*, *supra* note 6, xi.

¹³ *Ibid.*

¹⁴ *Report of the International Law Commission to the Sixty-Third Session*, *supra* note 2, 289; ILC, *Protection of the Environment in Relation to Armed Conflicts, Text and Titles of the Draft Principles Provisionally Adopted by the Drafting Committee on First Reading*, *supra* note 3, Draft Principle 4.

requiring that they “[...] shall be protected against any attack, as long as it does not contain a military objective”.¹⁵ Commentary to the ILC Draft Principles note that internationally designated PAs by multilateral agreements may be recognized as protected zones.¹⁶ In principle, this includes TBPA established through multilateral agreements. As noted by the Special Rapporteurs in their Introductory Note of this Special Issue, Draft Principle 4 on protected zones should enhance protection *in bello*. However, the vulnerability of international cooperation to armed conflict, the existence of “paper parks” that are legally designated yet ineffective on the ground, and the frequent occurrence of protected areas downgrading, downsizing, and degazettement (PADDD) even in peacetime, indicate that the designation of protected status alone is not enough to safeguard the environment.¹⁷

The first section of this article provides a critique of potential gaps in international law as captured by the ILC Draft Principles regarding protected zones and questions whether they suffice to effectively protect PAs *in bello*. It identifies a number of weaknesses, namely the possibility that not all protected or conserved areas may qualify as protected zones when interpreting the ILC Draft Principles and that there is insufficient guidance on the active protection of protected zones in times of armed conflict. Ideally, all protected and conserved areas should by default be considered *protected zones* in relation to armed conflicts, but it is unlikely States will accept such a blanket protection, so we need to consider what is required to operationalize the protection of protected areas beyond just designation. In the second section, two case studies in different parts of Africa’s Great Rift Valley illustrate what may be needed institutionally and legally to sustain cooperation and conservation – two fundamental elements of ecological peacebuilding or the resolution of armed conflicts through collaborative environmental protection.

International cooperation through TBPA elicits the potential for environmental peacebuilding or improved relations and even the resolution

¹⁵ *Report of the International Law Commission to the Seventy-First Session*, *supra* note 4, 213.

¹⁶ *Report of the International Law Commission to the Sixty-Eighth Session*, UN Doc A/71/10, 2 May-10 June and 4 July-12 August 2016, 327.

¹⁷ M. B. Mascia *et al.*, ‘Protected Area Downgrading, Downsizing, and Degazettement (PADDD) in Africa, Asia, and Latin America and the Caribbean, 1900-2010’, 169 *Biological Conservation* (2013), 355-356; J. P. Rodriguez & K. M. Rodriguez-Clark, ‘Even ‘Paper Parks’ Are Important’, 16 *TRENDS in Ecology & Evolution* (2001) 1, 17; Š. Waisová, ‘Environmental Cooperation as Instrument of Conflict Transformation in Conflict-Prone Areas: Where Does It Start, How Deep It Can Be and What Effects It Can Have’, *Politické Vedy* (2015) 2, 105, 118-119.

of conflicts through shared natural resource management.¹⁸ Yet, evidence to this effect in TBPA has been elusive, suggesting that they rely on pre-existing international peace between States for formalization and ongoing non-violent relations for continuity.¹⁹ TBPA, including Parks for Peace, and the multi-stakeholder cooperation upon which they are premised are not conflict resilient.²⁰ This vulnerability compromises TBPA protection *in bello* and its potential for environmental peacebuilding. Furthermore, TBPA have been repeatedly criticized for afflicting other violences and contributing to conflicts, including armed conflict,²¹ hence the need for conflict sensitivity in addition to conflict resilience.²² Conflict sensitive conservation should contribute to conflict resilience and, in turn, better protect protected zones *in bello*. In a TBPA, this facilitates ongoing cooperation that can contribute to broader environmental peacebuilding.

While the case studies present different issues and adaptations, their experiences, as discussed in section three, provide valuable lessons regarding engagement of the security sector and other partners in conservation. This teaches us something of how TBPA institutions and their objectives can prevail, even in places where negative peace is evasive. Only by offering actual protection for PAs on the ground *in bello* can Draft Principles one day achieve enhanced protection for the environment in relation to armed conflict.

¹⁸ Ali, *Peace Parks: A Conservation and Conflict Resolution*, *supra* note 11, 7-10; K. Conca & G. D. Dabelko, *Environmental Peacemaking* (2002), 4-5, 9-11, 220, 223, 230.

¹⁹ K. Barquet, P. Lujala, & J. K. Rød, 'Transboundary Conservation and Militarized Interstate Disputes', 42 *Political Geography* (2014) 1, 1, 8-10; Waisová, 'Environmental Cooperation as Instrument of Conflict Transformation in Conflict-Prone Areas: Where Does it Start, How Deep it Can Be and What Effects it Can Have', *supra* note 17, 105, 118-119.

²⁰ T. Ide, 'The Impact of Environmental Cooperation on Peacemaking: Definitions, Mechanisms, and Empirical Evidence', 21 *International Studies Review* (2018) 3, 327-346.

²¹ D. Brockington, *Fortress Conservation: The Preservation of the Mkomazi Game Reserve, Tanzania* (2002); M. Dowie, *Conservation Refugees: The Hundred-Year Conflict Between Global Conservation and Native Peoples* (2009); R. Duffy *et al.*, 'Why We Must Question the Militarisation of Conservation', 232 *Biological Conservation* (2019), 66; J. Verweijen & E. Marijnen, 'The Counterinsurgency/Conservation Nexus: Guerrilla Livelihoods and the Dynamics of Conflict and Violence in the Virunga National Park, Democratic Republic of the Congo', 45 *The Journal of Peasant Studies* (2016) 2, 300.

²² See A. Hammill *et al.*, *Conflict-Sensitive Conservation: Practitioners' Manual* (2009), available at <https://www.iisd.org/library/conflict-sensitive-conservation-practitioners-manual> (last visited 17 March 2020).

B. Protecting Protected Areas From Armed Conflict

I. Protected Areas on the Frontlines

Biodiversity everywhere is under threat from human activities, including land and forest conversion, pollution, over-exploitation, and armed conflict.²³ Major armed conflicts (>1,000 human casualties) afflicted two-thirds (23 total) of the world's recognized biodiversity hotspots between 1950 and 2000.²⁴ Although ten of the countries hosting biodiversity hotspots were untouched by major armed conflicts, they may have experienced conflicts of lesser scale.²⁵ Many of today's armed conflicts do not rise to the level of major armed conflicts, but the suffering of both people and nature in these places is not dismissible.²⁶ Considering that PAs are intended to safeguard nature from human harms, it would be disappointing if these places were not protected from arguably the worst of human behaviors – armed conflict.

The impacts of armed conflict on PAs can be direct and indirect, resulting from targeted attacks, collateral damage or other, often less visible impacts linked to either of the former. Direct impacts (tactical pathways) include physical destruction or degradation of land, resources, or species, which can be intended tactics of war (e.g., fire-bombing forests) or collateral damage resulting from conflict activities (e.g., exploitation of wildlife for conflict-supporting revenues).²⁷ Indirect impacts (non-tactical pathways) include the effects of conflict-displaced peoples (i.e., refugees and internally displaced people) and disruption or changes to institutional and economic systems.²⁸ Although some claim that violent conflict can have the positive effect of keeping people and

²³ Hanson *et al.*, 'Warfare in Biodiversity Hotspots', *supra* note 1, 578; N. Myers, 'Threatened Biotas: "Hotspots" in Tropical Forests', 8 *Environmentalist* (1988) 3, 187; N. Myers *et al.*, 'Biodiversity Hotspots for Conservation Priorities', 403 *Nature* (2000) 853, 855-856; United Nations Environment Programme, *Global Environment Outlook 5: Summary for Policy Makers* (2012) 20.

²⁴ Hanson *et al.*, 'Warfare in Biodiversity Hotspots', *supra* note 1, 580.

²⁵ *Report of the International Law Commission to the Sixty-Eighth Session*, *supra* note 16, 327.

²⁶ K. Dupuy *et al.*, *Trends in Armed Conflict, 1946-2016*, (2017) 4, at 2.

²⁷ J. E. Austin & C. Bruch, *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives* (2000), 1-6; B. N. Bella, 'A Survey of the "War on Wildlife": How Conflict Affects Conservation', *New Security Beat*, 3 April 2017, available at <https://www.newsecuritybeat.org/2017/04/survey-war-wildlife-conf> (last visited 17 March 2020); S. V. Price, *War and Tropical Forests: Conservation in Areas of Armed Conflict* (2003).

²⁸ Bella, 'A Survey of the "War on Wildlife": How Conflict Affects Conservation', *supra* note 27; K. M. Gaynor *et al.*, 'War and Wildlife: Linking Armed Conflict to Conservation', 14 *Frontiers in Ecology and the Environment* (2016) 10, 533.

development out of PAs,²⁹ thereby inadvertently safeguarding nature and even providing opportunity for ecological regeneration (e.g., forests in Colombia and the Demilitarized Zone between the Koreas), many of the effects are indisputably negative.³⁰ PAs can become overwhelmed by displaced peoples, used for military cover and maneuvers, and PA staff may be recruited into armed forces, removed for their safety, or lose funding to maintain conservation activities.³¹ It is important, therefore, to sustain effective conservation in PAs during armed conflict, allowing them to play a positive role in post-conflict peace.

When it comes to protecting PAs from armed conflict, there is increasing experience on the ground, but little published guidance to draw upon. Most research on armed conflict and PAs has focused on impacts to wildlife and less on effective conservation practices, which I argue should be conflict resilient, conflict sensitive, and ideally, conflict-transformative or peacebuilding.³² While the ILC Draft Principles call for enhanced protection of internationally designated PAs, there is little legal scholarship on how to designate such areas and design their agreements for conflict resilience, conflict sensitivity and ultimately, positive peace.³³ Design in this case refers to

²⁹ R. Burgess, E. Miguel & C. Stanton, 'War and Deforestation in Sierra Leone', 10 *Environmental Research Letters* (2015) 9, 1, 6; K. C. Kim, 'Preserving Biodiversity in Korea's Demilitarized Zone', 278 *Science* (1997) 5336, 242-243; J. Lelieveld *et al.*, 'Abrupt Recent Trend Changes in Atmospheric Nitrogen Dioxide over the Middle East', 1 *Science Advances* (2015) 7, 1, 2.

³⁰ Gaynor *et al.*, 'War and Wildlife: Linking Armed Conflict to Conservation', *supra* note 28; P. Le Billon, *Power Is Consuming the Forest: The Political Ecology of Conflict and Reconstruction in Cambodia* (1999), 1, available at https://ora.ox.ac.uk/objects/uuid:9dd5daa2-704c-4909-850a-d4d64294cce3/download_file?file_format=pdf&safe_filename=602330160.pdf&type_of_work=Thesis (last visited 17 March 2020); A. J. Plumptre, M. Masozera & A. Vedder, *The Impact of Civil War on the Conservation of Protected Areas in Rwanda* (2001), 4-13.

³¹ J. Kalpers, *Volcanoes under Siege: Impact of a Decade of Armed Conflict in the Virungas*, BSP Case Studies (2001), 4-24; S. Kanyamibwa, 'Impact of War on Conservation: Rwandan Environment and Wildlife in Agony', 7 *Biodiversity & Conservation* (1998), 1399; de Merode *et al.*, 'The Impact of Armed Conflict on Protected-Area Efficacy in Central Africa', 3 *Biology Letters* (2007) 3, 299; Plumptre, Masozera & Vedder, *The Impact of Civil War on the Conservation of Protected Areas in Rwanda*, *supra* note 30, at 1-25.

³² Plumptre, 'Lessons Learned from On-the-Ground Conservation in Rwanda and the Democratic Republic of the Congo' *supra* note 5, 69-88; Daskin & Pringle, 'Warfare and Wildlife Declines in Africa's Protected Areas', *supra* note 5, 328-336; Dudley *et al.*, 'Effects of War and Civil Strife on Wildlife and Wildlife Habitats', *supra* note 5, 319-329.

³³ Hsiao, 'Missing Peace: Why Transboundary Conservation Areas Are Not Resolving Conflicts', *supra* note 7.

“[...] the legal and governance framework which stipulates why a PA is being created, how it shall be constituted and governed, as well as who is responsible for specific activities within the territory in order to achieve its goals or principles, and any other aspect of its constitution”.³⁴

Even TBPAAs designated under or in response to an international agreement (e.g., Convention on Biological Diversity or World Heritage Convention) need to determine context-appropriate formulations for cross-border institutional and governance arrangements. This is important for conflict resilience, as will follow in the two case studies. Oftentimes, these arrangements are captured in multilateral or transboundary agreements (e.g., Memorandum of Understanding or MoU establishing a TBPA).³⁵ This article is intended to provide insights into what TBPA agreements or designations should incorporate in order to sustain conservation *in bello*.

TBPAAs are an idealized solution for species and ecosystems requiring connectivity (i.e., territory and freedom of movement) unhindered by political or human divides.³⁶ Parks for Peace attribute another value to transboundary conservation – *peace* – or the possibility that cooperation can triumph over the self-interests of States.³⁷ Waterton-Glacier International Peace Park between Canada and the United States, for example, celebrates friendly relations between those two States.³⁸ La Cordillera del Condor helped resolve a long-time border

³⁴ Hsiao, *Protecting Places for Nature, People, and Peace: A Critical Socio-Legal Review of Transboundary Conservation Areas*, *supra* note 8, 4.

³⁵ See for example, Democratic Republic of Congo, Republic of Rwanda and Republic of Uganda, *Greater Virunga Transboundary Collaboration Treaty on Wildlife Conservation and Tourism Development (GVTCT)*, 30 October 2015; Hsiao, *Protecting Places for Nature, People, and Peace: A Critical Socio-Legal Review of Transboundary Conservation Areas*, *supra* note 8, 121-129, 136.

³⁶ Vasilijević *et al.*, *Transboundary Conservation: A Systematic and Integrated Approach*, *supra* note 6, xi.

³⁷ R. Lejano, ‘Peace Games: Theorizing About Transboundary Conservation’, in S. H. Ali (ed.), *Peace Parks: Conservation and Conflict Resolution* (2007), 41, 41.

³⁸ National Park Service and Parks Canada, *Memorandum of Understanding Between the National Park Service of the Department of the Interior of the United States of America and Parks Canada of the Government of Canada, on Cooperation in Management, Research, Protection, Conservation, and Presentation of National Parks and National Historic Sites* (May 1998), available at <http://www.watertonglacierpeacepark.org/history.html> (last visited 16 April 2020).

dispute between Ecuador and Peru.³⁹ Some TBPA's have aspirations for peace exactly because they still experience violent conflict (e.g., the Greater Virunga Landscape).⁴⁰ In conflict-afflicted TBPA's, sustained conservation safeguards resources that can contribute towards a peaceful future, hence this article focuses on TBPA's and their protection *in bello*.

II. Not all Protected Areas are Created Equal: Qualifying as a Protected Zone

Some international humanitarian laws offer protection for natural environments in armed conflict, notably:

1. Prohibitions against widespread, long-term and severe damage to the natural environment [Arts. 35(3) and 55(1) of *Protocol I to the Geneva Conventions* (1977); Art. 8(2)(b)(iv) of *Rome Statute*; Art. 1 of the ENMOD Convention]⁴¹
2. Protection of forests and vegetation from incendiary attacks [*Protocol III of the Convention on Certain Conventional Weapons*]⁴²

³⁹ S. Ali, 'A Casualty of Peace? Lessons on De-Militarizing Conservation in the Cordillera Del Condor Corridor', in T. Lookingbill & P. Smallwood, *Collateral Values of Natural Capital* (2018), 177-188; Government of Peru and Government of Ecuador, 'Peace, Friendship, and Boundaries Between Peru and Ecuador Protocol Between Peru and Ecuador (Translation)', 29 January 1942, available at <https://peacemaker.un.org/sites/peacemaker.un.org/files/Rio%20Protocol%20English%201942.pdf> (last visited 18 March 2020).

⁴⁰ E. C. Hsiao, 'Interview with Fidele Ruzigandekwe, Deputy Director of Programs of Greater Virunga Transboundary Collaboration Executive Secretariat' (2017). All cited interviews were conducted by the author.

⁴¹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3 [Protocol I]; *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*, 18 May 1977, 1108 UNTS 151 [ENMOD Convention]; *Rome Statute of the International Criminal Court*, 17 July 1998, UN Doc A/CONF.183/9.

⁴² *United Nations Conference 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 on Prohibitions or Restrictions on the Use of Incendiary Weapons* (Protocol III), 27 October 1980, UN Doc A/CONF.95/15.

3. Care taken to protect and preserve the natural environment from hostilities not of military necessity [ICRC on Rules of Customary International Humanitarian Law]⁴³

A few non-binding multilateral environmental texts express a general principle that natural environments should be protected from warfare (e.g., Principles 24 & 25 of the Rio Declaration).⁴⁴ These have all been echoed by the International Court of Justice in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.⁴⁵ International laws protecting natural environments in relation to armed conflict do not, however, specifically mention PAs. This makes the ILC's Draft Principles addressing *protected zones* potentially important.

While PAs certainly qualify as natural environments, there is no existing mandate that, at minimum, all protected or conserved areas must be spared when it comes to armed conflicts. The 2019 commentary accompanying the ILC Draft Principles says particular weight should be given to areas of “[...] major environmental and cultural importance [...]”.⁴⁶ While PAs, by IUCN definition, are designated for their environmental values, they may not equate to *major* environmental importance. There is no universally accepted standard for *major environmental importance*. Some organizations use the terminology “biodiversity hotspots”, which are typically based on a minimum threshold of species diversity (e.g., at least 1,500 endemic vascular plants) and significant levels of threat (i.e., has already lost 70% or more of its natural vegetation).⁴⁷

⁴³ J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law* (2005), available at <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> (last visited 22 April 2020), Rules 43-45; International Committee of the Red Cross (ICRC), ‘Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict’, 301 *International Review of the Red Cross* (1996), available at <https://www.icrc.org/eng/resources/documents/article/other/57jn38.htm> (last visited 27 April 2020).

⁴⁴ *Report of the United Nations Conference on Environment and Development*, 12 August 1992, UN Doc A/CONF.151/26 [Rio Declaration on Environment and Development]; GA Res. 37/17, UN Doc A/RES/37/17, 20 October 1982.

⁴⁵ *Legality of the Threat of the Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 241-243, para. 27-32.

⁴⁶ *Report of the International Law Commission to the Seventy-First Session*, *supra* note 4, 211.

⁴⁷ R. A. Mittermeier *et al.*, ‘Global Biodiversity Conservation: The Critical Role of Hotspots’, in F. E. Zachos & J. C. Habel (eds), *Biodiversity Hotspots: Distribution and Protection of Conservation Priority Areas* (2011), 5-7; Myers *et al.*, ‘Biodiversity Hotspots for Conservation Priorities’, *supra* note 23, 853-857.

Others refer to “key biodiversity areas”, which are based more on an area’s contribution to the persistence of threatened species, broader ecological integrity, and biological processes.⁴⁸ World Heritage Sites are the ILC’s most mentioned protected zone of major environmental importance, yet there are only 197 World Heritage Sites compared to 242,423 PAs in the World Database on Protected Areas maintained by UN Environment’s World Conservation Monitoring Centre.⁴⁹ This Database has only begun to capture all of the *areas and territories conserved by indigenous peoples and local communities* (ICCAs), private PAs, and Other Effective Area-Based Conservation Measures (OECMs) – all worthy of protection *in bello*.⁵⁰ PAs distinguish themselves from other natural environments by their designation, indicating the importance of their conservation, but the ILC’s repeated mention of only a small subset of PAs (i.e., World Heritage Sites) in the commentary could be interpreted by States to imply a hierarchy of importance and thereby protection in relation to armed conflict.

Cultural importance is another vague concept in the ILC Draft Principles. The 2019 ILC commentary on Draft Principle 4 explicitly recognizes ancestral lands and sacred areas of indigenous peoples as protected zones.⁵¹ ICCAs fit squarely within this environment-culture linkage, but do privately protected areas or nationally designated areas without indigenous cultural value? Many nationally gazetted or privately protected areas emphasize ecological values; their social interests may have more to do with permanent sovereignty over natural resources, aesthetic and recreational values, or financial benefits. Is that

⁴⁸ International Union for the Conservation of Nature, ‘A Global Standard for the Identification of Key Biodiversity Areas’ (2016), vi, available at <https://portals.iucn.org/library/node/46259> (last visited 18 March 2020).

⁴⁹ *Report of the International Law Commission to the Sixty-Eighth Session*, *supra* note 16, 324; *Report of the International Law Commission to the Seventy-First Session*, *supra* note 4, 222-223; Special Rapporteur M. G. Jacobsson, *Second Report on the Protection of the Environment in Relation to Armed Conflicts*, UN Doc A/CN.4/685, 28 May 2015, 69-70; UN Environment World Conservation Monitoring Centre & International Union for Conservation of Nature, ‘Protected Planet Report’ (2019), available at <https://livereport.protectedplanet.net> (last visited 18 March 2020).

⁵⁰ S. T. Garnett *et al.*, ‘A Spatial Overview of the Global Importance of Indigenous Lands for Conservation’, 1 *Nature Sustainability* (2018) 7, 369, 369-370; Indigenous and Community Conserved Areas Registry, ‘ICCA Registry’ (2020), available at www.iccaregistry.org (last visited 18 March 2020); H. Jonas *et al.*, ‘New Steps of Change: Looking Beyond Protected Areas to Consider Other Effective Area Based Conservation Measures’, 20 *PARKS* (2014) 2, 111, 112-114; S. Stolton, K. H. Redford & N. Dudley, *The Futures of Privately Protected Areas* (2014), 21-23.

⁵¹ *Report of the International Law Commission to the Seventy-First Session*, *supra* note 4, 223.

the cultural importance envisioned by the ILC? Does its ecological importance to humans amount to cultural value? ILC comments refer to the inherent connection between environmental and cultural importance recognized in international agreements (e.g., Convention on Biological Diversity, World Heritage Convention), meaning the nature of cultural value (e.g., economic vs. ancestral) may not be important for the designation of protected zones, but this is unclear.⁵²

In the interest of protecting all PAs all the time, all *de jure* or *de facto* protected or conserved areas ought to be, by default, protected zones in relation to armed conflict. Clearly, certain authorities have deemed them important enough to delineate them for the purposes of conservation and these protections should be respected and upheld against the negative impacts of armed conflict. It could otherwise be confusing for parties to armed conflict to distinguish between PAs that are protected zones and those that are not. Ignorance would be an unfortunate excuse for wartime destruction. Blanket recognition of all PAs as protected zones can also prevent confusion regarding nuances in PA designation and avoid hierarchies of environmental and cultural importance, which can be very subjective. Future comments on the Draft Principles should also address the status of international jurisdictions, which are also supposed to be devoted to peaceful uses (e.g., high seas and the poles).⁵³

The distinction between a protected zone (Draft Principle 4), a protected zone protected *in bello* (Draft Principle 17), and the generally protected environment (Draft Principle 13) is important because it connotes different levels of protection for nature in relation to armed conflict. General protection of the environment expressed in Draft Principle 13 declares that “[n]o part of the natural environment may be attacked, unless it has become a military objective” but protected zones potentially go further by stating that they “[...] shall be protected against any attack [...]”. This signals a responsibility to protect, not just a duty to refrain. ILC comment on Draft Principle 17 states that the designation of a protected zone serves to enhance protection offered in Draft Principle 13, affirming a higher duty for protected zones.⁵⁴

Like PAs, not all protected zones are created equal. In fact, Draft Principle 17’s *in bello* enhanced protection of protected zones only applies to areas that

⁵² *Ibid.*, 221-224.

⁵³ *The Antarctic Treaty*, 1 December 1959, Preamble, Art. 1, 402 UNTS 71; *United Nations Convention on the Law of the Sea*, 10 December 1982, Preamble, Art. 141 & 301, 1833 UNTS 397.

⁵⁴ *Ibid.*, 260.

have been designated by agreement, even though Draft Principle 4 says that protected zones can be designated by agreement *or* otherwise.⁵⁵ This makes protected zones established by agreement, broadly interpreted to include “[...] 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 [...]” particularly important.⁵⁶ TBPA’s designated by cross-border agreements between State parties should fall within this remit, but the Draft Principles and their comments do not clarify how the designation should be stipulated. If the existence of an international agreement alone is sufficient for *in bello* protection, are States prepared to take on active protection of these zones during armed conflict? Will existing TBPA’s be grandfathered in, even if this kind of protection was not envisioned at the time of agreement? Ongoing armed conflicts in TBPA’s with international agreements indicate that agreements alone are not enough.

III. Holes in the Armor: Protection During Armed Conflict

As is common in international law and humanitarian law, the ILC Draft Principles rely heavily on the good behavior and *promise-keeping* of State parties (*pacta sunt servanda*). This can become problematic in at least two contexts: indigenous territories and TBPA’s. Paragraph 6 of the 2019 ILC comments on Draft Principle 5 notes that States should ensure that military activities do not take place within indigenous territories and they can do so by designating them as protected zones.⁵⁷ This ignores the self-determination of indigenous peoples by calling on States to designate indigenous territories as protected zones. ILC commentary to Draft Principle 4 notes that protected zone agreements can be with non-State actors or through an international organization, but this implies that a State must be party and/or relegates the representative institutions of indigenous nations to the categories of non-State actors or international organizations, which demeans indigenous sovereignty.⁵⁸

Asking States to take appropriate measures in consultation and cooperation with indigenous peoples, through their own leadership and representative structures, assumes rather naively that all States recognize the existence,

⁵⁵ ILC, *Protection of the Environment in Relation to Armed Conflicts, Text and Titles of the Draft Principles Provisionally Adopted by the Drafting Committee on First Reading*, *supra* note 3, Draft Principle 4[I-(x), 5].

⁵⁶ *Report of the International Law Commission to the Seventy-First Session*, *supra* note 4, 260, Draft Principle 17 (1).

⁵⁷ *Ibid.*, 226.

⁵⁸ *Ibid.*, 222.

authority, and territories of all indigenous peoples in the world.⁵⁹ Requiring States and other wartime actors (e.g., private security forces) to recognize and protect indigenous territories *in bello*, when priorities of national security and military necessity dominate, may be asking too much. It can also aggravate conflicts around competing systems of indigenous leadership and representation (e.g., State-determined tribal representation vs. traditional governance systems of indigenous peoples). As the Kidepo case study will indicate, indigenous and traditional communities can be effective in protecting natural environments and resolving conflicts. Conflict sensitivity and resilience requires that this potential not be undermined through the dilution of indigenous sovereignty or self-determined representation.

The protection of TBPA's *in bello* is precarious for other reasons. Waisová's article on "Environmental cooperation as instrument of conflict transformation in conflict-prone areas" and a survey of TBPA practitioners I conducted in 2017 emphasize the challenges of sustaining transboundary cooperation in times of armed conflict.⁶⁰ As TBPA agreements give no indication that they do not apply during armed conflicts, breakdowns in cross-border conservation could result in material breaches of the agreements upon which a TBPA's protected zone status resides.⁶¹ The same could be said for the cessation of conservation activities due to the occupation of a portion of the PA by security forces.⁶² ILC comments to Draft Principle 17 specifically state that military presence would cause *in bello* protections to cease.⁶³ The ease with which Draft Principle 17's protection could fall away is troubling for TBPA's, which often draw on military support during times of insecurity or are managed by paramilitary ranger forces.

Cooperation typically underpins international designation of PAs and TBPA's, yet the ILC Draft Principles' only mentions of cooperation are:

⁵⁹ ILC, *Protection of the Environment in Relation to Armed Conflicts, Text and Titles of the Draft Principles Provisionally Adopted by the Drafting Committee on First Reading*, *supra* note 3, Draft Principle 5.

⁶⁰ Waisová, 'Environmental Cooperation as Instrument of Conflict Transformation in Conflict-Prone Areas', *supra* note 17, 105-126.

⁶¹ Based on the author's 2017 review of 56 TBPA agreements. Hsiao, *Protecting Places for Nature, People, and Peace: A Critical Socio-Legal Review of Transboundary Conservation Areas*, *supra* note 8, 121-187.

⁶² *Report of the International Law Commission to the Seventy-First Session*, *supra* note 4, 260.

⁶³ *Ibid.*

1. Draft Principle 5: States to cooperate with indigenous peoples' leadership and representative institutions regarding protection or remediation of indigenous territories;
2. Draft Principle 24: States or international organisation to cooperate in good faith in sharing or granting access to information vital to national defense or security;
3. Draft Principle 25: cooperation among relevant actors on post-conflict environmental assessments and remedial measures; and
4. Draft Principle 28: States and relevant international organizations to cooperate in ensuring remnants of war at sea do not endanger the environment.⁶⁴

These Draft Principles potentially miss the diverse network of cooperation required to sustain conservation *in bello*; for example, humanitarian and development organizations, as well as traditional and faith-based leaders. It also does not identify the legal responsibilities of States engaging with non-State or non-military State actors, including armed groups and paramilitary ranger forces operating in PAs. In places like the Greater Virunga Landscape and Kidepo Landscape, complex relations between State and non-State armed groups require extreme conflict sensitivity and unconventional approaches to conservation.

It is well known amongst local conservationists that, in 2008, when Laurent Nkunda's rebel group, the Congrès National pour la Defense du Peuple (CNDP), took over the Mikeno sector of Virunga National Park on the Congo-side of the Greater Virunga Landscape, they continued mountain gorilla conservation and even tourism.⁶⁵ At the end of 2018, exiled park management (technically contracted to an NGO) negotiated with Nkunda and his forces to allow rangers to return to the area.⁶⁶ If this would have constituted an international armed conflict, these responsibilities may fall under Draft Principle 20 on Occupying

⁶⁴ ILC, *Protection of the Environment in Relation to Armed Conflicts, Text and Titles of the Draft Principles Provisionally Adopted by the Drafting Committee on First Reading*, *supra* note 3, Draft Principles 5 [6], 24 [18], 25 [15] & 28 [17].

⁶⁵ Based on anonymous interviews during field research in 2010-2011 and 2016-2017.; H. Thomas & G. Nienaber, 'Interview with General Laurent Nkunda' (2009), available at <https://www.youtube.com/watch?v=K9tiu-lig58&feature=related> (last visited 18 March 2020).

⁶⁶ N.N., 'Gorilla Warfare', *The Sydney Morning Herald* (4 January 2009), available at <https://www.smh.com.au/world/gorilla-warfare-20090104-gdt8lz.html> (last visited 18 March 2020).

Powers, but that does not consider relations between NGOs, rangers, and rebels, which delicately negotiated the future of critically endangered mountain gorillas. In other parts of the Virunga, local communities negotiate rights of access and use of natural resources with armed groups (e.g., Mai Mai militias regulating fisheries in Lake Edward) in order to sustain livelihoods.⁶⁷ These negotiated agreements are critical to the well-being of species and habitats during armed conflict, but it is uncertain where they sit within the ILC Draft Principles, in particular given that this concerns a non-international armed conflict. Generally, there is little guidance on conservation partnerships with armed forces, both in capacity-building/training and in law or policy, including TBPA agreements.⁶⁸

Lack of diverse agency in conservation *in bello* can undermine conservation objectives, play into social conflicts and criticisms deriving from the exclusive nature of PAs (especially where a history of PA-induced displacement or disenfranchisement remains unreconciled), and displaces indigenous self-determination and/or endogenous approaches to conflict resolution and peacebuilding. As the two case studies will demonstrate, these are key considerations for conflict resilient, conflict sensitive, and conflict-transformative conservation in places of armed conflict.

C. Transboundary Conservation in Africa's Great Rift Valley

When the IUCN first proposed a definition of Parks for Peace, it considered these places a “[...] particular sub-set of protected areas where there is a clear biodiversity objective, a clear peace objective *and* co-operation between at least two countries or sub-national jurisdictions”.⁶⁹ The updated definition refers to Parks for Peace as a “[...] special designation [...] dedicated to the promotion, celebration and/or commemoration of peace and cooperation”.⁷⁰ This effectively transforms peace from a clear objective of transboundary conservation to a symbolic designation. Perhaps this retreat from a stronger position on TBPAs

⁶⁷ E. C. Hsiao, ‘Interview with Congolese Conservationist, Goma 16 Feb 2017’ (2017).

⁶⁸ L. Braack *et al.*, *Security Considerations in the Planning and Management of Transboundary Conservation Areas* (2006), 5, available at <http://www.tbpa.net/docs/pdfs/Securityconsiderationsintransboundary.pdf> (last visited 18 March 2020).

⁶⁹ T. Sandwith *et al.*, *Transboundary Protected Areas for Peace and Co-Operation* (2001), 4, available at http://web.bf.uni-lj.si/students/vnd/knjiznica/Skoberne_literatura/gradiva/zavarovana_obmocja/IUCN_TBPA.pdf (last visited 18 March 2020).

⁷⁰ Vasilijević *et al.*, *Transboundary Conservation: A Systematic and Integrated Approach*, *supra* note 6, 14.

and peace is related to lack of evidence that TBPAAs can and are impacting positively on peace and conflict in violent borderlands.⁷¹ This section looks at how two TBPAAs address conflicts with a common vision towards regional peace. The case studies illustrate the challenges and needs of sustained transboundary cooperation, an act which can protect the status of PAs involved and ideally supports broader peacebuilding. At the end of the day, *de facto* protection of PAs *in bello* is more important than *de jure* protected zone status, but the hope is that *de jure* protected zones will lead to effective *de facto* protection *in bello*.

I. Notes on Methodology of Field Research

The case studies that follow provide a brief description of the bioregion, a simplified landscape of conflict issues, a history of transboundary collaboration, and an overview of the legal frameworks. All of the interviews cited were conducted in both the Greater Virunga Landscape and Kidepo Landscape, primarily between December 2016 and May 2017. The Kidepo Landscape is actually one of four sub-TBPAAs that constitute the Landscapes for Peace initiative between South Sudan and Uganda. Due to time and resource constraints, visits to other parts of the Landscapes for Peace were restricted and, due to insecurity in South Sudan, only Kidepo Valley National Park (Uganda) of the Kidepo Landscape was covered. More field time was spent in the Greater Virunga Landscape, where transboundary collaboration is more active than in Kidepo Valley National Park (NP).⁷²

Field research was based on observation and semi-informal interviews with PA managers and staff, namely in the Law Enforcement, Community Conservation, and Research and Monitoring departments. Other interviewed stakeholders include security officers (military, police, intelligence), local government representatives (village-level and district-level), NGOs engaged in transboundary activities, academics, and Community-Based Organizations (CBOs). The Greater Virunga Transboundary Collaboration (GVTC) Executive Secretariat was very helpful in providing a number of contacts and access to transboundary meetings.

⁷¹ Barquet, Lujala & Rød, 'Transboundary Conservation and Militarized Interstate Disputes', *supra* note 19; Hsiao, 'Missing Peace: Why Transboundary Conservation Areas Are Not Resolving Conflicts', *supra* note 7; Waisová, 'Environmental Cooperation as Instrument of Conflict Transformation in Conflict-Prone Areas', *supra* note 17, 105-126.

⁷² E. C. Hsiao, 'Interview with WCS Uganda, Country Director, Kampala, Uganda, 7 December 2016' (2016); A. J. Plumptre, 'E-Mail from Andy Plumptre, WCS Albertine Rift Programme' (2016).

Communities that were bordering both the TBPA and international boundary were visited for a better understanding of cross-border social dynamics and conflicts, and to identify traditional conflict resolution mechanisms. In PA communities, the Community Conservation Wardens served as liaisons to other interviewees, providing contacts and sometimes coordinating meetings, which when needed were translated on-site by a Community Conservation Ranger. Interviews involving local languages were transcribed but not translated due to resource limitations. The implications are that my understanding of interviewee responses is based entirely on rangers' translations during the time of interview and may be misinterpreted or biased, especially given the influence of a ranger's presence on interviewees' comfort or willingness to speak freely. As much as possible, information is further confirmed through secondary literature, media publications, or other interviews.

II. Major Ecological and Cultural Importance

The Great Rift Valley encompasses the West (Albertine) Rift Valley and East (Kenya/Gregory) Rift Valley.⁷³ In the heart of the Albertine Rift is the Greater Virunga Landscape between DRC, Rwanda, and Uganda. In the heart of the Gregory Rift is the series of smaller TBPA's or Landscapes for Peace between South Sudan and Uganda. One of these is the Kidepo Landscape, which also sits near the border of northern Kenya. Africa's Great Rift Valley is a key region to highlight for a number of reasons. Naturally, it is one of the most biodiverse regions of the world and, in terms of violence and conflict, possibly one of the most threatened.⁷⁴ It is considered a biodiversity hotspot and hosts numerous key biodiversity areas, as well as World Heritage Sites (Bwindi Impenetrable, Rwenzori Mountains, and Virunga National Parks).⁷⁵ Most of its PAs are marked by porous borders where species, including people, move back and forth somewhat regardless of where military and customs posts are located.

⁷³ A. Seimon & A. J. Plumptre, 'Albertine Rift, Africa', in J. A. Hilty, C. C. Chester & M. S. Cross (eds), *Climate and Conservation: Landscape and Seascape Science, Planning and Action* (2012), 33, 33.

⁷⁴ K. Omeje & T. Redeker Hepner, 'Introduction', in K. Omeje & T. Redeker Hepner (eds), *Conflict and Peacebuilding in the African Great Lakes Region* (2013), 1; A. Plumptre *et al.*, 'The Biodiversity of the Albertine Rift', 3 *Albertine Rift Technical Reports* (2003), 102-103.

⁷⁵ Greater Virunga Transboundary Collaboration, *Transboundary Collaboration in the Greater Virunga Landscape Protected Area Network: Transboundary Strategic Plan 2013-2018* (2014), available at http://www.greatervirunga.org/IMG/pdf/transboundary_strategic_plan_2feb16.pdf (last visited 18 March 2020); Plumptre *et al.*, 'The Biodiversity of the Albertine Rift' *supra* note 74, Preface.

The Greater Virunga Landscape was divided by the British and Belgians at the 1894 Conference of Berlin between DRC, Rwanda, and Uganda.⁷⁶ The peak of Mount Sabinyo marks the trinational jurisdictions of the Virunga Massif. This water tower hosts over 400 endemic species and at least 70 threatened species in one of the world's most resource rich landscapes, featuring oil and gas reserves, precious metals (e.g., gold, rare earth, coltan), and fertile agricultural land.⁷⁷ The Landscapes for Peace appear as four islands straddling a border infamous for its stories of violence, famine, and child soldiers.⁷⁸ It hosts some of the last remaining natural woodland patches and important wetlands for human and other populations.⁷⁹ Nimule funnels the White Nile River, tracing back to Lakes Albert and Victoria, while the Imatong and Didinga Mountains form a watershed between the Nile and Congo river systems.⁸⁰ Kidepo Valley, specifically, is an attractive wildlife destination because the Narus Valley provides a perennial water source and open gathering space for a diversity of species.⁸¹

III. Armed Conflicts in the TBPA's

The socio-political context of the Greater Virunga Landscape and Kidepo Landscape are complex and vary from village to village, as well as from landscape to landscape, but they share at least a few common factors: (1) ongoing armed conflicts impacting PAs; (2) transboundary agreements that address armed conflicts and environmental peacebuilding; and (3) human populations characterized by natural resource-dependent subsistence livelihoods

⁷⁶ I. Griffiths, 'The Scramble for Africa: Inherited Political Boundaries', 152 *The Geographic Journal* (1986) 2, 204, 204.

⁷⁷ Plumptre *et al.*, 'The Biodiversity of the Albertine Rift', *supra* note 74, 25; W. Okumu, 'Resources and Border Disputes in Eastern Africa', 4 *Journal of Eastern African Studies* (2010) 2, 279, 279-297.

⁷⁸ M. Fekadu Mulugeta, 'Small Arms and Conflict among East African Pastoralists: The Karamoja (In)Security Complex', 87 *Africa* (2017) 4, 739, 741; *Memorandum of Understanding Between the Government of Southern Sudan and the Government of Uganda On the Management of Transboundary Conservation Landscapes for Peace*, 5 March 2007 (on file with author); B. Knighton, 'Belief in Guns and Warlords: Freeing Karamojong Identity From Africanist Theory', 4 *African Identities* (2006) 2, 269, 269-271.

⁷⁹ United Nations Development Programme, *Launching Protected Area Network Management and Building Capacity in Post-Conflict Southern Sudan*, July 2010, ii.

⁸⁰ *Ibid.*, 7.

⁸¹ Uganda Wildlife Authority, 'Kidepo Valley National Park: Park at a Glance' (2018), available at <http://ugandawildlife.org/explore-our-parks/parks-by-name-a-z/kidepo-valley-national-park> (last visited 18 March 2020).

and economic poverty, and deemed a threat to PAs and peace.⁸² As two separate landscapes, they have long been connected through regional politics as well as ancient wildlife and transhumance migrations. In some places, ethnic groups share relations across borders (e.g., the Bakonzo and Banyarwanda); in others, they inter-raid (e.g., Karamojong, Dading'a, Jie, and Dodoth between South Sudan and Uganda).⁸³

Many of the TBPA-adjacent communities share a story of conservation induced displacement as colonial administrators gazetted forest, hunting, and wildlife reserves and independent post-colonial States asserted permanent sovereignty over natural resources through paramilitary institutionalization of reserves turned national parks.⁸⁴ At times, contingents of formerly displaced local identity-based groups have occupied or *encroached* PA lands and resources in direct conflict with central governments or PA authorities. For example, the Allied Democratic Forces – National Army for the Liberation of Uganda (ADF-NALU) rebel forces, who took over the Rwenzori Mountains and trafficked minerals and ivory amongst other illicit goods.⁸⁵ The ADF-NALU were allegedly

⁸² Greater Virunga Transboundary Collaboration, 'Greater Virunga Landscape Annual Conservation Status Report 2015' (2017), 8-12; A. Plumpre *et al.*, 'The Socio-Economic Status of People Living Near Protected Areas in the Central Albertine Rift', 4 *Albertine Rift Technical Reports* (2004), 132; United Nations Development Programme, *Launching Protected Area Network Management and Building Capacity in Post-Conflict Southern Sudan*, *supra* note 79.

⁸³ J. Leff, 'Pastoralists at War: Violence and Security in the Kenya-Sudan-Uganda Border Region', 3 *International Journal of Conflict and Violence* (2009) 2, 188, 190; G. Prunier, *From Genocide to Continental War: The 'Congolese' Conflict and the Crisis of Contemporary Africa* (2011), 82-83.

⁸⁴ D. Hart-Davis, 'Let Us Never Go the Way of the Ik', *The Independent* (20 August 1994), available at <http://www.independent.co.uk/voices/country-matters-let-us-never-go-the-way-of-the-ik-1384655.html> (last visited 18 March 2020); M. Matovu, 'Land Injustice for the Basongora', *Minority Voices Newsroom*, 20 June 2012, available at <http://www.minorityvoices.org/news.php?action=view&id=1140> (last visited 18 March 2020); L. A. Young & K. Sing'Oei, 'Land, Livelihoods and Identities: Inter-Community Conflicts in East Africa' (2011), 48, available at <http://minorityrights.org/wp-content/uploads/old-site-downloads/download-1076-Land-livelihoods-and-identities-Inter-community-conflicts-in-East-Africa.pdf> (last visited 18 March 2020).

⁸⁵ S. Hege *et al.*, *Letter Dated 12 October 2012 from the Group of Experts on the Democratic Republic of the Congo Addressed to the Chairman of the Security Council Committee Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo*, UN Doc S/2012/843, 15 November 2012, 44, 23; K. Hoffman, 'Myths Set in Motion: The Moral Economy of Mai Mai Governance', in A. Arjona, N. Kasfir & Z. Mampilly (eds), *Rebel Governance in Civil War* (2015), 158, 163; K. Hoffman, K. Vlassenroot & G. Marchais, 'Taxation, Stateness and Armed Groups: Public Authority and Resource

recruited by President Mobutu (DRC) to destabilize the Ugandan border and, while taking refuge in the DRC, liaised with Sudanese intelligence and security forces supplying Hutu militia or genocidaires in Rwanda.⁸⁶ The Hutu genocidaires, often known as Interhamwe or the Democratic Forces for the Liberation of Rwanda (FDLR), are still cited by villagers and security personnel in the Greater Virunga as a threat to security and peace.⁸⁷

Other ethnically-identified militias also engage in poaching, resource trafficking, and armed conflicts, including with PA authorities.⁸⁸ The Mai-Mai, for example, occupy the central sector of Virunga National Park and largely derive their income from local communities in the territories they control.⁸⁹ The name Mai-Mai refers to “[...] resistance fighters who are invincible [...]” and many of them “[...] are formed on an ethnic basis to protect their communities from ‘invasion’ or domination by other ethnic groups [...]” but

Extraction in Eastern Congo’, 47 *Development and Change* (2016) 6, 1434, 1441; International Criminal Police Organisation & United Nations Environment, ‘Strategic Report: Environment, Peace and Security - A Convergence of Threats’ (2016), available at https://wedocs.unep.org/bitstream/handle/20.500.11822/17008/environment_peace_security.pdf?sequence=1&isAllowed=y (last visited 18 March 2020); M. Kavira Luneghe, ‘Armed Groups at DRC’s Lake Edward Devastate Fish Stocks, Jobs and Farms’, *Global Press Journal* (6 September 2017), available at <https://globalpressjournal.com/africa/democratic-republic-of-congo/armed-groups-drcs-lake-edward-devastate-fish-stocks-jobs-farms/> (last visited 20 March 2020); J. Kule Bitswande, ‘Kasese – a Tragic Conflict Rooted in Land, One Boy’s Dream and a Family’s Hope’, *The Observer* (3 March 2017), available at <http://allafrica.com/stories/201703030450.html> (last visited 18 March 2020).

⁸⁶ Prunier, *From Genocide to Continental War: The ‘Congolese’ Conflict and the Crisis of Contemporary Africa*, *supra* note 83, 86-87.

⁸⁷ E. C. Hsiao, ‘Interview with Village Leader, Kimitoni Village, 14 February 2017’ (2017); E. C. Hsiao, ‘Interview with FARDC Liaison to Virunga National Park in Rumangabo, Goma 16 February 2017’ (2017); E. C. Hsiao, ‘Interview with Local Leader near Ishasha Sector, Queen Elizabeth NP, 13 April 2017’ (2017); E. C. Hsiao, ‘Interview with Uganda People Defense Force (UPDF) Colonel Seconded to ICGLR EJVM, 24 March 2017’ (2017).

⁸⁸ E. C. Hsiao, ‘Interview with Uganda Security Officer, Goma 24 March 2017’ (2017); D. Howden, ‘Gorilla Warfare: The Battle to Save One of Africa’s Rarest Animals’, *The Independent* (17 October 2009), available at <https://www.independent.co.uk/environment/nature/gorilla-warfare-the-battle-to-save-one-of-africas-rarest-animals-1803193.html> (last visited 18 March 2020); Verweijen & Marijnen, ‘The Counterinsurgency/Conservation Nexus: Guerrilla Livelihoods and the Dynamics of Conflict and Violence in the Virunga National Park, Democratic Republic of the Congo’, *supra* note 21, 13, 15.

⁸⁹ Hsiao, ‘Interview with Village, Kimitoni Village, 14 February 2017’, *supra* note 87.

they are sometimes of mixed identity (i.e., Nande, Hunde, and Nyanga tribes).⁹⁰ It is difficult to say whether they are protecting or extorting their own local communities. Of course, there are numerous Mai-Mai groups, so it is difficult to generalize, but it could be said such uses of armed force represent a very mafia-like strategy that coercively reclaims authority once displaced by conservation. It is this violent relationship between conservation through PAs and armed conflict in the Greater Virunga Landscape that makes conventional State-based PAs management more challenging *in bello*.

The story of conservation induced displacement and resentment towards green-grabbing in the Kidepo Landscape is not too different. After the Ik's traditional lands were gazetted into Kidepo Valley National Park, they settled in a key cattle rustling corridor used by Didinga from the north, Turkana from the east, and Karamojong and Jie from the west. The constant inter-raiding left them without livestock or crops, crippled economic development, and allegedly led the Ik to abandon their sick and elderly during the 1960 famines.⁹¹ Today, the Ik are considered one of the most destitute and marginalized ethnic groups in all of Uganda.⁹²

Luo agriculturalists and agro-pastoral Karamojong sub-groups who populate the Kidepo Landscape similarly found themselves on the wrong side of park borderlines. Many were displaced or abandoned their lands during decades of armed conflict between the Lord's Resistance Army (LRA) and the Uganda People's Defense Force (UPDF). In their absence, UWA undertook land surveys and a boundary demarcation process that was soon challenged.⁹³ When residents returned, they found their communal lands and homesteads converted into a

⁹⁰ E. C. Hsiao, 'Messages with a Congolese Conservationist, 6 July 2018' (2018).

⁹¹ E. C. Hsiao, 'Interview with UWA Community Conservation Warden, Kidepo Valley National Park 18 April 2017' (2017); D. Harmon, 'Cultural Diversity, Human Subsistence, and the National Park Ideal', 9 *Environmental Ethics* (1987) 2, 147, 152-153; Hart-Davis, 'Let Us Never Go the Way of the Ik', *supra* note 84; C. M. Turnbull, *The Mountain People* (1987).

⁹² Forest Peoples Programme, United Organisation for Batwa Development in Uganda & International Work Group for Indigenous Affairs, 'Alternative Report to the Second Periodic Report of Uganda to the African Commission on Human and Peoples' Rights' (2009) 23, available at <http://www.forestpeoples.org/sites/fpp/files/publication/2010/08/ugandaachprsupprepmay09eng.pdf> (last visited 18 March 2020); B. Okiror, 'Ugandan Tribes Face Extinction', *New Vision* (15 November 2008), available at https://www.newvision.co.ug/new_vision/news/1176983/ugandan-tribes-extinction (last visited 18 March 2020).

⁹³ N.N., 'Interview with AWF Programme Officer, Karenga 18 Apr 2017' (2017); M. A. Rugadya & H. Kamusiime, 'Tenure in Mystery: The Status of Land Under Wildlife,

national park.⁹⁴ Rugadya and Kamusiime note that “[...] today the demarcation of the gazetted areas is perceived as land grabbing. Even though it was common knowledge that much of the land in the region was under protected status [...]”.⁹⁵ People knew there was a national park nearby, but did not realize until after its boundaries were signposted that their lands were part of it.

Kidepo locals remain skeptical of conservation activities, fearing they will lose more land and access to essential livelihood resources and rights of pasture. The same skepticism could be applied to the State in general, seeing as how the current status of (negative) peace was secured through multiple extremely violent disarmament campaigns in villages across the Kidepo Landscape.⁹⁶ These complex connections between PAs and armed conflict, as well as local communities and armed groups, require special consideration when designing and undertaking conservation in places of conflict. In order to be conflict resilient, conservation must be conflict sensitive.

IV. Institutionalizing Transboundary Cooperation

The Greater Virunga Landscape began when Belgians designated Albert National Park in 1925 “[...] to protect mountain gorilla populations on the boundary between the colonies of Ruanda-Urundi and the Congo”.⁹⁷ Post-independence, Albert National Park became Virunga National Park in the DRC and Volcanoes National Park in Rwanda. Shortly before that, George Schaller and his protégée Dian Fossey initiated mountain gorilla research in 1959.⁹⁸ In

Forestry and Mining Concessions in Karmoja Region, Uganda’, 17 *Nomadic Peoples* (2013) 1, 33, 40.

⁹⁴ P. Carmody & D. Taylor, ‘Globalization, Land Grabbing, and the Present-Day Colonial State in Uganda: Ecolonization and Its Impacts’, 25 *Journal of Environment & Development* (2016) 1, 100, 114-116.

⁹⁵ Rugadya & Kamusiime, ‘Tenure in Mystery: The Status of Land Under Wildlife, Forestry and Mining Concessions in Karmoja Region, Uganda’, *supra* note 93, 40.

⁹⁶ J. Kerry, ‘The Lord’s Resistance Army Disarmament and Northern Uganda Recovery Act of 2009: Report (to Accompany S. 1067)’, Senate Report No. 2, 15 December 2009; K. Mkutu, ‘Disarmament in Karamoja, Northern Uganda: Is This a Solution for Localised Violent Inter and Intra-Communal Conflict?’, 97 *The Round Table* (2008) 394, 99, 100-116; E. Stites & D. Akabwai, ‘“We Are Now Reduced to Women”: Impacts of Forced Disarmament in Karamoja, Uganda’, 14 *Nomadic Peoples* (2010) 2, 24, 24-30.

⁹⁷ H. van der Linde *et al.*, *Beyond Boundaries: A Bibliography on Transboundary Natural Resource Management in Sub-Saharan Africa* (2001), 3; Vasilijević *et al.*, *Transboundary Conservation: A Systematic and Integrated Approach*, *supra* note 6, 4.

⁹⁸ J. Refisch & J. Jenson, ‘Transboundary Collaboration in the Greater Virunga Landscape: From Gorilla Conservation to Conflict-Sensitive Transboundary Landscape Management’,

1979, a coalition of international NGOs founded the Mountain Gorilla Project, based in Rwanda.⁹⁹ In 1991, they became the International Gorilla Conservation Programme (IGCP).¹⁰⁰

While IGCP and its partners supported transboundary technical meetings in the Virunga Massif, the Wildlife Conservation Society (WCS) observed that PA authorities in DRC and Uganda (the ICCN and UWA respectively) were informally cooperating in the elephant corridors and savannah lands to the north. In 2003, they facilitated a transboundary meeting between PA authorities and local governments in the central and northern sectors of Virunga National Park and adjacent Ugandan national parks.¹⁰¹ These PAs collectively formed the Central Albertine Rift Transfrontier Conservation Area Network under a 2004 trilateral MoU between the three countries' PA authorities.¹⁰² Since then, a paper trail of agreements (see Table below) at increasingly higher levels of government mark a decade of institutional formation and formalization, resulting in the Greater Virunga Transboundary Collaboration (GVTC).

in C. Bruch, C. Muffett & S. S. Nichols (eds), *Governance, Natural Resources, and Post Conflict Peacebuilding* (2016) 825, 5.

⁹⁹ M. Gray & E. Rutagarama, *20 Years of IGCP: Lessons Learned in Mountain Gorilla Conservation* (2011), 5.

¹⁰⁰ Refisch & Jenson, 'Transboundary Collaboration in the Greater Virunga Landscape: From Gorilla Conservation to Conflict-Sensitive Transboundary Landscape Management', *supra* note 98, 5-6.

¹⁰¹ A. J. Plumptre, D. Kujirakwinja & S. Kobusingye, 'Transboundary Collaboration between Virunga Park, Democratic Republic of Congo and Queen Elizabeth, Rwenzori and Semuliki Parks, Uganda: Report of Transboundary Meeting 20-21st June 2003' (2003), 3.

¹⁰² Office Rwandais de Tourisme et des Parcs Nationaux, Uganda Wildlife Authority & Institut Congolais pour la Conservation de la Nature, *Trilateral Memorandum of Understanding between the Office Rwandais de Tourisme et Des Parcs Nationaux the Uganda Wildlife Authority and the Institut Congolais Pour La Conservation de La Nature on the Collaborative Conservation of the Central Albertine Rift Transfrontier Protected Area Network* (2004), available at http://www.tbpa.net/docs/treaties_MOUs/TRILATERAL_Central_Albertine_Rift_MOU_2004-Eng.pdf (last visited 18 March 2020).

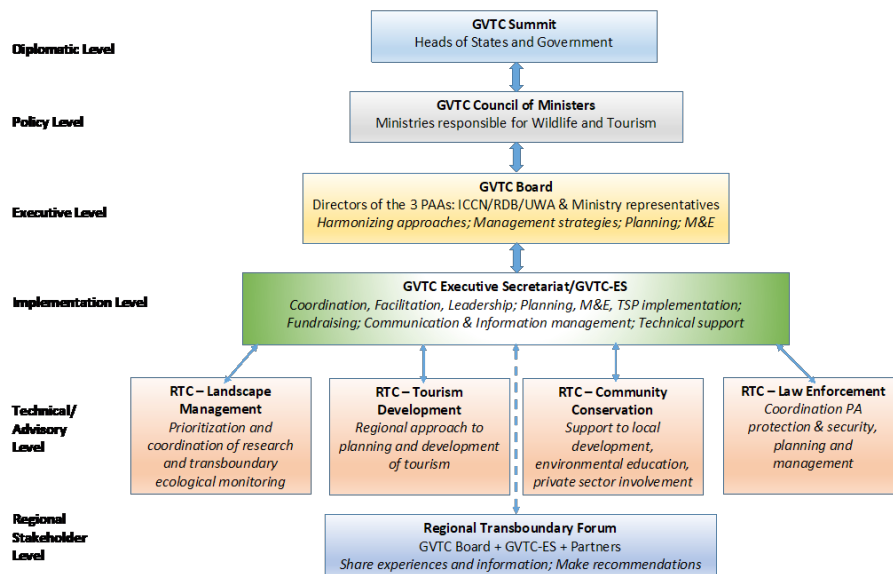
Table of GVTC Framework Agreements¹⁰³:

DATE	AGREEMENT	SHORT TITLE
9 January 2004	Trilateral Memorandum of Understanding between the Office Rwandais de Tourisme et des Parcs Nationaux, the Uganda Wildlife Authority, and the Institut Congolais pour la Conservation de la Nature on the Collaborative Conservation of the Central Albertine Rift Transfrontier Protected Area Network	2004 Trilateral MoU
14 October 2005	Tripartite Ministerial Declaration of Goma on the Transboundary Natural Resources Management of the Transfrontier Protected Area Network of the Greater Virunga landscape	2005 Ministerial Declaration
28 May 2006	Trilateral Memorandum of Understanding between the Uganda Wildlife Authority, <i>UWA</i> , the Office Rwandais de Tourisme et des Parcs Nationaux, <i>ORTPN</i> , and the Institut Congolais Pour La Conservation de la Nature, <i>ICCN</i> , on the Collaborative Monitoring of and Sharing Revenues from Transfrontier Tourism Gorilla Groups	2006 Revenue-Sharing MoU
15 July 2008	The Rubavu Ministerial Declaration for the Greater Virunga Transboundary Collaboration	2008 Rubavu Declaration
6 February 2009	Minute of the Inter-Ministerial Board Relating to the Institutionalization of the Greater Virunga Transboundary Collaboration	2009 Board Minutes
December 2013	Headquarters Agreement between the Government of the Republic of Rwanda and the Greater Virunga Transboundary Collaboration <i>GVTC</i>	2013 Headquarters Agreement
14 May 2014	Memorandum of Understanding between International Conference on the Great Lakes Region (ICGLR) and the Economic Community of the Great Lakes Countries (CEPGL) and Greater Virunga Transboundary Collaboration (GVTC)	2014 MoU between ICGLR, CEPGL, and GVTC

¹⁰³ The respective references can be found in the annex to this article.

DATE	AGREEMENT	SHORT TITLE
30 October 2015	Treaty on the Greater Virunga Transboundary Collaboration on Wildlife Conservation and Tourism Development	2015 GVTC Treaty

GVTC began as a cooperation mechanism among NGO-supported PAs and turned into inter-ministerial cooperation through an inter-ministerial Board, national secondments to a Kigali-based GVTC Executive Secretariat, and spread to other areas of government, including finance, through a revenue-sharing scheme, and security forces. Different levels of institutional alliance allow for cooperation through different channels (see diagram below).



Adapted from GVTC Transboundary Strategic Plan 2013-2018, based on 2015 GVTC Treaty.

Interventions are designed to occur primarily at the Implementation and Technical levels, involving the GVTC Executive Secretariat, PA authorities, and a number of NGO or research organizations that form Regional Technical Committees (RTC). When appropriate, conflict issues may be raised to the GVTC Board, Council, or Summit. This happened when accusations of kidnappings, armed robberies, and military incursions along the contested Sarambwe border plagued Bwindi and Sarambwe National Parks as well as adjacent communities

in Uganda and DRC respectively.¹⁰⁴ A fact-finding mission and meetings between PA authorities, local authorities, and the military were facilitated by GVTC's Executive Secretariat, resulting in improved communication between national armies (FARDC and UPDF) and ameliorated suspicions of military trespass.¹⁰⁵

Transboundary meetings led to Board resolutions calling on relevant Ministers to address border conflicts, not only in Sarambwe but also along other areas of common concern (e.g., Kagezi, Lake Edward) within the Greater Virunga Landscape.¹⁰⁶ Open communication between the national armies also facilitated joint operations with UPDF and UWA on the Uganda-side of Sabinyo when the trinational volcano was occupied by the Congolese rebel group, March 23 Movement (M23), and over 100 alleged rebels were arrested by the UPDF while attempting to cross from refugee camps in Uganda back to DRC through the national park in late January 2017.¹⁰⁷ This demonstrates the environmental peacebuilding potential of transboundary conservation *in bello* and yet it is unclear whether this kind of military involvement constitutes a breach of Draft Principle 17 protected zone status.

Transboundary conservation in the Kidepo Landscape has a much shorter history than in the Greater Virunga Landscape. There was some informal cross-border collaboration when South Sudan was still a part of Sudan, but that is not well-documented and likely ceased during various conflict years. In 2005, a USAID-funded WCS report on "The Impact of Conflict in Northern Uganda on the Environment and Natural Resource Management", identified

¹⁰⁴ A. Meder (ed.), 'Sarambwe Reserve: Current Developments and Threats', 51 *Gorilla Journal* (2015) 9.

¹⁰⁵ E. C. Hsiao, 'Interview with UPDF Brigade Commander, Kihiki April 11, 2017' (2017); J. Byamukama & I. Ochen Ochen, *Sarambwe Habitat Degradation and Other Transboundary International Porous Border Conflicts Threatenin Sustainable Conservation and Tourism Development in Greater Virunga Landscape Between Democratic Republic of Congo and Uganda*, GVTC-Board (2016), iv, 2.

¹⁰⁶ *Ibid.*; Greater Virunga Transboundary Collaboration, 'Round Table on Dialogue Between State Partners of DRC and Uganda on Wildlife Conservation and Development in the Greater Virunga Landscape (Security Group)' (2017) (on file with author and GVTC Secretariat); P. Mateke, S. E. F. Lutaichirwa Mulwahale & G. Muamba Tshibusu, 'Report on the Cross Border Bilateral Meeting Between Ugandan South Western Border Districts of Kisoro, Kanungu, Rukungiri, Rubirizi, Kasese, Bundibugyo and Ntoroko and the North Kivu Province of the Democratic Republic of the Congo' (2017) (on file with author and GVTC Secretariat) 11.

¹⁰⁷ E. C. Hsiao, 'Interview with UWA Chief Warden, Mgahinga Gorilla National Park on April 2017' (2017).

three potential peace parks in the Imatong Massif, Greater Kidepo, and Otzi-Nimule.¹⁰⁸ Between 2007 and 2010, WCS in partnership with UWA conducted aerial surveys to determine what wildlife was left after the war.¹⁰⁹ They found that, with conflict-displaced people moving towards roads, urban centers, and military outposts, vegetation had regenerated and recovered to pre-war conditions over the previous 25 years.¹¹⁰

As part of a broader strategy to rebuild the PA system in South Sudan and integrate them into a post-conflict nation-building and development strategy, WCS supported dialogues between the nascent Government of South Sudan and the Government of Uganda, resulting in the 2007 MoU “On the Management of Transboundary Conservation Landscapes for Peace”.¹¹¹ The 2007 MoU called for the establishment of an Inter-governmental Steering Committee and Site Technical Committees to operationalize the MoU. Transboundary collaboration was to “[...] deliberately support conflict resolution and promote peace and stability in the border areas [...] to establish dialogue, build trust and confidence between our peoples”.¹¹² That same year, South Sudan and Uganda signed a bilateral “Agreement on Technical, Economic, Political, Social and Cultural Cooperation”, indicating that relations between the newly independent State and its southern ally were strong.¹¹³

In 2009, WCS received a USAID grant to implement a transboundary program.¹¹⁴ According to UWA, there were cross-border visits and coordinated patrols up to 2014, but these diminished and became largely one-way visits of the South Sudanese going to Uganda and then none at all.¹¹⁵ In 2014, WCS’

¹⁰⁸ S. Nampindo, G. Picton Phillipps & A. Plumtre, *The Impact of Conflict in Northern Uganda on the Environment and Natural Resource Management* (2005), 42-44.

¹⁰⁹ United Nations Development Programme, *Launching Protected Area Network Management and Building Capacity in Post-Conflict Southern Sudan*, *supra* note 79, ii.

¹¹⁰ Hsiao, ‘Interview with WCS Uganda, Country Director, Kampala, Uganda 7 December 2016’, *supra* note 72.

¹¹¹ *Memorandum of Understanding Between the Government of Southern Sudan and the Government of Uganda On the Management of Transboundary Conservation Landscapes for Peace*, *supra* note 78 (on file with author and the WCS Uganda).

¹¹² *Ibid.*, Art. 3, 9.

¹¹³ Discussed in G. Carrington, *Cross-Border Trade: Fuelling Conflict or Building Peace? An Exploration of Cross-Border Trade Between Sudan and Uganda and the Implications for Peacebuilding* (2009), 14.

¹¹⁴ Hsiao, ‘Interview with WCS Uganda, Country Director, Kampala, Uganda 7 December 2016’, *supra* note 72.

¹¹⁵ Hsiao, ‘Interview with UWA Community Conservation Warden, Kidepo Valley National Park 18 April 2017’, *supra* note 91.

transboundary program funding ended, leaving coordination of cross-border activities to the States. Instead of supporting rangers in the park when armed conflict resurged shortly after, the Sudanese People's Liberation Army (SPLA) took over Kidepo Wildlife Reserve in South Sudan, potentially breaching its protected zone status.¹¹⁶ With peace in northern Uganda, UWA is eager to work with their South Sudanese counterparts in protecting big game species (especially elephants) as they migrate seasonally out of Ugandan protection and into armed conflict zones in the north.¹¹⁷ The Kidepo Valley National Park Law Enforcement Warden remarked that: "We have the will to do it. The other side, they're not in a position to do it, just because of the insecurity that is there."¹¹⁸ The 2007 MoU on Landscapes for Peace could become a well-intentioned corridor of 'paper parks'.

These two case studies highlight important issues regarding the operationalization of *in bello* protection and the fragility of protected zone status, which states will need to consider as they finalize and operationalize the Draft Principles. Both TBPA's constitute areas of major environmental and cultural importance "[...] susceptible to the adverse consequences of hostilities [...]" – exactly the kind of places that should be designated protected zones.¹¹⁹ Both are international PAs designated by agreement(s) that refer specifically to conflict resolution and environmental peacebuilding, and thus should constitute protected zones with "enhanced protection" under Draft Principle 17.¹²⁰ Yet both continue to suffer from armed conflicts. In the Kidepo Landscape, the agreement has stalemated and, in both TBPA's, Draft Principle 17 protection *in bello* could be breached. Thus far, it is uncertain whether the ILC Draft Principles will be able to protect such places from the adverse consequences of armed conflict.

¹¹⁶ *Report of the International Law Commission to the Seventy-First Session, supra* note 4, 260, Draft Principle 17(3).

¹¹⁷ Hsiao, 'Interview with UWA Community Conservation Warden, Kidepo Valley National Park 18 April 2017', *supra* note 91.

¹¹⁸ Hsiao, 'Interview with UWA Law Enforcement Warden, 18 April 2017' (2017).

¹¹⁹ *Report of the International Law Commission to the Seventy-First Session, supra* note 4, 222, Principle 4(3).

¹²⁰ *Ibid.*, 260, Draft Principle 17(2).

D. Lessons in Sustaining Transboundary Conservation in Places of Armed Conflict

After the Rwandan genocide, Plumptre conducted a survey of PA staff who stayed on in Volcanoes National Park and Nyungwe National Park (part of another TBPA on the Burundi-Rwanda border), “[...] despite the loss of all senior staff, the suspension of regular salaries, and threats to their lives”.¹²¹ He identified the following elements as key to sustaining conservation during armed conflict: (1) commitment of junior staff, (2) maintained presence of long-term projects with funding, (3) care for employees (including families of murdered staff), (4) good communication with the capital and safe zones, and (5) education of local communities.¹²² Field research and interviews in the Greater Virunga Landscape and Kidepo Landscape affirm the importance of maintaining activities and projects (which rely on sustained resourcing, both human and material), inclusive partnership (including with and beyond security organs), and education or awareness-raising in local communities, but emphasize that conflict sensitivity must be incorporated across the board. It is not sufficient solely to sustain cooperation if it is aggravating root causes or social conflicts linked to armed conflict.

I. Engaging the Security Sector

One of the great achievements and risks of transboundary conservation is engagement with the security sector. In the Greater Virunga Landscape, cooperation with security organs, ranging from the military to judiciary, has played an increasing role in protecting the constituent PAs from the harmful impacts of armed conflicts in the region. In 2018, a communiqué resulting from a roundtable dialogue facilitated by the GVTC Executive Secretariat on wildlife conservation and development between DRC and Uganda committed to establish a “[...] permanent framework for communication and information sharing between local administrative entities and security authorities [...]” institutionalizing the conservation-security nexus.¹²³

¹²¹ Plumptre, ‘Lessons Learned from On-the-Ground Conservation in Rwanda and the Democratic Republic of the Congo’, *supra* note 5, 69.

¹²² *Ibid.*, 85.

¹²³ S. E. F. Lutaichirwa Mulwahale, H. S. Sekandi & G. Muamba Tshibusu, *Round Table on Dialogue Between State Partners of DRC and Uganda on Wildlife Conservation and Development in the Greater Virunga Landscape (Communique)*, 28 June 2017 (on file with author and GVTC Secretariat).

In the Greater Virunga Landscape, national security cooperation extends to other regional bodies. GVTC's partnership with ICGLR has helped unify security cooperation by facilitating otherwise logistically complicated (and potentially controversial) border crossings of military personnel.¹²⁴ The East African Community (EAC) participated in GVTC efforts towards legal harmonization of wildlife crimes and is in the process of developing a regional wildlife policy that could address illicit activities linked to armed groups in the PAs.¹²⁵ In October 2018, the GVTC Executive Secretariat hosted a conference on peace and security that emphasized the need to strengthen cooperation to address causes and impacts of violent conflict in coordination with the UN and other peace and development programs in the landscape.¹²⁶

During the January 2017 Law Enforcement Regional Technical Committee meeting in Goma that I attended as an observer, the group of military officers, police, customs agents, judiciary, and PA wardens from the three countries determined their first priority is 'Peace and Security' and then proceeded to outline a series of activities along with each of their responsibilities towards securing that common goal.¹²⁷ The Chief Park Warden of Volcanoes National Park (Rwanda) attributed this broadened inclusivity to the signing of the Treaty:

“But, you know, engaging people is the most useful, productive approach and without the treaty you can't achieve it easily, because bringing onboard these institutions is very difficult... the legal framework is very, very important. [...] There's no meeting as wardens without police, without the army, without customs, because... we need them, more than they need us.”¹²⁸

¹²⁴ Greater Virunga Transboundary Collaboration, International Conference on the Great Lakes Region & Economic Community of Great Lake Countries, *Memorandum of Understanding Between International Conference on the Great Lakes Region (ICGLR) and the Economic Community of Great Lake Countries (CEPGL) and Greater Virunga Transboundary Collaboration (GVTC)*, 81-103; Hsiao, 'Interview with UPDF Colonel Seconded to ICGLR EJVM, 24 March 2017', *supra* note 87.

¹²⁵ GVTC, *Concept Note on Harmonization of Wildlife Crime Related Policies and Laws in GVL Stakeholders Meeting*, 2017 (on file with author and GVTC Secretariat).

¹²⁶ CGVTC Secretariat, *Coalition Building Conference for Peace and Security and Shared Natural Resources Management in the Greater Virunga Landscape: Concept Note*, 2018 (on file with author and GVTC Secretariat).

¹²⁷ E. C. Hsiao, 'Interview with Chief Park Warden, Volcanoes National Park, Kinigi, Rwanda' (2017).

¹²⁸ *Ibid.*

This provides some attestation to the importance of formalizing mechanisms of inclusion for other stakeholders in transboundary conservation through multilateral agreements and the need for diverse partnerships and security coordination. Conservation-security partnerships in places of armed conflict must be undertaken with great awareness. One researcher describes the European Commission's armament and training of Virunga National Park ranger forces in fulfilment of UNESCO World Heritage Committee decisions as a threat to post-conflict peace.¹²⁹ Duffy and others question whether conservation should be financing more guns in an already violent landscape and speak to fears shared by other academics that *green militarization* undermines just and stable peace.¹³⁰ This is certainly the case when ranger forces are implicated in wildlife crimes or human rights abuses.¹³¹

The danger of *green militarization* in the Greater Virunga Landscape is not just about further antagonizing communities, it is also about 'sleeping with the enemy.' In the Kidepo Landscape, after South Sudanese PA authorities fled, UWA tried to collaborate with the SPLA stationed in and around the park, but the army was not interested in wildlife protection.¹³² They have been linked to ivory and resource trafficking out of the Kidepo Wildlife Reserve, much like how the UN mission in DRC (MONUSCO) was caught trafficking ivory and minerals from Virunga National Park.¹³³ When elements of the UN, the

¹²⁹ B. Sjöstedt, 'Environmental Governance and Peacebuilding as a Joint Enterprise', in *Protecting Nature in Conflicts & Building Peace: Success Stories in Conflicts & Their Aftermath*, Paper Presented to 15th Annual Colloquium of the IUCN Academy of Environmental Law, Cebu, 29 May - 2 June 2017 (2017), 12 (on file with B. Sjöstedt).

¹³⁰ Duffy *et al.*, 'Why We Must Question the Militarisation of Conservation', *supra* note 21.

¹³¹ E. C. Hsiao, 'Interview with Local Leader near Bwindi Impenetrable NP on 16 January 2017' (2017); T. Warren & K. J. M. Baker, 'WWF's Secret War', BuzzFeed News (2019), available at <https://www.buzzfeednews.com/collection/wwfsecretwar> (last visited 19 March 2020).

¹³² J. Delaney & S. Sautner, 'Deep Concern for South Sudan's Natural Resources – an Emerging Illegal Exploitation and Trafficking Crisis', WCS News Release (2 March 2016), available at <https://newsroom.wcs.org/News-Releases/articleType/ArticleView/articleId/8603/Deep-Concern-for-South-Sudans-Natural-Resources-an-Emerging-Illegal-Exploitation-and-Trafficking-Crisis.aspx> (last visited 19 March 2020); C. Doki, 'South Sudan's Wildlife Become Casualties Of War and Are Killed to Feed Soldiers and Rebels', Inter Press Service (17 June 2014), available at <http://www.ipsnews.net/2014/06/south-sudans-wildlife-become-casualties-war-killed-feed-soldiers-rebels/> (last visited 19 March 2020).

¹³³ Hsiao, 'Interview with Congolese Conservationist, Goma 16 Feb 2017', *supra* note 67; E. C. Hsiao, 'Interview with UWA Community Conservation Ranger, Kidepo Valley

national armies, or other (security) partners are compromised, engagement must implement safeguards, transparency, accountability, and conflict sensitivity or the credibility of transboundary institution(s) can be sacrificed.¹³⁴ Militarization or military engagement in TBPA's may be necessary to respond to armed groups and ensure conservation *in bello*, but conflict sensitivity and long-term peacebuilding may require alternative approaches.

II. Reaching Out to Other Partners for Conservation

PA authorities are not neutral actors in a landscape. During a border visit in May 2017, I was advised that field interviews with an UWA escort in South Sudan would not be safe given recent arrests by UWA of a number of poachers from border-adjacent villages.¹³⁵ The local Catholic priest suggested that I accompany him instead, as his clerical garb serves as a well-accepted cloak of neutrality on the other side of the border. This comment reiterates the risk of alienation when allying with paramilitary/security forces and highlights the value of working with non-conventional conservation allies to link human and environmental needs during armed conflict.

Without a PA counterpart and little success in partnering with the military in South Sudan, UWA has piggybacked on local peace processes facilitated by the Catholic Diocese.¹³⁶ In May 2017, the Catholic Diocese held a youth dialogue, bringing approximately 50 young people from Birra, Lotukei, and Mening in South Sudan to Karenga, Uganda where the Kidepo Valley National Park headquarters is based.¹³⁷ UWA staff spoke to the youth during this two-day event about the importance of wildlife for post-conflict peace and the benefits of

National Park' (2017).

¹³⁴ H. Dranginis, 'Grand Theft Global: Prosecuting the War Crime of Natural Resource Pillage in the Democratic Republic of the Congo' (2015), 3, 17, available at <http://www.satsentinel.org/sites/default/files/reports/GrandTheftGlobal-PillageReport-Dranginis-Enough-Jan2015.pdf> (last visited 19 March 2020); H. Dranginis, 'The Mafia in the Park: A Charcoal Syndicate Is Threatening Virunga, Africa's Oldest National Park' (2016), 45, available at https://enoughproject.org/files/report_MafiaInThePark_Dranginis_Enough_June2016.pdf (last visited 19 March 2020).

¹³⁵ E. C. Hsiao, 'Communications with UWA Community Conservation Ranger, Kidepo Valley National Park, 18-20 April 2017' (2017).

¹³⁶ E. C. Hsiao, 'Interview with Father Raphael Lobeerei, Kidepo Valley National Park 19 April 2017' (2017).

¹³⁷ Hsiao, 'Interview with UWA Community Conservation Warden, Kidepo Valley National Park 18 April 2017' (2017), *supra* note 91; *Ibid.*

cross-border conservation, and then toured them around the park to witness the revenue potential of abundant wildlife and post-conflict tourism.¹³⁸

Plumptre's study indicates these efforts in environmental education are critical to supporting rangers in continuing their work during armed conflict.¹³⁹ Unfortunately, environmental education and awareness-raising is not contemplated at all in the ILC Draft Principles, nor is it mentioned in most TBPA agreements.¹⁴⁰ In the Greater Virunga Landscape, there is only generic reference to the promotion of biodiversity conservation.¹⁴¹ There is no direction as to the kind of environmental education that can be most meaningful for communities inhabiting these landscapes or more effective towards engaging them in ongoing support for PAs during armed conflict. This non-violent approach to securing PAs *in bello* needs further research.

III. Bottom-up vs. Top-down Approaches to TBPA Design

While internationally designated PAs are encouraged by the ILC Draft Principles, it is worth questioning whether the top-down approach of designation by States or international organizations is conducive to their sustained protection and peacebuilding potential during times of armed conflict. Both the TBPA in this study started with an MoU, but the Greater Virunga Landscape was more of a *bottom-up* approach beginning with PA authorities attempting to formalize support for existing activities on the ground. The Landscapes for Peace MoU between corresponding Ministers of Environment on behalf of their respective governments took a higher-level approach. There are advantages and disadvantages to different levels of entry in TBPA designations. The Greater Virunga approach was deemed appropriate by its early proponents because relations were poor between the central governments.¹⁴² A more *top-down* approach works when relations between higher-levels of government are stronger, as between South

¹³⁸ E. C. Hsiao, 'E-Mails from Kidepo Valley National Park Community Conservation Warden' (2017).

¹³⁹ Plumptre, 'Lessons Learned from On-the-Ground Conservation in Rwanda and the Democratic Republic of the Congo', *supra* note 5, 85.

¹⁴⁰ Hsiao, *Protecting Places for Nature, People, and Peace: A Critical Socio-Legal Review of Transboundary Conservation Areas*, *supra* note 8, 158.

¹⁴¹ Democratic Republic of Congo, Republic of Rwanda and Republic of Uganda, *Greater Virunga Transboundary Collaboration Treaty on Wildlife Conservation and Tourism Development (GVTCT)*, *supra* note 35, Art. 6(1).

¹⁴² A. Martin *et al.*, 'Understanding the Co-Existence of Conflict and Cooperation: Transboundary Ecosystem Management in the Virunga Massif', 48 *Journal of Peace Research* (2011) 5, 621, 626-630.

Sudan and Uganda. As Brock says, “[...] ecological cooperation is a dependent variable that reflects the state of overall relations more than it influences the relations”.¹⁴³

According to John Hanks, the first Chief Executive Officer of the Peace Parks Foundation in Southern Africa, “[...] if you can have this high level of political support, it definitely makes a difference in getting things up and running”.¹⁴⁴ Adding support to Hanks’ observation of the value of high-level collaborations, Schoon notes that, in the Greater Limpopo, “[...] the top-down emergence of the transboundary park has resulted in a high degree of success in the achievement of goals requiring senior government officials and crossing a breadth of governmental ministries [...]”.¹⁴⁵ He also observed that “[...] the bottom-up genesis of a transboundary park results in more collaborative responses at an operational level than a top-down origination”, which in turn, he posits supports greater institutional resilience.¹⁴⁶ In other words, TBPA initiated at a political level are better at dealing with high-level matters and TBPA initiated at the technical level are better at maintaining operations throughout changing circumstances.

Hanks also notes that, once the green light is given by the Heads of State, it is imperative that other levels of government push forward operationalizing cooperation. High-level arrangements may not transfer to operations on the ground though, and this is critical for PAs experiencing armed conflict. In the Landscapes for Peace, initial high-level meetings were held until 2011, but according to WCS, “[...] these did not really quickly translate into real action on the ground, seeing rangers on the other side coming to Uganda or rangers from this side going to the other side [...]”.¹⁴⁷ If transboundary conservation relies only on high-level institutions to cooperate, it can become ineffective *in bello*.

Schoon hypothesizes that institutional design at the outset of collaboration can determine path dependence for institutional resilience, meaning the Landscapes for Peace initiative may have been inappropriately designed. Given the fragility of peace in the region, a more *bottom-up* approach would provide a baseline of operational cooperation that, if bolstered by Plumptre’s suggestions,

¹⁴³ L. Brock, ‘Peace Through Parks: The Environment on the Peace Research Agenda’, 28 *Journal of Peace Research* (1991) 4, 407, 414.

¹⁴⁴ E. C. Hsiao, ‘Interview with John Hanks, First CEO of Peace Parks Foundation’ (2017).

¹⁴⁵ M. Schoon, ‘Governance in Transboundary Conservation: How Institutional Structure and Path Dependence Matter’, 11 *Conservation and Society* (2013) 4, 420, 426.

¹⁴⁶ *Ibid.*, 425.

¹⁴⁷ Hsiao, ‘Interview with WCS Uganda, Country Director, Kampala, Uganda 7 December 2016’, *supra* note 72.

might produce a pathway of greater (conflict) resilience. Alternatively, the Landscapes for Peace initiative could build on a long history of peacemaking and biocultural connectivity by agro-pastoral communities moving across its borders to establish a community-governed TBPA or Transboundary ICCA. In the Kidepo Landscape specifically, this would draw on the authority of non-State actors in the Karenga Community Conservation Area adjacent to Kidepo Valley National Park, where most of the wildlife ranges seasonally and the border is more porous to local communities than it is to UWA staff. Furthermore, despite all their inter-raiding, these communities share common peacemaking practices that endure today.¹⁴⁸

“We try [...] to resolve the clan issues by bringing back the elders together and they talk together. Some Karamojong, they come, they say ‘we are killing ourselves, these things have brought us bad omen.’ So there are some of these places that people have been going for these kind of, what people call *kalongat*. They go there sometimes to pray, to possibly take away some bad happenings within the society.”¹⁴⁹

The cultural authority of elders extends to environmental management:

“Well, in one way or another, in terms of environmental protection, the shrines and the authority of the elders was actually more holding. Look, for example, this area that we are sitting in. This area could be bare by now. There wouldn’t be there any of these trees. It used to be clean, but far back ’95, ’96, ’91, the elders sat and said, [...] ‘We should not cut these trees. Let’s leave them.’ [...] So it was done and that’s why these small things are surviving, otherwise by now we’d have stones rolling because it was really terrible by then. There would be complete erosion.”¹⁵⁰

¹⁴⁸ E. C. Hsiao, ‘Interview with Peter Abach, Local Councilman (LC3), Karenga 19 April 2017’ (2017); Oryema, ‘Communications with UWA Community Conservation Ranger, Kidepo Valley National Park, 18-20 April 2017’.

¹⁴⁹ Hsiao, ‘Interview with Peter Abach, Local Councilman (LC3), Karenga 19 April 2017’, *supra* note 148.

¹⁵⁰ *Ibid.*

According to a local leader, the communities have been maintaining peace dialogues since 1998, developing their own version of the GVTC's multi-level, multi-institutional transboundary structure to draw upon.

“Different actors, we started as local government. We brought up local development partners. We had organizations like the church also contributed, the Catholic Church [...] and many others that I cannot mention, both in South Sudan and here. But we were all trying to mitigate the conflict and we have been able to mitigate at State level with State Ministers, at the county levels with county leadership and at karaal level with karaal leaders. We had all those interventions, even had the youth at the church level and had some exchanges about the youth across the borders.”¹⁵¹

A *greening* of the existing peace dialogues could address root causes of armed conflict, providing an interesting twist on environmental peacebuilding that is typically premised on a converse causal relationship whereby environmental cooperation strengthens human or inter-state relations and dialogue options for peace. The agro-pastoral conflicts of Karamoja are “[...] influenced by climatic variations and consequent drought and food crises [...]”, made worse by environmental degradation deteriorating agricultural productivity.¹⁵² Instead, inter-clan protected zone designations would be a peace process in and of itself, paving the way back to environmental cooperation and socio-ecological well-being. Stemming from the self-determination of indigenous or traditional systems, it should create a greater sense of ownership and thus enhance local efforts to protect protected zones from armed conflict.

TBPA agreements are rarely negotiated between or with non-state partners. A few exceptions are: (1) the Bjeshkët e Namuna/Prokletije Mountains TBPA between Albania and Montenegro, which is a cooperation between Local Action Groups; (2) the Balkan Transboundary Peace Park initiative between Albania, Montenegro, and Kosovo, which is represented by a coalition of civil society and local authorities; and (3) the Nawt-sa-Maat Alliance for the Salish Seas between

¹⁵¹ *Ibid.*

¹⁵² L. MacOpiyo, *Pastoralists' Livelihoods in the Kidepo Valley Area of Northern Uganda: A Desk Review of the Prevailing Livelihood Strategies Development Environment and State of Resource Management in the Kidepo Valley Area and Its Environment* (2011), 22.

Canada and the US by an alliance of First Nations.¹⁵³ It is more common for PAs authorities, who are signatories to TBPA agreements, to sign subsequent MoUs with community organizations or groups for resource-use, PA access, human-wildlife conflict interventions, etc. In the Kidepo Landscape, UWA could enter into MoUs with local leaders and partners to formalize existing transboundary peace processes under the Intergovernmental Steering Committee and Site Technical Committees called for by the 2007 MoU.¹⁵⁴ This would revitalize the existing transboundary agreement, operationalize functional systems of environmental peacebuilding, and potentially recalibrate the institutional pathway for conflict resilience. These endogenous processes may prove more effective for environmental protection in times of armed conflict, making non-State designations of protected zones especially important under the ILC Draft Principles.

Community approaches have their advantages. Research in Nepal has shown that strong community governance of natural resources improves both community resistance and forest resilience to occupation by armed insurgents.¹⁵⁵ In contrast, green militarization risks breaching Draft Principle 17's *in bello* protection. Although GVTC's partnership with ICGLR and CEPGL institutes a multi-prong approach to peace, through traditional security and economic development, respectively, the economic approach to peace or liberal peace has its critics, as do neoliberal approaches to conservation.¹⁵⁶ These case studies

¹⁵³ Local Action Group (LAG) of Albania and LAG of Montenegro, *Memorandum of Understanding Between The Local Action Group (LAG) of Albania and The Local Action Group (LAG) of Montenegro Concerning Cooperation in Environmental Protection, Tourism, Recreation and Sustainable Development in the Territories of the Two Communities Either Side of the International Border between Albania and Montenegro in the Bjeshkët e Namunal Prokletije Mountains, and Local Authorities of Municipalities/Districts of Shkodra, Bajram Curri, Plava, Rozaje, Peja and Decani, Letter of Good Intent for Cross-Border Local Authorities of Albania, Montenegro and Kosov*, 15 November 2006, available at https://www.iucn.org/sites/dev/files/import/downloads/lags_alb_mne_mou.pdf (last visited 16 April 2020); *International Treaty to Protect the Salish Sea*, 21 September 2014.

¹⁵⁴ *Memorandum of Understanding Between the Government of Southern Sudan and the Government of Uganda On the Management of Transboundary Conservation Landscapes for Peace* (on file with author and WCS Uganda), *supra* note 78, Art. 3.

¹⁵⁵ N. Baral, *Institutional Resilience of Community-Based Conservation to the Maoist Insurgency in Nepal* (2009) 103; B. K. Karna, G. P. Shivakoti & E. L. Webb, 'Resilience of Community Forestry under Conditions of Armed Conflict in Nepal', 37 *Environmental Conservation* (2010) 2, 201-209.

¹⁵⁶ B. Büscher, *Transforming the Frontier: Peace Parks and the Politics of Neoliberal Conservation in Southern Africa* (2013) 17, 28-31; C. F. Gelpi & J. M. Grieco, 'Democracy, Interdependence, and the Sources of the Liberal Peace', 45 *Journal of Peace Research* (2008)

emphasize the importance of conflict sensitivity for conflict resilience. It is critical to support what works on the ground, including traditional and indigenous institutions and peace processes that offer non-coercive alternatives.

E. Conclusion

The Greater Virunga Landscape and Kidepo Landscape are unique and intertwined in many ways. Their experiences in developing legal frameworks for transboundary conservation and institutionalizing cross-border cooperation amidst armed conflict provide a number of lessons as well as questions. On Uganda's western border, expanding partnerships, including with the security sector, have facilitated *in bello* conservation in the Greater Virunga Landscape. The growing population of mountain gorillas is considered an indicator of its success.¹⁵⁷ On Uganda's northern border, armed conflict and lack of resources has hindered intergovernmental cooperation in the Kidepo Landscape, so more endogenous alternatives have emerged. Ongoing peace dialogues between traditional communities hosted by a faith-based institution provide an opportunity to reformulate transboundary institutional design in keeping with its original transboundary agreement.

Where armed conflict plagues TBPA, it is important to sustain PA-level support designed for conflict resilience and conflict sensitivity, and then to recognize these collaborations through agreements that provide longer-term stability to their ongoing efforts. It is especially critical for PA authorities to engage existing peace mechanisms and actors (whether security forces or cultural leaders) so that TBPA can experience enhanced protection during armed conflict. Engagement with the security sector or even armed groups may be necessary but needs to be sensitive of any contribution to violent conflict, long-standing injustices, or human rights violations. It is also critical that military activities in PAs do not breach Draft Principle 17 protected zone status. The ILC Draft Principles should clarify rules of engagement with armed groups and how protected zones should be protected under occupation, without stripping away *in bello* protection. It is exactly these kinds of PAs that most require protection in relation to armed conflict and this may require interaction with armed groups.

1, 17; See for an in-depth discussion, N. Heynen *et al.* (eds), *Neoliberal Environments: False Promises and Unnatural Consequences* (2007).

¹⁵⁷ J. R. Hickey *et al.*, 'Bwindi-Sarambwe 2018 Surveys: Monitoring Mountain Gorillas, Other Select Mammals, and Human Activities' (2019), 5, available at http://igcp.org/wp-content/uploads/Bwindi-Sarambwe-2018-Final-Report-2019_12_15.pdf (last visited 19 March 2020).

An alternative to militarization is increasing local participation. While cooperation between PA authorities in the Greater Virunga Landscape was initially the backbone of cross-border conservation, it is their alliance with other actors, especially NGOs and regional institutions, that enables their persistence in the landscape. In the case of Kidepo, other partners means traditional leaders or elders and religious groups. It is not clear whether such actors (including indigenous peoples) acting alone can designate protected zones and, as a norm of practice, they rarely participate in TBPA agreements as signatories. Instead, they can be brought in through inter-institutional agreements or as members of transboundary institutions. This puts environmental governance in the hands of local actors with a direct stake in the armed conflict impacting the TBPA. It also commits more stakeholders to the protection of PAs *in bello*.

Protecting PAs *in bello* provides some reprieve for conflict-afflicted wildlife in violent borderlands and migratory corridors that span States. When transboundary collaboration was difficult in the Greater Virunga Landscape due to insecurity, a wildlife refuge was the best that the PA authorities could try to maintain.¹⁵⁸ This illustrates the importance of protected zones for the protection of natural environments in relation to armed conflict. The ILC Draft Principles provide for protected zones of major environmental and cultural importance. This includes, *inter alia*, World Heritage Sites, some nationally designated PAs, and internationally protected areas or TBPAs. For TBPAs to be recognized as protected zones during armed conflict, they must be designated by agreement, and the agreement should not be materially breached *in bello*. If a TBPA agreement is to remain in good standing, it requires sustained cooperation towards PAs conservation and possibly even towards conflict resolution. When applying the ILC Draft Principles, states should consider a progressive interpretation of Draft Principle 17, incorporating all protected and conserved areas regardless of how they are designated (by agreement or otherwise).

It is one thing to designate and white-flag a PA and another to actually protect it from the day-to-day impacts of ongoing armed conflicts. This article provides examples from two TBPAs that have tried to maintain transboundary conservation during armed conflict when circumstances are uniquely challenging. These case studies demonstrate that a bottom-up approach to both international

¹⁵⁸ Kalpers, *Volcanoes Under Siege: Impact of a Decade of Armed Conflict in the Virungas*, *supra* note 31, 20-21; Kanyamibwa, 'Impact of War on Conservation: Rwandan Environment and Wildlife in Agony', *supra* note 31, 1399-1405, *supra* note 31; Plumptre, Masozera & Vedder, *The Impact of Civil War on the Conservation of Protected Areas in Rwanda*, *supra* note 31.

designations and transboundary institutional design are important for conflict resilience or sustained protection *in bello*. It is critical to engage with a diversity of stakeholders, including non-State and non-conservation actors, and this may necessitate engagement with armed groups. In such cases, engagement should be conflict sensitive and ensure that it does not breach protected zone status. These lessons may help other TBPA's seeking to design conflict resilient and conflict sensitive transboundary cooperation. Similarly, these lessons can be applied to any protected zone or natural environment struggling for protection against the impacts of armed conflict. Hopefully, this article can inform ongoing debates on the ILC Draft Principles on *Protection of the Environment in Relation to Armed Conflict* so that they can be most effective when most needed.

Annex

- 2004 Trilateral MoU¹⁵⁹
- 2005 Ministerial Declaration¹⁶⁰
- 2006 Revenue-Sharing MoU¹⁶¹
- 2008 Rubavu Declaration¹⁶²
- 2009 Board Minutes¹⁶³
- 2013 Headquarters Agreement¹⁶⁴
- 2014 MoU between ICGLR, CEPGL, and GVTC¹⁶⁵

¹⁵⁹ Office Rwandais de Tourisme et des Parcs Nationaux, Uganda Wildlife Authority & Institut Congolais pour la Conservation de la Nature, *Trilateral Memorandum of Understanding between the Office Rwandais de Tourisme et Des Parcs Nationaux the Uganda Wildlife Authority and the Institut Congolais Pour La Conservation de La Nature on the Collaborative Conservation of the Central Albertine Rift Transfrontier Protected Area Network* (2004), available at http://www.tbpa.net/docs/treaties_MOUs/TRILATERAL_Central_Albertine_Rift_MOU_2004-Eng.pdf (last visited 18 March 2020).

¹⁶⁰ The Democratic Republic of Congo, The Republic of Rwanda & The Republic of Uganda, Ministry of Environment, Nature Conservation, Water and Forests, DRC, Ministry of Commerce, Industries, Investments Promotion, Tourism and Cooperative, the Republic of Rwanda and Ministry of Tourism, Trade and Industry, the Republic of Uganda, *Tripartite Declaration On the Transboundary Natural Resources Management of the Transfrontier Protected Area Network of the Central Albertine Rift* (2005), available at https://www.tbpa.net/docs/treaties_MOUs/AlbertineRiftTripartiteDeclaration-English.pdf (last visited 18 March 2020).

¹⁶¹ Uganda Wildlife Authority, Office Rwandais de Tourisme et des Parcs Nationaux and Institut Congolais pour la Conservation de la Nature, *Trilateral Memorandum of Understanding Between the Uganda Wildlife Authority 'UWA', the Office Rwandais de Tourisme et Des Parcs Nationaux 'ORTPN' and the Institut Congolais Pour La Conservation de La Nature 'ICCN' on the Collaborative Monitoring of and Sharing Revenues From Transfrontier Tourism Gorilla Groups* (2006), available at <http://www.greatervirunga.org/IMG/pdf/agreement-iccn-ortpn-uwa-2.pdf> (last visited 18 March 2020).

¹⁶² Bureau of Oceans and International Environmental and Scientific Affairs, *Rubavu Ministerial Declaration for the Greater Virunga Transboundary Collaboration* (15 July 2008).

¹⁶³ Greater Virunga Transboundary Collaboration, *Transboundary Collaboration in the Greater Virunga Landscape Protected Area Network: Transboundary Strategic Plan 2013-2018*, *supra* note 75, 73.

¹⁶⁴ Greater Virunga Transboundary Collaboration & Government of the Republic of Rwanda, *Headquarters Agreement Between the Government of the Republic of Rwanda and the Greater Virunga Transboundary Collaboration* (2013).

¹⁶⁵ Greater Virunga Transboundary Collaboration, *Transboundary Collaboration in the Greater Virunga Landscape Protected Area Network: Transboundary Strategic Plan 2013-2018*, *supra* note 75, 81-103.

- 2015 GVTC Treaty¹⁶⁶

¹⁶⁶ Democratic Republic of Congo, Republic of Rwanda and Republic of Uganda, *Greater Virunga Transboundary Collaboration Treaty on Wildlife Conservation and Tourism Development (GVTCCT)*, *supra* note 35.

Through the Looking Glass: Corporate Actors and Environmental Harm Beyond the ILC

Daniëlla Dam-de Jong* and Saskia Wolters**

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* Daniëlla Dam-de Jong is Associate Professor at the Grotius Centre on International Legal Studies of Leiden University.

** Saskia Wolters obtained her LL.M. (cum laude) from the same university. The authors would like to thank the reviewers for their helpful comments. Any remaining mistakes are of course the responsibility of the authors.

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Abstract

Corporate activities take place in a variety of social contexts, including in countries affected by armed conflict. Whether corporations are physically present in these regions or merely do business with partners from conflict zones, there is an increased risk that their activities contribute to egregious human rights abuses or serious environmental harm. This is especially so for corporations active in or relying on the extractives sector. It is against this background that the ILC included two principles addressing corporate responsibility for environmental harm in its Draft Principles on the protection of the environment in relation to armed conflict. Both principles explicitly call on the home States of these corporations to give effect to their complementary role in regulating and enforcing corporate social responsibility. Draft Principle 10 addresses the responsibility of home States to regulate multinational corporations under the heading of “corporate due diligence”, while Draft Principle 11 addresses the responsibility of home States to hold multinational corporations liable for environmental damage caused in conflict zones. The current contribution engages with the potential normative foundations underpinning extraterritorial responsibilities for the home States of multinational corporations with respect to the prevention and remediation of environmental harm in conflict zones, focusing on international humanitarian law and international human rights law. It concludes that the Draft Principles are certainly indicative of the direction in which the law is evolving, but that no firm obligations beyond treaty law can be discerned as of yet. It was therefore a wise decision to phrase the respective Draft Principles as recommendations instead of obligations. At the same time, there are sufficient indications to conclude that it seems a matter of time before it is accepted that States have distinct obligations under customary international law for which their responsibility may be engaged. It is argued that the ILC Draft Principles provide an important impetus to these developments, not in the least because they provide a reference to States regarding the state-of-the-art and guidance for future action.

A. Introduction

On July 8th, 2019, the International Law Commission (ILC) provisionally adopted, upon first reading, a set of 28 Draft Principles on protection of the environment in relation to armed conflict, thereby concluding six years of study conducted by ILC Special Rapporteurs Marie Jacobsson and Marja Lehto on this topic. The Draft Principles have the potential to make an important contribution to strengthening mechanisms for environmental protection in conflict and post-conflict settings. This is certainly true for the Draft Principles that are the focus of the current contribution, namely Draft Principles 10 and 11 relating to environmental harm caused by corporate actors. The inclusion of these Draft Principles is highly significant, not in the least because of the involvement of corporations in the illicit exploitation of natural resources financing armed conflicts, which is a prevalent cause of environmental harm in contemporary armed conflicts.

Draft Principle 10 addresses the responsibility of home States to regulate *their* multinational corporations under the heading of “corporate due diligence”. It encourages States to “[...] 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 [...]” in conflict and post-conflict situations.¹ The Draft Principle covers two different scenarios. The first concerns supply chain responsibility, which is explicitly addressed in the second sentence of the principle, stipulating that the measures that States should take “[...] include those aimed at ensuring that natural resources are purchased or obtained in an environmentally sustainable manner [...]”.² The Draft Principle thereby formulates a recommendation for States to ensure that the corporations domiciled in their territory obtain their raw materials in an environmentally sustainable manner. The second scenario concerns environmental harm caused by corporations operating within the territory of conflict and post-conflict States. The Draft Principle encourages home States to take appropriate measures to ensure that their corporations take measures to avoid environmental harm when operating in conflict or post-conflict States.

Draft Principle 11 complements Draft Principle 10 by addressing the responsibility of home States to hold *their* multinational corporations liable for

¹ *Report of the International Law Commission to the Seventy-First Session*, UN Doc A/74/10, 20 August 2019, 212.

² *Ibid.*

environmental damage caused in conflict zones. It encourages States to “[...] take appropriate legislative and other measures aimed at ensuring that corporations [...] 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 conflict and post-conflict situations.³ The Draft Principle is restricted to harm *caused by* the activities of the respective corporation itself; liability is not foreseen for harm to which the corporation *contributed* or that is *linked to* a corporation’s activities, e.g. caused by business partners. This is an important restriction compared to related initiatives aimed at enhancing home State’s engagement with corporate social responsibility, most notably the United Nations (UN) Guiding Principles on Business and Human Rights.⁴ However, the Draft Principle does extend to activities undertaken by a corporation’s subsidiaries acting under its *de facto* control. More specifically, States are encouraged to pierce the corporate veil by “[...] 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 [...]”.⁵ This is an important contribution, as attempts by victims to hold corporations accountable for harm caused by their subsidiaries have often failed because of difficulties in establishing the connections between the subsidiary and its parent.⁶ Lastly, the Draft Principle determines that “[t]o this end, as appropriate, States should provide adequate and effective procedures and remedies, in particular for the victims of such harm”.⁷

³ Ibid.

⁴ See the commentary to Principle 7 addressing the responsibility of home States for corporations operating in conflict zones, which encourages States to explore liability for corporations that “[...] commit or contribute to gross human rights abuses” in conflict-affected areas (emphasis added). See also more generally Principle 3, which encourages States, as part of their duty to protect, to “[e]nforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights [...]”. This responsibility to respect is defined in Principle 13 as “[a]void causing or contributing to adverse human rights impacts through their own activities, [...]” as well as to “[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships [...]”. Human Rights Council, Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, UN Doc A/HRC/17/31, 21 March 2011, 11 (Annex).

⁵ *Report of the International Law Commission to the Seventy-First Session*, *supra* note 1.

⁶ A. Y. Vastardis & R. Chambers, ‘Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?’, 67 *International and Comparative Law Quarterly* (2018) 2, 389.

⁷ *Report of the International Law Commission to the Seventy-First Session*, *supra* note 1, 211.

Notwithstanding the fact that the Draft Principles are phrased as recommendations, they generated considerable debate within the ILC, both in the Drafting Committee and in Plenary.⁸ A principal concern that was expressed relates to the explicit reference made by both Draft Principles to human health. Some members requested the deletion of this reference as they considered human health to fall outside the remit of the study, while others were of the view that the protection of the environment and human health were intrinsically linked and that the reference should therefore be retained.⁹ This concern exposes the much more fundamental issue regarding the appropriateness of the integrative approach taken by the Draft Principles with respect to international environmental and human rights law.¹⁰

Other concerns that were raised relate to the normative foundations of the extraterritorial application of Draft Principles 10 and 11. Both Draft Principles call on the home States of multinational corporations to exercise extraterritorial jurisdiction with respect to environmental harm caused by corporate actors in conflict and post-conflict zones. Draft Principle 10 calls on States to take measures to prevent their corporations from contributing to environmental harm abroad, whether through their own activities or through those of their business partners. Draft Principle 11 furthermore calls on States to provide appropriate remedies for environmental harm caused by their corporations abroad. Two issues were raised in this respect. The first pertains to the nature and scope of home States' responsibility to exercise extraterritorial jurisdiction. The original proposal by the Special Rapporteur called on States to "[...] take necessary legislative and other measures to ensure that corporations [...] exercise due diligence [...]" on the one hand and that they can be held liable on the other.¹¹ The Drafting Committee however decided to alter the formulation in order to provide States more flexibility "[...] when deciding which measures should be taken in this context at the national level [...]".¹² For this purpose,

⁸ See e.g. ILC, 'Protection of the Environment in Relation to Armed Conflicts, Statement of the Chair of the Drafting Committee' (2019), available at https://legal.un.org/ilc/documentation/english/statements/2019_dc_chairman_statement_peac.pdf (last visited 25 February 2020), 7-12.

⁹ *Ibid.*

¹⁰ *Report of the International Law Commission to the Seventy-First Session*, *supra* note 1, 242.

¹¹ *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto*, UN Doc A/CN.4/728, 27 March 2019, 23, 49-50, paras 50, 104.

¹² See ILC, 'Protection of the Environment in Relation to Armed Conflicts, Statement of the Chair of the Drafting Committee', *supra* note 8, 8.

necessary was replaced by *appropriate* and *to ensure* was replaced by the more aspirational *aimed to ensure*.¹³ The second issue concerns the implications of the exercise of extraterritorial jurisdiction by home States for the sovereignty of host States, especially in light of the recommendation to home States to pierce the corporate veil. In the plenary discussion, some members cautioned against the excessive exercise of extraterritorial jurisdiction by home States to the detriment of the sovereignty of the host State.¹⁴

In light of the concerns raised in the debates, the current contribution raises the following question: to what extent does current international law establish extraterritorial obligations for the home States of multinational corporations with respect to the prevention and remediation of environmental harm in conflict zones, and how do these obligations relate to the sovereignty of the host States? In order to assess this, this paper will engage with the normative foundations underpinning the Draft Principles. For this purpose, section B will first clarify the connections between corporate activities and various forms of environmental harm in conflict zones. The purpose of this inquiry is to facilitate understanding of the types of corporate activities potentially within the remit of the responsibility of home States. Subsequently, section C will examine the international legal obligations underlying the recommendations contained in Draft Principles 10 and 11. Section D will complement this analysis with an inquiry into the current state-of-the-art in international law with respect to the exercise of extraterritorial jurisdiction by home States. Section E will extend the inquiry to State practice. It will explore how States have interpreted their due diligence obligations and the manner in which States have given effect to them in their domestic legislation. Finally, section F evaluates the potential contribution of the Draft Principles for the development of international law on State responsibility.

B. Exploring Extraterritorial Environmental Harm: Linkages Between Corporate Activities and Environmental Harm in Conflict Zones

The purpose of this section is to establish what types of activities generating environmental harm potentially fall within the remit of home State's

¹³ *Ibid.*

¹⁴ See e.g., *Provisional Summary Record of the 3465th Meeting of the International Law Commission to the Seventy-First Session (First Part)*, UN Doc A/CN.4/SR.3465, 24 June 2019, 13.

responsibility under the draft articles. The ILC study takes as a starting-point that armed conflict situations are generally characterized by weak institutional oversight, either because domestic institutions have collapsed or because parts of the territory of the conflict-affected State have fallen into the hands of armed groups.¹⁵ Furthermore, even after hostilities have been terminated, it often takes a long time to rebuild the rule of law in conflict-affected States.¹⁶ This creates a complex operational environment for corporations. Given the volatility of the situation and the lack of regulatory oversight, there is an increased risk that corporations intentionally or unintentionally contribute to human rights abuses and/or inflict harm on the environment. There is an abundance of cases to illustrate this problem. One such example concerns the massive pollution caused by oil operations in the Niger Delta, more specifically in Ogoniland. Even though oil production in this region ceased in the early 1990s as a consequence of internal strife, the facilities were never dismantled. Moreover, pipelines transporting oil produced in other parts of Nigeria still passed through the region. As the situation had become too volatile, these pipelines were no longer maintained. This in turn presented opportunities for armed groups operating in Ogoniland to sabotage the oil pipelines. An environmental impact assessment conducted by the UN Environment Programme (UNEP) in 2011 concluded that “[...] the control, maintenance and decommissioning of oilfield infrastructure in Ogoniland are inadequate”.¹⁷ The UNEP team further concluded that the contamination of Ogoniland and nearby areas was widespread, affecting soil, groundwater, and surface water as well as fauna and flora, and constituted a danger to public health.¹⁸

Apart from situations in which the corporation’s regular operations may have contributed to environmental harm in conflict zones, a prevalent problem in armed conflict situations concerns the illegal exploitation of natural resources as a means of financing the armed conflict.¹⁹ In Africa, approximately 75% of civil wars since the 1990s “[...] have been partially funded by revenues from natural

¹⁵ *Report of the International Law Commission to the Seventy-First Session, supra* note 1, 245.

¹⁶ *Ibid.*

¹⁷ UNEP, ‘*Environmental Assessment of Ogoniland*’ (2011), 12, available at https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf (last visited 21 February 2020).

¹⁸ *Ibid.*, 9-12.

¹⁹ The term *illegal* is employed here in a general manner, following the terminology used in the ILC study. For a critical appraisal of this term, see D. A. Dam-de Jong, ‘Between Paradox and Panacea: Legalizing Exploitation of Natural Resources by Armed Groups in the Fight Against Conflict Resources’ (2019), available at <https://armedgroups-internationallaw.org/2019/06/18/between-paradox-and-panacea-legalizing-exploitation->

resources”.²⁰ This is detrimental to the development of the States concerned, as revenues from public goods are being used to fund armed conflict,²¹ but it also constitutes a major cause of environmental harm. For example, the armed conflict in Cambodia during the 1980s was largely financed by proceeds from timber. The extensive logging by all the parties to the armed conflict significantly diminished the country’s forest cover.²² Likewise, minerals and gold have been the primary source of revenue for armed groups operating in the east of the Democratic Republic of the Congo (DRC) for the past twenty years. A UN Panel of Experts concluded as early as 2002 that highly organized and systematic exploitation activities within and around UNESCO World Heritage Sites in the DRC posed a significant threat to the integrity of those sites.²³ These practices do not immediately end after the armed conflict is over. Sometimes the conclusion of peace even creates an institutional vacuum which benefits transnational criminal groups. This is, for instance, currently taking place in Colombia. An assessment by the UN Office on Drugs and Crime (UNODC) of gold production in Colombia revealed that large-scale illegal gold production, including in nature reserves, has had serious impacts on fragile ecosystems.²⁴

Corporations can be involved in these practices in a myriad of ways, depending on their position in the supply chain. A distinction has been made between corporations operating upstream and downstream in the supply chain.²⁵ Upstream corporations are all those involved in preparing raw natural resources

of-natural-resources-by-armed-groups-in-the-fight-against-conflict-resources/ (last visited 21 February 2020).

²⁰ UNSC, *8372nd Meeting, Maintenance of International Peace and Security: Root Causes of Conflict — the Role of Natural Resources*, UN Doc S/PV.8372, 16 October 2018, 2.

²¹ K. Ballentine & H. Nitzschke (eds), *Profiting from Peace: Managing the Resource Dimensions of Civil War* (2005).

²² For more details on the links between logging and the armed conflict in Cambodia, see P. Le Billon & S. Springer, ‘Between War and Peace: Violence and Accommodation in the Cambodian Logging Sector’, in W. de Jong, D. Donovan & K. Abe (eds), *Extreme Conflict and Tropical Forests* (2007), 17.

²³ UNSC, *Interim Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, UN Doc S/2002/565, 22 May 2002, 10 (Enclosure, paras 50-53).

²⁴ See UN Office on Drugs and Crime, ‘Alluvial Gold Exploitation: Evidences From Remote Sensing 2016’ (2018), 41-67, available at https://www.unodc.org/documents/publications/Evoa_2016_in_1.pdf (last visited 21 February 2020).

²⁵ This distinction between upstream and downstream corporations is based on industry standards, as incorporated in the Organisation for Economic Co-operation and Development Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, discussed in section E.

for further processing. This category includes corporations that actually exploit natural resources, but also corporations selling equipment necessary for the exploitation of natural resources, those that transport the natural resources from the mine to trading houses and/or smelters/refiners, as well as *middle-men* that purchase the natural resources before they are further processed and, lastly, smelters and refiners. Finally, downstream corporations are all those involved in transforming processed natural resources into end products. These include suppliers of semi-finished products as well as consumer brands.

The most obvious form of corporate involvement in the illegal exploitation of natural resources is through direct involvement in the exploitation. Corporations may actively attempt to benefit from the opportunities presented by armed conflict. The logging industry in Liberia provides a relevant example. During the 1989-1996 civil war, several timber companies accepted logging concessions granted by the rebel group National Patriotic Front of Liberia (NPFL).²⁶ When Charles Taylor, the leader of the NPFL, became president in 1997, some of the same timber companies furthermore helped Taylor to siphon logging revenues away for the purpose of funding the activities of rebel groups operating in Sierra Leone.²⁷ Involvement in the illegal exploitation of natural resources may also occur, for instance, when corporations operate otherwise perfectly legal concessions in conflict zones. In light of the long production cycles and high costs associated with the exploitation of natural resources, especially extractives, corporations active in this sector rarely relocate their

²⁶ The Panel of Experts established by the UNSC to, *inter alia*, investigate links between the exploitation of natural resources and other forms of economic activity in Liberia, and the fueling of conflict in Sierra Leone and neighboring countries noted in its 2001 Report that “[d]uring the 1989– 1996 civil war, timber provided Charles Taylor and his NPFL rebels their main independent source of revenue”. UNSC, *Report of the Panel of Experts Pursuant to Resolution 1343 (2001), Paragraph 19, Concerning Liberia*, UN Doc S/2001/1015, 26 October 2001, 70 (Annex, Enclosure, para. 322).

²⁷ The Panel of Experts pointed to the role of specific logging companies, the most important being the Oriental Timber Company (OTC), chaired by the Dutch Businessman Guus van Kouwenhoven, who was convicted by a Dutch court of appeal in 2017 for his role in supplying weapons to the Taylor government in contravention of the weapons embargo imposed against Liberia by the UNSC. The Panel’s 2001 report furthermore indicates that Van Kouwenhoven “[...] managed logging operations for [Taylor] through rebel-controlled Buchanan in the early 1990s”. By the time Taylor had become president, concessions held by the OTC represented 42 per cent of Liberia’s total productive forests. See *ibid.* 72 (Annex, Enclosure, para. 333).

activities when conflict breaks out.²⁸ This also implies that they are vulnerable to pressure exerted by the parties to the armed conflict, including extortion by armed groups through the imposition of illegal taxes. In other instances, armed groups have simply taken control of mines within existing concessions.²⁹

More often however, corporations' involvement in the illegal exploitation of natural resources is indirect, for instance, because they purchase natural resources from armed groups or corporations associated with them. Reports by various UN Panels of Experts provide detailed accounts of smuggling networks and the involvement of corporations in third countries in concealing the origin of the natural resources involved.³⁰ Processing corporations furthermore have a key role to perform in preventing illegally exploited natural resources from moving further down the supply chain, as it is impossible to verify the origin of natural resources beyond the point where the raw materials are worked. Allegations have been made towards several corporations of turning a blind eye to the origin of natural resources processed by them. One example concerns a case brought to the Swiss prosecutor in 2013 with respect to the gold refiner Argor Heraeus. This corporation had been accused of involvement in concealing the origin of three tonnes of illegal gold procured from the African Great Lakes region in the early 2000s. The case was ultimately dismissed because of lack of evidence regarding criminal intent.³¹

Overall, home States' responsibility with respect to corporate activities in or related to conflict and post-conflict zones may be engaged in two ways.

²⁸ W. Rosenau *et al.*, 'Corporations and Counterinsurgency' (2009), 3, available at https://www.rand.org/pubs/occasional_papers/OP259.html (last visited 25 February 2020).

²⁹ See e.g., UNSC, *Final Report of the Group of Experts on the Democratic Republic of the Congo*, UN Doc S/2009/603, 23 November 2009, 38 (Enclosure, para. 158), in which the Group notes that a corporation has complained that one of the armed groups operating in Kivu has taken control of gold mining areas within the corporation's concession and refuses to withdraw.

³⁰ See for example, UNSC, *Report of the Panel of Experts on Violations of Security Council Sanctions Against UNITA*, UN Doc S/2000/203, 10 March 2000, 30-31 (Annex I, Enclosure, paras 87-93), which revealed the relative ease with which diamonds exploited by the Angolan rebel movement UNITA could enter the legal diamond market. See also the reports by the Group of Experts on the DR Congo, which meticulously trace the smuggling of minerals and gold from the mines to overseas markets, eg the gold market in Dubai. UNSC, *Final Report of the Group of Experts on the Democratic Republic of the Congo*, UN Doc S/2019/469, 7 June 2019, 30-38 (Enclosure, paras 147-191).

³¹ Schweizerische Bundesanwaltschaft, *Dismissal of Proceedings Against Argor-Heraeus*, Case number SV.13-MUA, Bern, 10 March 2015. See J.G. Stewart, 'The Argor Heraeus Decision on Corporate Pillage of Gold', available at <http://jamesgstewart.com/the-argor-heraeus-decision-on-corporate-pillage-of-gold/> (last visited 25 February 2020).

First, home States have a responsibility to regulate the cross-border business transactions of corporations domiciled in their jurisdiction. Second, home States' responsibility may be engaged when corporations domiciled in their jurisdiction engage directly in the illegal exploitation of natural resources or otherwise environmentally destructive practices in conflict zones. Both forms of responsibility are contemplated in the ILC draft articles.

C. International Legal Foundations for States' Obligations to Prevent and Remediate Environmental Harm Caused by Corporations

It is not controversial to argue that States can be held responsible for their own conduct in relation to the acts of non-state actors. As will be discussed in this section, international law recognizes self-standing obligations for States to take all reasonable measures to prevent violations of international law by non-state actors within their jurisdiction or control. It is this type of obligation that is reflected in the recommendations contained in Draft Principles 10 and 11. These Draft Principles call on States to take "[...] appropriate [...] measures [...]" that are "[...] aimed at ensuring that corporations [...] exercise due diligence [...]" to prevent environmental harm (principle 10) and "[...] can be held liable [...]" for having caused environmental harm (principle 11).³² It can be derived from the discussions within the ILC that the members interpreted the phrase *aimed at ensuring* as aspirational, calling on States to make their best efforts instead of requiring particular results.³³ Such obligations of conduct, which require States to take positive action with respect to non-state actors, are referred to as *due diligence* obligations. Due diligence obligations formulate a standard of conduct that is required to discharge other, i.e. more material, obligations.³⁴ Their content therefore depends on the primary norm that is at stake, but generally they can

³² *Report of the International Law Commission to the Seventy-First Session*, *supra* note 1, 211.

³³ The original proposal by the Special Rapporteur used the terms "should ensure", which was modified into *aimed at ensuring*. This textual revision was mainly introduced because some ILC members interpreted *should ensure* as an obligation of result. See *Provisional Summary Record of the 3471st Meeting of the International Law Commission to the Seventy-First Session (First Part)*, UN Doc A/CN.4/SR.3471, 8 July 2019, 4; and ILC, 'Protection of the Environment in Relation to Armed Conflicts, Statement of the Chair of the Drafting Committee', *supra* note 8, 8.

³⁴ See J. Bonnitcha & R. McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights', 28 *European Journal of International Law* (2017) 3, 899, 900.

be seen as satisfied if it can be demonstrated that the State took all reasonable measures at its disposal, even if these were ultimately not sufficient to prevent the harm in question.³⁵

Obligations of due diligence have a longstanding tradition in international law, going back to 17th century writings by Hugo Grotius and Samuel Pufendorf.³⁶ Today, they can be found in several fields of international law, including in international humanitarian, human rights, and environmental law, which together provide the legal framework for environmental protection in situations of armed conflict. The objective of this section is to examine the international legal obligations underlying the recommendations contained in Draft Principles 10 and 11. For this purpose, section C.I will focus on international humanitarian law as the *lex specialis* for situations of armed conflict and section C.II will extend the inquiry into international human rights law and, indirectly, international environmental law.

I. International Humanitarian Law as Legal Foundation for States' Obligations to Prevent and Remediate Environmental Harm Caused by Corporations

International humanitarian law, as the *lex specialis* during armed conflict,³⁷ contains several obligations for parties to an armed conflict that are relevant for the prevention of environmental harm. However, the majority of these obligations is concerned with regulating the means and methods of warfare and is thus less suitable for the regulation of economic activities. An obligation for States to prevent environmental harm caused by corporations in conflict situations therefore cannot be solely based on international humanitarian law.

³⁵ In the context of genocide, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, 221, para. 430. For a more in-depth analysis of due diligence, its different understandings and applications, see S. Besson, *La «Due Diligence» en Droit International* (forthcoming 2020). See also International Law Association Study Group on Due Diligence in International Law, 'First Report' (2014), available at <https://www.ila-hq.org/index.php/study-groups?study-groupsID=63> (last visited 21 February 2020).

³⁶ See J. Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law', 36 *New York University Journal of International Law* (2004) 2 & 3, 265, 283.

³⁷ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 240, para. 25.

Through the prohibition of pillage, international humanitarian law however does provide a solid legal basis for preventing and punishing acts of illegal exploitation of natural resources in conflict zones. The prohibition of pillage, which has been included in Draft Principle 18 of the ILC study, is part of all major IHL conventions and has also been recognized as part of customary international law.³⁸ The prohibition applies to all acts of theft in the context of an armed conflict and has been expressly applied to instances of illegal natural resource exploitation.³⁹ Moreover, it does not only apply to the belligerents themselves, but also to private persons, including corporations.⁴⁰ Corporations can therefore be held directly responsible for violating the prohibition of pillage. In light of this observation, the question can be raised whether there is a corresponding obligation for States to prevent and punish instances of pillage.

Such an obligation can be founded on identical Article 1 of the four 1949 Geneva Conventions, which formulates an obligation for States to “[...] ensure respect [...]” for the provisions contained in the Conventions.⁴¹ This obligation can be interpreted as being applicable to private actors within a State’s jurisdiction or control.⁴² This implies that States parties to the 1949 Geneva Conventions are under an obligation to prevent and punish breaches of the prohibition of pillage included in Article 33 of Geneva Convention IV, as far as reasonable and appropriate. Whether and to what extent home States that

³⁸ For a more extensive analysis of the prohibition of pillage in the context of illegal exploitation of natural resources, see L.J. van den Herik & D.A. Dam-de Jong, ‘Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation During Armed Conflict’, 22 *Criminal Law Forum*, 2nd ed. (2011) 3, 237.

³⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168, 252, para. 245.

⁴⁰ See J. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (2011), 75-79.

⁴¹ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, Article 1, 75 UNTS 31, 32 [First Geneva Convention]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, Article 1, 75 UNTS 85, 86 [Second Geneva Convention]; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, Article 1, 75 UNTS 135, 136 [Third Geneva Convention]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Article 1, 75 UNTS 287, 288 [Fourth Geneva Convention]; see also *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Judgment, ICJ Report 1986, 14, 114, para. 220.

⁴² See M. Sassòli, ‘State Responsibility for Violations of International Law’, 84 *International Review of the Red Cross* (2002) 846, 401, 412.

are not themselves parties to the armed conflict have an obligation to ensure respect of the conventions by their nationals operating in conflict zones requires further analysis. Indications that the obligation does extend to these situations can be found in the *Wall* Advisory Opinion, in which the International Court of Justice (ICJ) stated that “[i]t follows from [Article 1] that every State party to [the] Convention[s], whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with”.⁴³ The updated commentary to the first Geneva Convention likewise argues that “[...] the proper functioning of the system of protection provided by the Conventions demands that States Parties not only apply the provisions themselves, but also do everything reasonably in their power to ensure that the provisions are respected universally”.⁴⁴

Whereas the Geneva Conventions apply generally to international armed conflicts, it is important to note that the obligation to ensure respect also applies to non-international armed conflicts, in as far as it concerns the acts that are included in Article 3 of the 1949 Geneva Conventions. It could furthermore be argued that the obligation indirectly applies to Additional Protocol II, as Article 1(1) of this Protocol explicitly states that it “[...] develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 [...]”.⁴⁵ If this argument is accepted, the obligation to ensure respect for the Conventions also applies to acts of pillage committed in non-international armed conflict, as covered by Article 4(2) of Additional Protocol II.

While the obligation to ensure respect for the Geneva Conventions extends to situations of occupation as a species of international armed conflict, a more specific legal basis for due diligence obligations in the context of occupation can be found in Article 43 of the 1907 Hague Regulations. This provision determines that an occupying power “[...] shall take all the measures in his

⁴³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 199-200, para. 158. For a more detailed analysis of the obligation to ensure respect for the conventions in the context of private military and security companies, see H. Tonkin, *State Control Over Private Military and Security Companies in Armed Conflict* (2011).

⁴⁴ International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2016), Article 1, para. 119.

⁴⁵ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts*, 8 June 1977, Article 1, 1125 UNTS 609, 611 [Protocol II]; see for this argument, L. Boisson de Chazournes & L. Condorelli, ‘Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests’, 82 *International Review of the Red Cross* (2000) 837, 67, 69.

power to [...] ensure, as far as possible, public order and safety [...].⁴⁶ The ICJ explicitly held that Article 43 comprises an obligation for occupying powers “[...] to secure respect for the applicable rules of international human rights law and international humanitarian law [...]”.⁴⁷ The Court held, moreover, that an occupying power’s “[...] responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory [...]”.⁴⁸ This specifically applies to acts of pillage, which are prohibited pursuant to Article 47 of the 1907 Hague Regulations. It can therefore be argued that an obligation to prevent and punish acts of pillage by corporations is incumbent on occupying States, insofar as it concerns corporations that are operating within occupied territory.

Whereas liability for the illegal exploitation of natural resources can be based directly on international humanitarian law, recourse can also be made to international criminal law. The war crime of pillage, which is included in Articles 8(2)(b)(xvi) and (e)(v) of the Rome Statute of the International Criminal Court and is referenced in Draft Principle 18 of the ILC Draft Principles on protection of the environment in relation to armed conflict, is concerned with criminal liability for individuals, thereby ruling out the possibility to try corporations directly.⁴⁹ As States parties to the Rome Statute are expected to prosecute crimes

⁴⁶ *Regulations Respecting the Laws and Customs of War on Land, Annex to Hague Convention IV*, 18 October 1907, Article 43, United States Treaty Series 539, 631, 651. For a more detailed analysis of Article 43 in the context of exploitation of natural resources, see M. Longobardo, ‘State Responsibility for International Humanitarian Law Violations by Private Actors in Occupied Territories and the Exploitation of Natural Resources’, 63 *Netherlands International Law Review* (2016) 3, 251.

⁴⁷ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *supra* note 39, 67, para. 178.

⁴⁸ *Ibid.*, 67, para. 179.

⁴⁹ See for example L. J. van den Herik, ‘Corporations as Future Subject of the International Criminal Court: an Exploration of the Counterarguments and Consequences’, in L.J. van den Herik & C. Stahn (eds), *Future Perspectives on International Criminal Justice* (2010), 350; N. Farrell, ‘Attributing Criminal Liability to Corporate Actors: Some Lessons From the International Tribunals’, 8 *Journal of International Criminal Justice* (2010) 3, 873; H. van der Wilt, ‘Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities’, 12 *Chinese Journal of International Law* (2013) 1, 43; P. Ambach, ‘International Criminal Responsibility of Transnational Corporate Actors Doing Business in Zones of Armed Conflict’, in F. Baetens (ed.), *Investment Law Within International Law: Integrationist Perspectives* (2013), 51; J. Kyriakakis, ‘Corporations Before International Criminal Courts: Implications for the International Criminal Justice Project’, 30 *Leiden Journal of International Law* (2017) 1, 221.

committed by their nationals,⁵⁰ home States of corporations have criminal jurisdiction over the natural persons within the corporation responsible for taking the decisions if these persons have the nationality of the home State.⁵¹ Moreover, corporations can be prosecuted directly if the domestic law of the home State accepts criminal responsibility for legal persons.⁵²

In terms of criminal liability, reference should also be made to two important regional instruments which have been developed in recent years. The first concerns the 2006 Lusaka Protocol Against the Illegal Exploitation of Natural Resources, adopted by the International Conference on the Great Lakes Region, an international organization composed of States in the African Great Lakes region.⁵³ This Protocol provides for the domestic criminalization of acts of illegal exploitation of natural resources.⁵⁴ More recently, the 2014 Malabo Protocol, adopted by the African Union, mirrors the relevant provisions of the Lusaka Protocol to establish the crime of illegal exploitation of natural resources, falling under the jurisdiction of the African Court of Justice and Human Rights.⁵⁵

International humanitarian law therefore provides a viable legal basis for the home State's obligation to prevent the illegal exploitation of natural resources by corporations domiciled in its territory, while both international humanitarian and criminal law have an important role to play in ensuring liability for such

⁵⁰ *Rome Statute of the International Criminal Court*, 17 July 1998, Articles 12 & 17, 2187 UNTS 90, 99, 100.

⁵¹ Nevertheless, there are a number of hurdles to take in the context of prosecuting illegal exploitation of natural resources. See Ambach, *supra* note 49; D. A. Dam-de Jong, 'Ignorantia Facti Excusat? The Viability of Due Diligence as a Model to Establish International Criminal Accountability for Corporate Actors Purchasing Natural Resources From Conflict Zones', in L. Enneking *et al.* (), *Accountability, International Business Operations, and the Law: Providing Justice for Corporate Human Rights Violations in Global Value Chains* (2019), 126.

⁵² For an analysis of the potential for domestic criminal courts to hold corporations accountable, see C. van den Ryngaert, 'Accountability for Corporate Human Rights Abuses: Lessons From the Possible Exercise of Dutch National Criminal Jurisdiction Over Multinational Corporations', 29 *Criminal Law Forum* (2018) 1, 1.

⁵³ International Conference on the Great Lakes Region, 'Protocol Against the Illegal Exploitation of Natural Resources', (2006), available at https://ungreatlakes.unmissions.org/sites/default/files/icglr_protocol_against_the_illegal_exploitation_of_natural_resourcess.pdf (last visited 24 February 2020).

⁵⁴ *Ibid.*, see notably Articles 12 and 13.a

⁵⁵ African Union, *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, 15 May 2014, Article 28 L BIs, EX.CL/846(XXV), Annex 5, 29.

acts. Nevertheless, these fields of international law are less suitable for addressing other forms of environmental harm caused by corporate actors. We should therefore consider how and to what extent other fields of international law may provide a complementary legal basis.

II. International Human Rights Law as Legal Foundation for States' Obligations to Prevent and Remediate Environmental Harm Caused by Corporations

In her second report, Special Rapporteur Marja Lehto referred extensively to international human rights law as legal foundation for Draft Principles 10 and 11.⁵⁶ She furthermore argued that human rights obligations may provide a basis for State responsibility for environmental harm in conflict scenarios because such harm may violate various human rights.⁵⁷ This argument builds upon recent developments within the context of international human rights law: more specifically, the recognition that the protection of human rights and the environment are intertwined.⁵⁸ Special Rapporteur John Knox, who was appointed by the Human Rights Council in 2012 as an independent expert to map the relationship between human rights and the environment, played an important role in clarifying the connections between the two fields. His 2013 report demonstrated that all major global and regional human rights bodies have identified “[...] rights whose enjoyment is infringed or threatened by environmental harm”.⁵⁹ Indeed, developments in international and regional systems evidence that a greening of human rights has occurred.⁶⁰

At the international level, the right to a healthy environment has been recognized as inherent to the enjoyment of other human rights.⁶¹ For example,

⁵⁶ *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, supra note 11, 32-49, paras 67-103.*

⁵⁷ *Ibid.*, 51, para. 108.

⁵⁸ J. Van de Venis, ‘A Human Right to a Clean and Healthy Environment: Dream or Reality in Europe?’, *Environmental Law Network International Review* (2011) 1, 27.

⁵⁹ Human Rights Council, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John Knox*, UN Doc A/HRC/25/53, 30 December 2013, 6, para. 17.

⁶⁰ A. Boyle, ‘Human Rights and the Environment’, in B. Boer (ed.), *Environmental Law Dimensions of Human Rights* (2015), 203; E. Grant, ‘International Human Rights Courts and Environmental Human Rights: Re-imagining Adjudicative Paradigms’, 6 *Journal of Human Rights and the Environment* (2015) 2, 156, 158.

⁶¹ D. Shelton, ‘Human Rights and the Environment: What Specific Environmental Rights Have Been Recognised’ 35 *Denver Journal of International Law & Policy* (2006) 1, 129,

the Committee on Economic, Social and Cultural Rights (CESCR) stated that a “[...] right to health [...]”⁶² includes a healthy environment as an “[...] underlying determinant [...]” of health.⁶³ The Human Rights Committee (HR Committee) has furthermore maintained that all human rights treaty bodies acknowledge a link between the realization of human rights and the environment.⁶⁴ In its recent General Comment 36 on the right to life, the Committee went as far as to recognize that States’ duty to protect life implies that they should “[...] take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity”.⁶⁵ Environmental degradation was thus acknowledged as a serious threat to the right to life.⁶⁶ The HR Committee applied this concept in the case *Portillo Cáceres v. Paraguay*, where it held that the right to life may be violated if States fail to take such appropriate measures in relation to environmental pollution.⁶⁷ A similar trend can be discerned among regional human rights bodies. In the African and Inter-American system substantive rights to a satisfactory and healthy environment have been recognized,⁶⁸ whereas in the European system it was determined that environmental degradation or damage may violate the enjoyment of other human rights.⁶⁹

129.

⁶² *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Article 12, 993 UNTS 3, 8.

⁶³ CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the ICESCR)*, UN Doc E/C.12/2000/4, 11 August 2000, 2, para. 4.

⁶⁴ Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, UN Doc A/HRC/10/61, 15 January 2009, 7, para. 18.

⁶⁵ HR Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, UN Doc CCPR/C/GC/36, 30 October 2018, 6, para. 26.

⁶⁶ *Ibid.*, 13, para. 62.

⁶⁷ HR Committee, *Portillo Cáceres v. Paraguay*, Communication No.2751/2016, UN Doc CCPR/C/126/D/2751/2016, 9 August 2019, 13-14, para. 7.3.

⁶⁸ For the Inter-American system, see *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, 17 November 1988, Article 11, OAS Treaty Series No. 69 [Protocol of San Salvador]. For the African system, see *African Charter on Human and Peoples’ Rights*, 27 June 1981, Article 24, 1520 UNTS 217, 250.

⁶⁹ These include Articles 2, 6, 8, 10 and 13 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221. Relevant case law of the European Court for Human Rights includes *Dubetska and Others v. Ukraine*, ECtHR Application No. 30499/03, Judgement of 10 February 2011, 18-19, para.

Based on these developments, the Framework Principles on Human Rights and the Environment require States to “[...] respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment”.⁷⁰ The commentary to the Framework Principles clarifies that States should “[...] refrain from violating human rights through causing or allowing environmental harm [and] protect against harmful environmental interference from other sources, including business enterprises [...]”.⁷¹

When it comes to determining States’ human rights obligations in the context of economic activities, the UN Guiding Principles on Business and Human Rights, developed by Special Rapporteur John Ruggie and endorsed by the Human Rights Council in 2011, are the first point of reference.⁷² Although these principles do not themselves formulate binding obligations for States, they are considered to be based on existing obligations for States under international human rights law.⁷³ The principles assert that “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises”.⁷⁴ For this purpose, they are required to “[...] tak[e] appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication”.⁷⁵ Furthermore, a draft treaty on business and human rights is currently being negotiated under the auspices of the Human Rights Council.⁷⁶ The preamble to this draft treaty clearly stipulates that “[...] States must protect against human rights abuse by third parties, including business enterprises, within their territory or otherwise

105; *López-Ostra v. Spain*, ECtHR Application No. 16798/90, Judgement of 9 December 1994, 15, para. 51; *Guerra and Others v. Italy*, ECtHR 116/1996/735/932, Judgement of 19 February 1998, 17, para. 60.

⁷⁰ Human Rights Council, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/37/59, 24 January 2018, 7 (Annex, Framework Principle 2).

⁷¹ *Ibid.*, 7-8 (Annex, para. 5).

⁷² *Human Rights Council, Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, supra note 4*, 6-27 (Annex). The guidelines were endorsed by the Human Rights Council through HRC Res. 17/4, UN Doc A/HRC/17/4, 6 July 2011.

⁷³ *Ibid.*, 6 (Annex, General Principles).

⁷⁴ *Ibid.*, 6 (Annex, Principle 1).

⁷⁵ *Ibid.*

⁷⁶ Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, UN Doc A/HRC/RES/29/9, 14 July 2014.

under their jurisdiction or control, and ensure respect for and implementation of international human rights law [...]”⁷⁷

It is relevant to note that these instruments understand States’ obligation to regulate corporate activities as falling under their obligation to protect human rights. The remainder of this section will explore the nature and contents of the obligation to protect in the context of economic activities. As a starting point for determining the nature of the obligation to protect, it can be observed that States generally have three levels of obligations under the human rights framework.⁷⁸ These are the obligations to respect, protect, and fulfil human rights.⁷⁹ Whereas the obligation *to respect* is a negative obligation,⁸⁰ the obligations *to protect* and *to fulfil* are positive obligations, which require States to adopt “[...] reasonable and appropriate measures [...]”⁸¹ to realize human rights and prevent abuses of human rights by non-state actors.⁸² The duty to protect entails an obligation for States to exercise due diligence to prevent, investigate,⁸³ punish, or redress

⁷⁷ Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights, ‘Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Revised Draft’ (2019), 2, 8th preambular paragraph, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf (last visited 24 February 2020).

⁷⁸ *First Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto*, UN Doc A/CN.4/720, 30 April 2018, 37-38, para. 71.

⁷⁹ D. Shelton & A. Gould, ‘Positive and Negative Obligations’, in D. Shelton (ed.), *Oxford Handbook of International Human Rights Law* (2013), 562.

⁸⁰ HR Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, 4, para. 10. See also: S. Joseph & M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd ed. (2013), 40.

⁸¹ HR Committee, *William Eduardo Delgado Páez v. Colombia*, Communication No. 195/1985, UN Doc CCPR/C/39/D/195/1985, 12 July 1990, 47-48, para. 5.5.

⁸² HR Committee, *Pestaño v. Philippines*, Communication No. 1619/2007, UN Doc CCPR/C/98/D/1619/2007, 11 May 2010, 10, para. 7.2; HR Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, *supra* note 80, 3-4, para. 8; Shelton, ‘Human Rights and the Environment: What Specific Environmental Rights Have Been Recognised’, *supra* note 61, 130.

⁸³ HR Committee, *Pestaño v. Philippines*, *supra* note 82, 10, para. 7.2.

harm to human rights caused by non-state actors.⁸⁴ States will be violating their positive obligations if they fail to take reasonable and appropriate measures.⁸⁵

The content of due diligence obligations owed by States under international human rights law with regards to the environment are arguably informed by international environmental law. The merger of States' obligations was envisaged by the HR Committee in General Comment No. 36, wherein the Committee determined that States parties to the International Covenant on Civil and Political Rights should interpret the right to life in light of their duties under international environmental law.⁸⁶ More specifically, the HR Committee determined that "[i]mplementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, *inter alia*, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors".⁸⁷ This implies, according to the Committee, that there is a soft obligation for States to *inter alia* "[...] ensure sustainable use of natural resources, develop and implement substantive environmental standards [and] conduct environmental impact assessments [...]".⁸⁸ The Inter-American Court took an identical approach and required that the content and the scope of the right to life must be interpreted through international environmental law.⁸⁹ Because States have due diligence obligations under human rights law to respect and ensure the right to life and environmental law obligations to, for example, prevent transboundary harm,

⁸⁴ Human Rights Council, *Report of the Special Representative of the Secretary-General on Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Addendum, State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations Core Human Rights Treaties: an Overview of Treaty Body Commentaries*, 13 February 2007, UN Doc A/HRC/4/35/Add.1, 9 (Annex, para. 7).

⁸⁵ HR Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, *supra* note 80, 3-4, para. 8; Bonnitcha & McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights', *supra* note 34, 904.

⁸⁶ HR Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, *supra* note 65, 13, para.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.* It should be noted that conducting environmental impact assessments is in fact a hard obligation under international law in particular circumstances. See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, 82-84, paras 203-205; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, 665, 706-707, paras 104-105.

⁸⁹ *Environment and Human Rights*, Advisory Opinion of 15 November 2017, IACtHR Series A, No. 23, 48, para. 116.

they must take measures to protect the environment against (transboundary) harm caused by corporations and other private actors.⁹⁰

In order to fulfil their obligations under human rights law to protect the environment, States must adopt policies and legislation to effectively require non-state actors, including corporations, to comply with their environmental standards.⁹¹ The CESCR has interpreted this obligation as entailing “[...] a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence [...]”.⁹² This is also reflected in Draft Principle 10 of the ILC study, which specifically refers to corporate due diligence. The core of States’ obligation to protect the environment from harm caused by corporations therefore hinges on the content of this concept, which has been authoritatively defined by the UN Guiding Principles on Business and Human Rights.⁹³ Corporate due diligence figures prominently in the UN Guiding Principles as a means to address negative human rights impacts by corporations.⁹⁴ Whereas it is first and foremost presented as a means for States to discharge their obligation under international law to *protect* human rights, the principles also recognize a distinct responsibility for corporations to *respect* human rights. The due diligence requirements for corporations are directly connected to this soft duty to respect human rights and are presented as a means for corporations to identify, prevent, mitigate, and account for adverse human rights impacts ensuing from their operations.⁹⁵

⁹⁰ HR Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, *supra* note 65, 13, para. 62.

⁹¹ Human Rights Council, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, *supra* note 70, 15 (Annex, Framework Principle 12 and commentary, para. 34).

⁹² CESCR, *General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN Doc E/C.12/GC/24, 10 August 2017, 5, para. 16.

⁹³ Human Rights Council, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, *supra* note 4.

⁹⁴ It should be noted that corporate due diligence is an important component of the principles, but that the framework itself is more complex. See J. Ruggie & J. Sherman III, ‘The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights: A Reply to Bonnitcha & McCorquodale’, 28 *European Journal of International Law* 3, 923.

⁹⁵ *Ibid.*, 923-924.

More specifically, Principle 15(b) of the UN Guiding Principles formulates a recommendation for corporations to have in place a “[...] human rights due diligence process to identify, prevent, mitigate, and account for how they address their impacts on human rights [...]”.⁹⁶ Other principles in the UN Guiding Principles further develop the responsibility to prevent, mitigate, account for, and remedy adverse human rights impacts. Particularly relevant with respect to due diligence, Principle 17 sets out the process of human rights due diligence in the corporate context. This process is referred to as “on-going” and therefore should be regarded as a continuous exercise throughout business operations; it includes “[...] assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed”.⁹⁷ The process is furthermore flexible, as its complexity depends on “[...] the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations”.⁹⁸ Most importantly, the process does not apply only to the corporation’s own activities but also to its business relationships.⁹⁹ It therefore includes a responsibility for corporate actors to assess their human rights impacts through their suppliers and other business partners.

Corporate due diligence therefore entails first and foremost an obligation to conduct human rights impact assessments, both with respect to a corporation’s own activities and with respect to its business partners, and to ensure that adequate policies are in place to respond to these impacts. As a consequence of the greening of human rights, these human rights impact assessments also extend to environmental harm. Requiring corporations to conduct due diligence can therefore be an effective way for States to give effect to their obligation to protect human rights in the context of business and human rights. Furthermore, inclusion of corporate due diligence in domestic legislation ensures that this becomes a mandatory practice for corporations.

⁹⁶ Human Rights Council, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, *supra* note 4, 15 (Annex, Principle 15).

⁹⁷ *Ibid.*, 16 (Annex, Principle 17).

⁹⁸ *Ibid.*

⁹⁹ *Ibid.* See also *ibid.*, 17-20 (Annex, Principles 18 to 22).

D. Extraterritorial Application of States' Due Diligence Obligations

The acknowledgment that States' due diligence obligations to ensure respect for international humanitarian law, on the one hand, and to protect against human rights abuses, on the other, extend to the activities of their corporations does not automatically entail an obligation for States to regulate the activities of those same corporations abroad. After all, States' obligations are usually confined to their jurisdiction. However, a trend can be recognized that States' due diligence obligations under international humanitarian law and human rights law may apply extraterritorially, specifically with respect to corporate activities.

For international humanitarian law, this ensues from the recognition that all States parties to the Geneva Conventions have an obligation to ensure respect by their nationals of the provisions of the Conventions, regardless of whether the relevant State is involved in the armed conflict. The 2016 International Committee of the Red Cross (ICRC) Commentary refers in this respect to *erga omnes partes* obligations.¹⁰⁰ This section will not further consider international humanitarian law, as the question of extraterritoriality in this field of international law seems less problematic than for international human rights law, especially because international criminal law provides a separate mechanism for the prosecution of war crimes.

For international human rights law, it is relevant to note that both the UN Guiding Principles on Business and Human Rights and the Draft Treaty on Business and Human Rights include relevant provisions. The UN Guiding Principles include a recommendation for States to set out an expectation that corporations domiciled in their territory or under their jurisdiction respect human rights throughout their operations and they call on States to take appropriate steps to ensure the effectiveness of domestic judicial mechanisms with respect to business-related human rights abuses.¹⁰¹ The Draft Treaty furthermore formulates an obligation for States to ensure that their domestic legislation requires corporations to respect environmental rights¹⁰² and to prevent

¹⁰⁰ International Committee of the Red Cross, *supra* note 44, Article 1, para. 119.

¹⁰¹ Human Rights Council, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *supra* note 4, 7, 23 (Annex, Principles 2, 26).

¹⁰² Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights, *supra* note 77, 3-4,

their abuse whilst conducting transnational and national business activities.¹⁰³ Additionally, this treaty is proposing that States ensure that their domestic law provides for a “[...] system of legal liability for human rights violations or abuses in the context of business activities, including those of transnational character”.¹⁰⁴

The provision of remedies by the home State is especially important in situations in which the host State is not in a position to ensure that private actors operating in their territory respect human rights, as is a common scenario in situations of armed conflict or the immediate aftermath. In recognition of this, Principle 7 of the UN Guiding Principles on Business and Human Rights determines that home States should help ensure that corporations are not involved with human rights abuses in conflict-affected areas.¹⁰⁵ At the same time, it is undeniable that the exercise of jurisdiction by the home State may infringe on host State sovereignty in these circumstances,¹⁰⁶ as was referenced in the discussions in the ILC regarding the Draft Principles. It is therefore of the utmost importance to carefully determine whether and in which circumstances home States have such extraterritorial obligations and how these relate to the sovereignty of the host State.

This question is closely connected to the meaning given to the concept of *jurisdiction*, as the recognition of extraterritorial obligations for States implies that the notion of jurisdiction is extended.¹⁰⁷ Generally, the obligations included in human rights treaties are exclusively owed to those within the State’s jurisdiction. Therefore, if an act occurs against someone outside the State’s jurisdiction, the *threshold criterion* is not met.¹⁰⁸ The aim of determining *jurisdiction* under human rights law is “[...] primarily about delineating as appropriately as possible

Article 1(2).

¹⁰³ *Ibid.*, 7-8, Article 5.

¹⁰⁴ *Ibid.*, 8-9, Article 6.

¹⁰⁵ Human Rights Council, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, *supra* note 4, 10-11 (Annex, Principle 7).

¹⁰⁶ R. Chambers, ‘An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct: Jurisdictional Dilemma Raised/ Created by the Use of the Extraterritorial Techniques’, 14 *Utrecht Law Review* (2018) 2, 22, 26.

¹⁰⁷ K. Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (2013), 16.

¹⁰⁸ M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011), 19-20.

the pool of persons to which a State ought to secure human rights”.¹⁰⁹ Therefore, arguably those affected by a State’s actions or omissions should be included in this pool.

This section will discuss that a trend has emerged which recommends that home States should regulate corporate activities which originate on their territory and have consequences beyond their territory, especially when this concerns corporate activities in conflict zones. Firstly, this section will analyze the developments related to transboundary harm, i.e. harm that originates in the home State and causes damage to persons or the environment in the host State. Secondly, these developments will be transplanted to situations of extraterritorial damage, i.e. situations in which the harm originates in the host State but was influenced by persons in the home State.

I. Transboundary Harm

Victims in other States may be affected by transboundary harm or extraterritorial damage. Transboundary harm occurs when harm originates in a particular State and then causes damage to persons or the environment in another State.¹¹⁰ Such damage is prohibited by the principle of *sic utere tuo ut alienum non laedas*, also known as the no-harm principle,¹¹¹ which provides that States have the responsibility to ensure that conduct within their jurisdiction does not result in environmental harm outside their territory.¹¹² In the *Trail Smelter* award, an arbitral tribunal found that “[...] no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein [...]”.¹¹³

This general obligation contained in the no-harm principle was read into the human rights framework by the Inter-American Court in its 2017

¹⁰⁹ M. Den Heijer & R. Lawson, ‘Extraterritorial Human Rights and the Concept of Jurisdiction’, in M. Langford *et al.* (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (2013), 163.

¹¹⁰ See definition in: ILC, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, *Yearbook of the International Law Commission* (2006), Vol. II, Part Two, 64, Principle 2(e).

¹¹¹ R. Percival, ‘Liability for Environmental Harm and Emerging Global Environmental Law’, *25 Maryland Journal of International Law* (2010) 1, 37, 39.

¹¹² Report of the United Nations Conference on the Human Environment, Declaration of the United Nations Conference on the Human Environment, UN Doc A/CONF.48/14/Rev.1, 5-16 June 1972, 5, Principle 21.

¹¹³ *Trail Smelter Case (United States v. Canada)*, Awards of Arbitral Tribunal, 11 March 1941, 3 Reports of International Arbitral Awards, 1905, 1965.

Environment and Human Rights Advisory Opinion.¹¹⁴ This Opinion reflects a far-reaching approach in the trend of recognizing due diligence obligations for transboundary harm. It determined that States must adopt all necessary measures to avoid activities within their State from impacting the enjoyment of people's human rights outside their territory.¹¹⁵ The *jurisdiction* of States is extended when transboundary harm has occurred “[...] if there is a causal connection between the incident that took place on its territory and the violation of the human rights of persons outside its territory”.¹¹⁶ If harmful conduct originates on a State's territory, the State would have had control over the harmful activities and, therefore, that State may be exercising jurisdiction over victims of the transboundary harm. The Inter-American Court established that there is a legal presumption that the State of origin has jurisdiction over those whose rights have been violated by transboundary harm.¹¹⁷

Likewise, the HR Committee, in its General Comment 36 on the right to life, recognized that States have an obligation to “[...] take appropriate legislative and other measures to ensure that all activities [...] having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities taken by corporate entities based in their territory or subject to their jurisdiction, are consistent with article 6 [...]”.¹¹⁸

Although the standard set by the HR Committee (direct and reasonably foreseeable impact) is arguably more stringent than that proposed by the Inter-American Court (causal connection between the violation and the infringement of human rights),¹¹⁹ both human rights bodies recognize in a general vein that States have an obligation to adopt legislation which ensures that corporations respect human rights and prevent their abuse during their (transboundary) business activities.¹²⁰ If States fail to adopt legislation requiring corporations to prevent transboundary harm from violating rights, States may be responsible for

¹¹⁴ *Environment and Human Rights*, *supra* note 89.

¹¹⁵ *Ibid.*, Official Summary, 3, para. g.

¹¹⁶ *Ibid.*, 43-44, paras 101-103.

¹¹⁷ C. Campbell-Duruflé & S.A. Atapattu, ‘The Inter-American Court’s *Environment and Human Rights* Advisory Opinion: Implications for International Climate Law’, 8 *Climate Law* (2018), 321, 333.

¹¹⁸ HR Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, *supra* note 65, 5, para. 22.

¹¹⁹ Arguably, the existence of a causal connection does not necessarily imply a direct connection between an act and a violation.

¹²⁰ See the proposed obligations in the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights, *supra* note 77, 7-8, Article 5.

human rights violations caused to individuals beyond their territory and outside their effective control.¹²¹

II. Extraterritorial Environmental Damage

The CESCR established that States are required “[...] to take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction [...]”.¹²² Therefore, the understanding of jurisdiction discussed above should arguably be extended to include situations where a parent company has adopted an environmentally harmful policy that was subsequently carried out by a subsidiary under its *de facto* control¹²³ and has resulted in environmental damage or exploitation in a conflict scenario. When there is a sufficiently close link of cooperation and knowledge¹²⁴ between the subsidiary and the parent company, such that the *veil* between them is recognized as artificial, the corporate veil may be pierced and the parent company may be liable for the subsidiary’s harmful conduct.¹²⁵

In scenarios of extraterritorial damage, where corporate activities were planned in a home State and consequently these activities caused environmental damage and human rights violations (in a conflict zone) abroad, the damage

¹²¹ *Environment and Human Rights*, *supra* note 89, 43-44, para. 103. Both human rights bodies furthermore adopt a foreseeability test. See D. Palombo, *Business and Human Rights: The Obligations of the European Home States* (2020), Chapter 4, II, A.

¹²² CESCR, *General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, *supra* note 92, 8, para. 26. For an analysis of the comment, see T. van Ho, ‘Introductory Note to General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (CESCR)’, 58 *International Legal Materials* (2019) 4, 872.

¹²³ *Vedanta Resources PLC & Anor v. Lungowe & Others*, UK Supreme Court, [2019] UKSC 20, Judgement of 10 April 2019, 20-23, paras 55, 61. The Court assessed *de facto* control based on “[...] the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary”. *Ibid.*, 18, para. 49. See also T. Van Ho, ‘Vedanta Resources PLC and Another v. Lungowe and Others’, 114 *American Journal of International Law* 1, 110.

¹²⁴ *Wiwa v. Royal Dutch Petroleum Co.*, 96 Civ. 8386 (KMW) (S.D.N.Y. Feb. 22, 2002), 13-14. See also: *Oguru & Efangu v. Shell Petroleum & Others*, Court of Appeal The Hague, 200.126.804 (zaak a) + 200.126.834 (zaak b), Judgement of 18 December 2015, para. 5.9.

¹²⁵ A. Wilson, ‘Beyond Unocal: Conceptual Problems in Using International Norms to Hold Transnational Corporations Liable Under the Alien Tort Claims Act’, in O. de Schutter (ed.), *Transnational Corporations and Human Rights* (2006), 66.

arguably originated in a State's territory.¹²⁶ States' due diligence obligations may therefore extend in these scenarios to require that corporations refrain from adopting policies domestically for subsidiaries to carry out activities abroad that will violate environmental rights in conflict zones.

In situations where corporate activities of a subsidiary occur in conflict or post-conflict zones and cause environmental harm, the question can be raised under what circumstances the home State can be considered to have obligations to provide remedies to the victims of such harm. It may be argued that, if such business activities have consequences which damage (environmental) human rights in locations where victims have no access to (effective) judicial remedies, for example because of the continued occurrence of an armed conflict, the home State's due diligence obligations may be considered to extend outside its territory.¹²⁷ These obligations should include the requirement that States provide access to effective remedies for victims of corporate human rights abuses, where such remedies are not available in the host State.¹²⁸ Additionally, to fulfil this obligation, it has been recommended that States establish domestic liability mechanisms to hold corporations liable for failing to comply with domestic legislation to prevent human rights abuses.¹²⁹

The existence of an obligation to exercise jurisdiction with respect to environmental harm caused by a corporation's subsidiary acting under its *de facto* control is, however, not generally recognized under international human rights law. Although there are movements toward interpreting jurisdiction more broadly, at this point there is insufficient evidence to conclude with certainty that the home State would be held responsible for failing to prevent extraterritorial corporate environmental harm in conflict scenarios. However, with the proposal of Draft Principle 10, the trend of extending obligations extraterritorially is further recognized and the concept is strengthened.

¹²⁶ *Environment and Human Rights*, *supra* note 89, 43-44, para. 103.

¹²⁷ *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto*, *supra* note 11, 35, para. 72.

¹²⁸ CESCR, *General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, *supra* note 92, 5, para. 14. The CESCR emphasizes that States should pay due attention to "[t]he extent to which an effective remedy is available and realistic in the alternative jurisdiction [...]". *Ibid.*, 13, para. 44.

¹²⁹ This recommendation has been included in the principle 6 of the draft treaty on the regulation of the activities of transnational corporations and in Draft Principle 11 on the protection of the environment in relation to armed conflict.

E. State Practice Relating to Due Diligence Obligations and Liability for Corporations

The measures that States should take pursuant to Draft Principles 10 and 11 of the ILC study, and more generally pursuant to their due diligence obligations under international humanitarian law and human rights law, consist of taking legislative and other measures. This section examines the various ways in which States have given effect to their due diligence obligations in regional and domestic frameworks. Section E.1 discusses the various guidelines developed by the Organization for Economic Cooperation and Development (OECD) as part of its investment framework. This organization has played a leading role in developing corporate due diligence. Section E.2 explores relevant domestic legislation.

As a preliminary remark, it should be noted that the ILC Draft Principles confine their call for liability to environmental harm that is caused by corporations in conflict and post-conflict situations. It is important to note that the term *caused* implies a narrower set of circumstances for liability than one which would be based on corporations' due diligence obligations. Liability is therefore not foreseen for harm that results from activities which, in the words of the UN Guiding Principles, "[...] may be directly linked to a corporation's operations, products or services by its business relationships [...]"¹³⁰ Draft Principle 11 therefore does not provide for liability in relation to harm ensuing from a corporation's failure to conduct proper due diligence with respect to its business partners. Enforcement of due diligence requirements is more aptly covered by Draft Principle 10 and ensues from the general recommendation for States to take "[...] other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories exercise due diligence [...]". Such other measures may include enforcement measures.

¹³⁰ See Human Rights Council, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *supra* note 4, 16 (Annex, Principle 17(a)). See also the commentary to Draft Principle 11 of the ILC study, which states as follows: "As for the term 'cause', the Guiding Principles on Business and Human Rights, in the context of human rights due diligence, refer to adverse impacts that the business enterprise 'may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.'" See *Report of the International Law Commission to the Seventy-First Session*, *supra* note 1, 244.

I. Guidelines for Corporate Due Diligence and Liability in the OECD Framework

The OECD has developed various tools to develop corporate due diligence over the past two decades, most importantly within its guidelines for multinational enterprises, which set out an international standard for responsible business conduct,¹³¹ and related instruments within its investment framework. The concept of due diligence was first introduced in the 2000 Guidelines for Multinational Enterprises, which included a rudimentary provision on supply chain due diligence, stating that “[...] enterprises should [...] [e]ncourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines”.¹³² The 2011 revision of the OECD Guidelines significantly developed this basic due diligence requirement through the formulation of a general expectation that corporations conduct risk-based due diligence in order to avoid that their business activities cause or substantially contribute “[...] to adverse impacts on matters covered by the *Guidelines* [...]”, that they “[...] address such impacts [...]” and that they “[...] seek to prevent or mitigate an adverse impact [...] directly linked to their operations, products or services by a business relationship”.¹³³

It is important to note that the duty for corporations to avoid causing or contributing to adverse impacts through their own activities includes their activities in the supply chain. In other words, practices such as franchising, licensing or subcontracting fall under a corporation’s own activities, to which the duty to address applies.¹³⁴ It is equally important to note that this duty to address adverse impacts does not apply to independent suppliers. In this context, corporations are merely expected to use their leverage to influence the entity causing the adverse impact with the aim of preventing or mitigating that impact.¹³⁵

Matters covered by the Guidelines include both human rights and environmental impacts. The human rights due diligence draws directly on the

¹³¹ See <https://mneguidelines.oecd.org/guidelines/> (last visited 27 January 2020) for more information on the OECD Guidelines for Multinational Enterprises.

¹³² OECD, *The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications*, OECD Doc DAF/IME/WPG(2000)15/FINAL, 31 October 2001, 11.

¹³³ OECD, ‘2011 Update of the OECD Guidelines for Multinational Enterprises’ (2011), 20, available at <https://www.oecd.org/daf/inv/mne/48004323.pdf> (last visited 15 March 2020).

¹³⁴ *Ibid.*, 24.

¹³⁵ *Ibid.*, 24.

UN Framework on Business and Human Rights and can be considered as a means to give effect to the UN Guiding Principles.¹³⁶ The environmental due diligence, on the other hand, draws on the 1992 Rio Declaration on Environment and Development, the 1998 Aarhus Convention, as well as on corporate standard-setting instruments such as the International Organization for Standardization (ISO) Standard on Environmental Management Systems.¹³⁷ The notion *due diligence* is not specifically mentioned in the environmental chapter. Yet corporations are *inter alia* expected to collect and evaluate “[...] adequate and timely information regarding the environmental, health, and safety impacts of their activities [...]” and they are to “[a]ssess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them”.¹³⁸ As the impacts of environmental harm on human rights would also be covered by human rights due diligence, the two chapters should be read together.

The inclusion of these due diligence requirements also spurred the development of more specific guidelines within the OECD, which aim to provide corporations in designated sectors practical guidance on how to implement due diligence in their sector.¹³⁹ The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas deserves special attention.¹⁴⁰ This Guidance applies to corporations based in OECD and other adherent countries that operate in or procure minerals from volatile regions worldwide, including but not limited to conflict regions. It is therefore a particularly relevant tool to address the phenomenon of illegal exploitation of natural resources, as discussed in section B.¹⁴¹

¹³⁶ *Ibid.*, 31-34.

¹³⁷ *Ibid.*, 42-46. The full name of the Aarhus Convention is *UN Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters* (25 June 1998, 2161 UNTS 447).

¹³⁸ OECD, *2011 Update of the OECD Guidelines for Multinational Enterprises*, supra note 133, 42-43.

¹³⁹ See supra note 122.

¹⁴⁰ See OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 3rd ed. (2016). For a detailed assessment of the Guidance, see Mary Footer, ‘Human Rights Due Diligence and the Responsible Supply Chain of Minerals from Conflict-Affected Areas: Towards a Normative Framework?’, in J. Letnar Čerňič & T. Van Ho (eds), *Human Rights and Business: Direct Corporate Accountability for Human Rights* (2015), 179.

¹⁴¹ The Guidance was in fact developed in close cooperation with the UN Group of Experts on the DR Congo, established by the UN Security Council, and the International

The Guidance introduces a five-step risk-based approach to due diligence, based on the four elements of human rights due diligence as included in the UN Guiding Principles, i.e. to prevent, mitigate, to account for, and to address. These five steps consist of strengthening company management systems, identifying and assessing supply chain risks, designing and implementing strategies to respond to identified risks, conducting independent audits, and publicly disclosing supply chain due diligence and findings in annual sustainability or corporate responsibility reports. The Guidance contains detailed recommendations for upstream and downstream corporations on how they should conduct each of these five steps.

With respect to identifying and assessing supply chain risks, for instance, upstream companies are “[...] expected to clarify chain of custody and the circumstances of mineral extraction, trade, handling and export [...]”.¹⁴² They further need to evaluate those circumstances against a number of risks.¹⁴³ These include contributing to serious abuses associated with the extraction, transport or trade of minerals, such as torture or compulsory labor; direct or indirect support to non-state armed groups, including by paying them illegal taxes; abuses by public or private security forces contracted by corporations or their suppliers; and, finally, contributing to bribery, fraud or corruption.¹⁴⁴ Downstream companies, on the other hand, are expected to assess the due diligence practices of their smelters or refiners, for example by reviewing information provided by them that establishes the origin of the minerals and by carrying out joint spot checks at the smelter/refiner’s facilities.¹⁴⁵ In practice, industry association programs, such as the responsible minerals program, play a prominent role in facilitating due diligence exercise by their members.¹⁴⁶

It is important to note that the risks, on which the due diligence exercise under the Guidance is based, are much more limited than those identified under the OECD Guidelines for Multinational Enterprises. For instance, the

Conference on the Great Lakes Region, an inter-governmental organization consisting of States in the African Great Lakes region. Curbing the illegal trade from this conflict region was therefore very much on the drafters’ minds.

¹⁴² See OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, *supra* note 140, 41-42.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*, 20-24.

¹⁴⁵ See OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, *supra* note 140, 42-43.

¹⁴⁶ See OECD, *Alignment Assessment of Industry Programmes With the OECD Minerals Guidance* (2018).

former Guidance does not refer at all to environmental harm. This omission is not to be regarded as excluding the applicability of this wider due diligence to corporations in the minerals sector; rather, the Guidance must be regarded as complementary to the OECD Guidelines.

The OECD further obliges every member State or adherent country to establish a National Contact Point (NCP) to assist in and monitor the implementation of the Guidelines, a feature which is also discussed by Special Rapporteur Marja Lehto in her second report.¹⁴⁷ As part of their mandate, NCPs mediate in disputes that arise in relation to the implementation of the OECD Guidelines and related instruments.¹⁴⁸ Complaints can be brought to the respective NCP by all interested parties, including worker organizations and non-governmental organizations. This procedure results either in a statement that the issues do not merit further consideration, a report outlining the agreement that the parties have reached or, lastly, a decision of non-compliance by the NCP including recommendations on how to reach compliance with the Guidelines.¹⁴⁹ Several of the disputes before OECD NCPs relate to environmental harm in conflict and post-conflict settings. Among the prime examples is a complaint brought to the British NCP by the NGO Global Witness against mineral trading company Afrimex in relation to the illegal exploitation of natural resources.¹⁵⁰ The NCP procedure can play a useful role in altering corporations' policies and can also, to a certain extent, foster accountability but it is not a legal procedure in itself.¹⁵¹ One may therefore question to what extent it can be used to hold corporations liable, as is the idea underlying Draft Principle 11.

¹⁴⁷ *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, supra note 11, 37-38.*

¹⁴⁸ OECD, *2011 Update of the OECD Guidelines for Multinational Enterprises, supra note 133, 68.*

¹⁴⁹ *Ibid.*, 72.

¹⁵⁰ See 'Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) LTD, Summary of NCP Decision' (2008), available at <http://www.oecd.org/investment/mne/43750590.pdf> (last visited 15 March 2020).

¹⁵¹ For a more thorough analysis of the function of NCPs, see K. Buhmann, 'National Contact Points under OECD's Guidelines for Multinational Enterprises: Institutional Diversity Affecting Assessments of the Delivery of Access to Remedy', in L. Enneking *et al.* (eds), *Accountability, International Business Operations, and the Law: Providing Justice for Corporate Human Rights Violations in Global Value Chains* (2019), 38.

II. Corporate Due Diligence and Liability in Domestic Legislation

The UN Guiding Principles, as well as the OECD Guidelines and Guidance, provide soft norms for corporations to exercise risk-based due diligence. As international law currently does not include binding obligations for corporations, it is left to domestic States to adopt appropriate legislation to give effect to these soft norms.¹⁵² Domestic legislation is therefore of prime importance for establishing binding due diligence obligations for corporations as well as holding corporations liable for causing environmental harm, as has been recognized by the ILC Draft Principles.

The United States' Dodd-Frank Act is a good example of a domestic law establishing such obligations. Section 1502 of that document requires corporations listed on the US stock exchange to report on their exercise of due diligence regarding the source and chain of custody of minerals procured from the DRC or neighboring States.¹⁵³ The EU Conflict Minerals Regulation likewise imposes mandatory due diligence on all major public and private European corporations procuring minerals from conflict-affected States.¹⁵⁴ The Chinese Due Diligence Guidance takes a broader approach than its American and European counterparts. It requires Chinese corporations to exercise due diligence not only with respect to *conflict minerals* and related problems, but also with respect to various types of environmental harm. These include the use of chemicals and hazardous substances subject to international bans and extracting or sourcing resources from World Heritage Sites.¹⁵⁵ Unfortunately, however, the due diligence exercise under the Chinese Guidance is not legally-binding.

¹⁵² It is not likely that this situation will change on the short term, as previous attempts to develop binding obligations for corporations under international law under the umbrella of the Human Rights Commission have not come to fruition. The most recent attempt to develop international law on corporate responsibility, the draft treaty on business and human rights, does not formulate direct obligations for corporations at all. For an overview of relevant international legal developments, see J. Wouters & A.L. Chané, 'Multinational Corporations in International Law', in M. Noortmann, A. Reinisch & C. Ryngaert (eds), *Non-State Actors in International Law* (2015), 225; and E. De Brabandere & M. Hazelzet, 'Corporate Responsibility and Human Rights – Navigating Between International, Domestic and Self-regulation', in Y. Radi (ed.), *Research Handbook on Human Rights and International Investment Law* (2018), 221.

¹⁵³ *Dodd Frank Wall Street Reform and Consumer Protection Act*, 21 July 2010, Bill number H.R. 4173, Report number H. Rept. 111-517, S. Rept. 111-176.

¹⁵⁴ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017, OJ 2017 L130 60.

¹⁵⁵ China Chamber of Commerce of Metals, Minerals & Chemical Importers & Exporters, 'Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains' (2015),

Several other domestic laws introducing mandatory human rights diligence are currently underway. Most of these can be considered as legislation implementing the UN Guiding Principles. The most advanced initiatives include the French *Loi relative au devoir de vigilance* and the Swiss Popular Initiative on Responsible Business. The French law on the duty of vigilance has already entered into force and requires corporations domiciled in France and with a minimum of 5,000 employees to establish and implement a vigilance plan. This plan should include reasonable vigilance measures to identify risks and to prevent serious violations of human rights and health and safety standards as well as serious harm to the environment. The duty of vigilance applies to a corporation's own activities, those of its subsidiaries and to those of its direct business partners.¹⁵⁶ Corporations can be held responsible for not living up to their obligations pursuant to the duty of vigilance.¹⁵⁷ In this sense, the French law goes beyond the ILC Draft Principles, as it addresses not only harm that is caused by a corporation, but also harm to which it has contributed or that can be directly linked to its operations. The Swiss Popular Initiative, which is an initiative of the Swiss Coalition for Corporate Justice, aims at revising the Swiss Constitution.¹⁵⁸ It is comparable in content, but agreement has not yet been reached with respect to the degree to which corporations could be held liable for their activities abroad.¹⁵⁹ The current proposal foresees liability with

available at <http://mneguidelines.oecd.org/chinese-due-diligence-guidelines-for-responsible-mineral-supply-chains.htm> (last visited 15 March 2020), 18-21.

¹⁵⁶ The original text is as follows: “*Le plan comporte les mesures de vigilance raisonnable propres à identifier les risques et à prévenir les atteintes graves envers les droits humains et les libertés fondamentales, la santé et la sécurité des personnes ainsi que l’environnement, résultant des activités de la société et de celles des sociétés qu’elle contrôle au sens du II de l’article L. 233-16, directement ou indirectement, ainsi que des activités des sous-traitants ou fournisseurs avec lesquels est entretenue une relation commerciale établie, lorsque ces activités sont rattachées à cette relation.*” See *LOI n° 2017-399 du 27 Mars 2017 Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d’Ordre*, Journal Officiel de la République Française – No. 74 du 28 Mars 2017, Art. 1.

¹⁵⁷ *Ibid.*, Art. 2.

¹⁵⁸ The initiative has reached the minimum threshold of 100.000 signatures and therefore will be put to a vote through a national referendum, unless Parliament adopts a counter-proposal. See N. Bueno, ‘The Swiss Popular Initiative on Responsible Business: From Responsibility to Liability’, in L. Enneking *et al.* (eds), *Accountability and International Business Operations: Providing Justice for Corporate Violations of Human Rights, Labor and Environmental Standards* (2019), 239, 245.

¹⁵⁹ See <https://www.business-humanrights.org/en/switzerland-ngo-coalition-launches-responsible-business-initiative> (last visited 15 March 2020) for a current overview of the political debate in Switzerland.

respect to harm caused by others that are under the control of the corporation. This includes, in any case, subsidiaries under the *de facto* control of the parent company, as envisaged by Draft Principle 11 of the ILC study but may also extend to other relations which are characterized by a large measure of control.¹⁶⁰

Notwithstanding the differences in their approaches, these initiatives demonstrate a clear trend towards the recognition of the need to adopt due diligence standards for corporations at the domestic level. Moreover, the majority of these standards is mandatory and can be enforced. For instance, a first case based on the new French law has been brought to the court against oil company Total for its alleged failure to elaborate and implement its vigilance plan in Uganda, where it is the main operator of a drilling project in a biodiversity rich nature reserve.¹⁶¹ These initiatives complement the range of other domestic laws providing for corporate liability that were already in place, including the US Alien Tort Statute.¹⁶²

F. Outlook

The principal aim of the two Draft Principles discussed in the current contribution is to enhance domestic implementation of corporate social responsibility. As the Special Rapporteur indicates in her report, “[...] respect for human rights is not optional for corporations”.¹⁶³ Either “[...] the relevant human rights standards are contained in domestic law that binds corporations [...]” or “[...] the responsibility to respect ‘exists over and above legal compliance’ as a (moral) expectation”.¹⁶⁴ As States play a crucial role in establishing obligations for corporations to respect, this article is set out to answer the question as to what extent current international law establishes extraterritorial obligations for the home States of multinational corporations with respect to the prevention and remediation of environmental harm in conflict zones and how these obligations relate to the sovereignty of the host States.

¹⁶⁰ See Bueno, *supra* note 158, 247-248.

¹⁶¹ See ‘Le Groupe Total Assigné en Justice Pour ses Impacts Sociaux et Environnementaux en Ouganda’, *Le Monde*, available at https://www.lemonde.fr/afrique/article/2019/10/24/le-groupe-total-assigne-en-justice-pour-ses-impacts-sociaux-et-environnementaux-en-ouganda_6016717_3212.html (last visited 15 March 2020).

¹⁶² Alien Tort Statute, 28 U.S. Code § 1350 (1948).

¹⁶³ *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts* by Marja Lehto, *supra* note 11, 33-34, para. 69.

¹⁶⁴ *Ibid.*

For this purpose, this paper first assessed potential linkages between multinational corporations and environmental harm in conflict and post-conflict settings. It concluded that home States' responsibility with respect to corporate activities in or related to conflict and post-conflict zones may be engaged in two ways. First, home States have a responsibility to regulate transborder business transactions of corporations domiciled in their jurisdiction. Second, home States' responsibility may be engaged when corporations domiciled in their jurisdiction engage directly in the illegal exploitation of natural resources or otherwise environmentally destructive practices in conflict zones. These types of responsibility were more closely assessed in the section addressing extraterritoriality, distinguishing between transboundary harm and extraterritorial environmental damage respectively.

When it comes to transboundary harm, i.e. harm that directly ensues from the practices of the corporation domiciled in the home State, both the Inter-American Court on Human Rights and the Human Rights Committee take the stance that States have an obligation to adopt legislation which ensures that corporations do not infringe on the human rights of individuals abroad. Such an obligation currently does not exist with respect to extraterritorial environmental damage, i.e. damage caused by local branches or subsidiaries operating in a conflict or post-conflict setting.

This difference may be explained from the perspective of the sovereignty of the host State. Regulating corporations when they engage in international business transactions is less likely to infringe on the sovereignty of the conflict or post-conflict State than holding corporations liable for environmental harm caused by local branches or subsidiaries in the conflict or post-conflict State. In the latter situation, these subsidiaries or local branches fall directly under the jurisdiction of the conflict or post-conflict State. For this reason, the position taken by the Draft Principles, calling on States to provide adequate and effective procedures and remedies to the extent that this is appropriate, is a good way to balance the interests. It is, in any case, of the utmost importance to provide victims with remedies, and the home State can be said to have a responsibility to provide such remedies if the host State is not in a position to do so.

Whereas the conclusion may therefore be drawn that the standards contained in the two Draft Principles to some extent reflect hard obligations, they belong for the most part to the domain of *lex ferenda*. It is, in this respect, important to distinguish between treaty and customary obligations. The aim of the ILC study is to codify existing rules of customary international law on the

one hand and to set out standards of conduct for States on the other.¹⁶⁵ Whereas Draft Principles 10 and 11 to some extent reflect treaty obligations, they cannot be said to represent customary international law.

Nevertheless, the Draft Principles are certainly indicative of the direction in which the law is evolving. It is furthermore relevant to note that these developments are not confined to the decisions and statements of human rights monitoring bodies but have also resonated in the actual practice of States. It therefore seems a matter of time before it is accepted that States have distinct obligations under customary international law for which their responsibility may be engaged. The ILC Draft Principles provide an important impetus to these developments, not in the least because they provide a reference to States regarding the state-of-the-art and a guidance for future action.

¹⁶⁵ The Special Rapporteur distinguishes between principles of a legal and of a policy nature. See International Law Commission, Seventy-First session. See *Provisional Summary Record of the 3471st Meeting of the International Law Commission to the Seventy-First Session (First Part)*, *supra* note 33, 3.

Business, Armed Conflict, and Protection of the Environment: What Avenues for Corporate Accountability?

Marie Davoise*

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* Marie Davoise (LL.M., King’s College London) is an English-qualified solicitor specializing in international criminal law and business and human rights, with experience in private practice, at the International Criminal Court and at the UN International Residual Mechanism for Criminal Tribunals. The views and opinions expressed in this article are those of the author.

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Abstract

In July 2019, the International Law Commission (ILC) provisionally adopted, on first reading, a series of draft principles on the protection of the environment in relation to armed conflict (the Draft Principles). The role of businesses in armed conflict is addressed in Draft Principle 10 and Draft Principle 11. The latter, in particular, requires States to implement appropriate measures to ensure that corporations operating in or from their territories can be held accountable for environmental harm in the context of armed conflict.

The inclusion of those two Draft Principles reflects increasingly vocal calls for corporate accountability, which has been the focus of the growing field of Business and Human Rights (BHR), an umbrella term encompassing a variety of legal regimes from tort law to criminal law.

This contribution will look at the link between businesses, the environment, and armed conflict. Using the newly adopted Draft Principle 11 as a starting point, it explores three major liability regimes through which businesses could be held accountable for damage to the environment in armed conflict: State responsibility, international criminal law, and transnational tort litigation.

Using case studies, the article discusses some of the challenges associated with each of those regimes, before concluding that the cross-fertilization phenomenon observed in this article (between public/private law, domestic/international level, and across various jurisdictions) is making BHR an increasingly salient discipline and useful tool in the fight against impunity for corporate environmental harm in armed conflict.

A. Introduction – Corporate Wrongs and the ‘Geographies of Injustice’

The dual role of the environment as both a driver and a casualty of armed conflicts around the globe has garnered increasing attention in recent years.¹ In 2013, the International Law Commission (ILC) decided to include the topic *Protection of the Environment in Relation to Armed Conflicts* in its program of work.² Six years later, the Drafting Committee of the ILC presented the Draft Principles it had provisionally adopted on the topic to the ILC in June 2019,³ which the Commission provisionally adopted on first reading at its seventy-first session a month later. The Draft Principles apply to the three temporal phases of armed conflict (before, during, and after conflict)⁴ and cover broad ground, from the designation of protected zones to the management of toxic and hazardous remnants of war.

Recognizing the increased willingness to address the role of businesses in armed conflict, which I describe in more detail later, the Draft Principles include two provisions that are directly relevant to corporations. First, Draft Principle 10 recommends that States take appropriate measures to ensure that corporations operating in or from their territories exercise due diligence with respect to protection of the environment in areas of armed conflict or in post-conflict environments. Second, Draft Principle 11 addresses situations in which harm has been caused to the environment by corporations and invites States to take appropriate measures, legislative or otherwise, to ensure that companies can be held liable for having caused such harm.

The inclusion of Draft Principles 10 and 11 makes sense in the context of an international legal sphere increasingly concerned with the impact of businesses,

¹ See for example International Committee of the Red Cross, ‘Environment and International Humanitarian Law’ (2010) available at www.icrc.org/en/doc/war-and-law/conduct-hostilities/environment-warfare/overview-environment-and-warfare.htm (last visited 26 May 2020). See also Resolution No. 15 of the United Nations Environment Assembly of the United Nations Environment Programme, *Protection of the Environment in Areas Affected by Armed Conflict*, UN Doc UNEP/EA.2/Res.15, 4 August 2016.

² GA Res. 68/112, UN Doc A/RES/68/112, 18 December 2013.

³ ILC, *Protection of the Environment in Relation to Armed Conflicts: Text and Titles of the Draft Principles Provisionally Adopted by the Drafting Committee on First Reading*, UN Doc A/CN.4/L.937, 6 June 2019.

⁴ Although it should be noted that not all Draft Principles are applicable during all phases; see Draft Principle 1 and Commentary thereto in International Law Commission, *Report of the International Law Commission to the Seventy-First session (29 April - 7 June and 8 July - 9 August 2019)*, UN Doc A/74/10, 216, 20 August 2019.

particularly multinational corporations, on both humans and the environment. Indeed, by operating in “[...] spatially concentrated clusters often referred to as transnational production chains [...]”,⁵ such corporations simultaneously transcend and exercise unprecedented influence over national economies.⁶ This creates a dissonance between the globalization of capital and the spatiality of the law, and, in particular, the spatiality of adjudication. By focusing on traditional links between business activities and domestic territory, domestic legal regimes become out of step with a global economy made of transnational supply chains, cross-border trade, and movements of both goods and people.⁷ Where the economy goes, and the law fails to follow, an accountability breach is created, opening a space into which many corporations rush. The dissonance creates what Baxi refers to as the “geographies of injustice”⁸ peculiar to conflict adjudication. The resulting negative effect is compounded by the privatization of State functions,⁹ leading to an erosion of “[...] the substance of public authority that States wield over their territory – including their capacity to protect human rights [...]”.¹⁰

This territoriality of jurisdiction is, of course, a consequence of the sovereignty granted to States under international law.¹¹ It is based on the Westphalian and post-Westphalian concept of the territorial nation-State, under which a State’s territory is traditionally regarded as the basic unit for

⁵ P. Macklem, ‘Corporate Accountability Under International Law: The Misguided Quest for Universal Jurisdiction’, 7 *International Law FORUM du droit international* (2005), 281.

⁶ For example, Kearney notes that the power of transnational corporations vis-à-vis the State has “[...] climbed markedly over the past sixty years [...]”, with 69 of the world’s 100 largest economies now belonging to corporations rather than States; see D. Kearney, ‘Transforming Adversary to Ally: Mobilizing Corporate Power for Land Rights’, 27 *Journal of Transnational Law & Policy* (2017-2018), 100-101.

⁷ Report of the United Nations High Commissioner for Human Rights, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse*, UN Doc A/HRC/32/19, 10 May 2016, para. 5.

⁸ U. Baxi, ‘Some Newly Emergent Geographies of Injustice: Boundaries and Borders in International Law’, 23 *Indiana Journal of Global Legal Studies* (2016).

⁹ For a discussion of the global trend towards privatization, see A. Reinisch, ‘The Changing International Framework for Dealing with Non-State Actors’, in P. Alston (ed.), *Non-State Actors and Human Rights* (2005), 75.

¹⁰ D. Augenstein, ‘Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Right to a Remedy’, 18 *Human Rights Law Review* (2018), 594.

¹¹ E. Young, ‘Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation after Kiobel’, 64 *Duke Law Journal* (2015) 6, 1031.

jurisdiction.¹² Thus, the barriers to cross-border litigation involving multinational companies are simply “[...] an expression of the delimitation of jurisdiction in public international law that protects the sovereign authority States wield over their territory and the people therein [...]”¹³

As a result of this sovereign status, the State is usually considered to be the only subject under international law. Under this view, companies, as non-State actors, are not considered responsible for their internationally wrongful acts, including violations of international human rights norms.¹⁴ In addition, classical international human rights law typically rested on the assumption that the perpetrator and victims would be located in the same territory, that there was a “[...] geographical overlap between the rights-owner and the rights-bearer [...]”¹⁵ As a result, international law appears to be an imperfect tool to address violations where a business (e.g. a multinational company headquartered in Europe) and the victim of its operations (e.g. local communities suffering environmental harm in a conflict zone) are located on two separate territories, often subject to different legal regimes.¹⁶ This is addressed in section *B. Doctrinal Difficulties in Applying International Law to Corporations*.

For my purposes, it is also important to understand the link between the three components of Draft Principles 10 and 11, which are at the intersection of a Venn diagram made up of three circles: corporations, environmental harm, and armed conflict. Section *C. Business, Armed Conflict and the Environment: A Venn Diagram* will examine the interplay between those three circles in more detail.

Having established the doctrinal difficulties of imposing direct international law obligations on businesses, and having explained precisely why the link between business, armed conflict, and the environment calls for some sort of corporate liability, the question is then: how? This contribution explores three potential avenues to address corporate environmental harm in armed conflict: the law of State responsibility through a binding treaty, the domestic

¹² Reinisch, ‘The Changing International Framework for Dealing with Non-State Actors’, *supra* note 9.

¹³ Augenstein, ‘Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Right to a Remedy’, *supra* note 10, 598.

¹⁴ C.L. Sriram, O. Martin-Ortega & J. Herma, *War, Conflict and Human Rights: Theory and Practice*, 3rd ed. (2018), 83.

¹⁵ Augenstein, ‘Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Right to a Remedy’, *supra* note 10, 596.

¹⁶ Macklem, ‘Corporate Accountability Under International Law: The Misguided Quest for Universal Jurisdiction’, *supra* note 5, 282-283.

application of international criminal law, and transnational tort litigation before national courts.

Indeed, the law of State responsibility could be one way to hold businesses indirectly accountable. BHR is a booming discipline, growing out of the recognition that corporations have a responsibility to respect human rights and should be held accountable for adverse human rights impacts linked to their commercial operations. It is characterized by the wide spectrum of instruments it encompasses, from soft law *initiatives* to (admittedly less frequent) legally binding instruments.¹⁷ A milestone in the development of BHR has been the adoption of the United Nations (UN) Guiding Principles on Business and Human Rights (the “UN Guiding Principles”)¹⁸ in 2011, which developed a framework based on three pillars: the State duty to protect human rights, the corporate responsibility to respect human rights, and access to remedy for victims of business-related abuses. Although not legally binding, the UN Guiding Principles are nevertheless considered “[...] a key reference for responsible business conduct by all stakeholder groups including business, civil society, and governments.”¹⁹ Soft law instruments, however, have often revealed the limit of their impact.²⁰ To address such shortcomings, an intergovernmental working group was established within the UN framework in June 2014, with the task of drafting a binding treaty on human rights and business (“Draft BHR Treaty”). As we will see below, this UN-backed binding treaty is currently being negotiated, albeit not without difficulty. Corporate accountability for human rights and environmental abuses²¹ is a central component of BHR. The current

¹⁷ E. Groulx Diggs, M. Regan & B. Parance, ‘Business and Human Rights as a Galaxy of Norms’, 50 *Georgetown Journal of International Law* (2019) 2, 309.

¹⁸ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Doc. A/HRC/17/31, 21 March 2011.

¹⁹ A. Graf & A. Iff, ‘Respecting Human Rights in Conflict Regions: How to Avoid the Conflict Spiral’, 2 *Business and Human Rights Journal* (2017), 111.

²⁰ For a discussion of the flaws associated with purely voluntary approaches and soft law instruments, see D. Bilchitz, ‘The Necessity for a Business and Human Rights Treaty’, 1 *Business and Human Rights Journal* (2016), 203-228.

²¹ Throughout this paper, the term *human rights* will be used broadly to cover legal claims anchored in a variety of disciplines, from criminal law to tort law. The reason for this is twofold. First, such disciplines have at times been found to contain strong human rights elements, and in fact they form an integral part of *business and human rights* as a discipline. Second, it remains common for environmental concerns to be pursued through the lens of human rights law. While there are valid concerns about an overly anthropocentric view

draft contains provisions relevant to protection of the environment and legal liability of corporations. If enacted, the treaty could offer an avenue for addressing corporate environmental harm in armed conflict through what Harold Koh calls *transnational law*,²² or international law that is then transplanted at the domestic level. This avenue is discussed in more detail at section *D. State Responsibility, Transnational Law, and the Draft BHR Treaty*.

The fight for corporate accountability is unfolding both at the international and domestic levels. National court systems provide an effective battleground for those seeking to use strategic litigation to hold companies to account, fueled by an apparent judicial willingness to consider what can broadly be defined as *human rights cases* against corporations.²³ As national judges increasingly look to comparative as well as international jurisprudence for guidance, cross-fertilization occurs both vertically (international/national) and horizontally (across domestic jurisdictions).²⁴ Domestic avenues for redress and accountability offer a crucial tool to address environmental harm caused by corporations in armed conflict. This article offers two main routes through which environmental harm caused by corporations could be addressed. Section *E. International Criminal Law and Argor-Heraeus* describes the public law route, which consists of a combination of criminal law and the increasing use of extra-territorial (and, in some cases, universal) jurisdiction. Section *F. Transnational Tort Litigation and Vedanta* discusses the private law route, i.e. the use of transnational tort litigation by

of environmental protection, the human rights framework, as understood in this broad sense, remains a useful conceptual tool for our purposes. See T. Stephens, *International Courts and Environmental Protection* (2009), 54. See also J. Auz Vaca, 'The Environmental Law Dimensions of an International Binding Treaty on Business and Human Rights', 15 *Brazilian Journal of International Law* (2018), 158.

²² H. Koh, 'Why Transnational Law Matters', 24 *Penn State International Law Review* (2005-2006), 745.

²³ Open Society Justice Initiative, *Strategic Litigation Impacts: Insights from Global Experience* (2018), 39: "Not only are more cases being brought, but litigation is expanding into new fields, from anti-corruption to international criminal justice, from the right to land to a sustainable environment, from access to citizenship to the rights of persons with intellectual disabilities. It is being pursued, not only in domestic fora, but transnationally through participation in other national court systems, on the assumption that, as national judges increasingly look to comparative as well as international jurisprudence for guidance, strategic litigation in one place may affect norm development elsewhere."

²⁴ A double-edged process with potentially negative consequences, see for example C. McCrudden, 'Transnational Culture Wars', 13 *International Journal of Constitutional Law* (2015), 434, describing increasing frequency of litigation on religious issues in European courts conducted by United States (US) faith-based Non-Governmental Organizations (NGOs).

private parties such as affected individuals and communities. Importantly, when a violation of criminal law attracts civil liability, “[...] wrongdoing becomes addressed by diffuse layers of law [...]”,²⁵ allowing accountability to become available in multiple fora and cross-fertilization to occur between the private and public law spheres.

This contribution will conclude by arguing that the Draft Principles, the Draft BHR Treaty, international criminal law, and transnational tort litigation all contribute to what Dworkin calls *salience*, a theory of the creation of international law according to which:

“If a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or by other form of coordination, then other states have at least a prima facie duty to subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect, expanded in that way, would improve the legitimacy of the subscribing state and the international order as a whole.”²⁶

In this regard, the Draft Principles do not just add a star to what has been called the BHR *galaxy of norms*,²⁷ but also consolidate and participate in the elevation to salience of an international norm against corporate environmental harm in armed conflict.

²⁵ M. Drumbl, ‘Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation and Development’, *International Center for Transitional Justice* (2009), 23.

²⁶ D. B. Dennison, ‘Taking Salience Seriously: the Viability of Ronald Dworkin’s Theory of Salience in the Context of Extra-Territorial Corporate Accountability’, 1 *Glocalism: Journal of Culture, Politics and Innovation* (2015), 8. See also O. Martin-Ortega, ‘Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?’, 32 *Netherlands Quarterly of Human Rights* (2014) 1, 44, 72: “In the attempt to regulate business activities and working methods that impact negatively on human rights, a corporate responsibility to respect human rights is emerging. This is not a legal responsibility in international law, but rather a social expectation that is slowly finding its way into mandatory regulatory frameworks”.

²⁷ A *galaxy* made of various layers of standards and expectations ranging from classic enforceable *hard law* to voluntary principles generated by private parties, multi-stakeholder initiatives, and international organizations. See Groulx Diggs, Regan & Parance, ‘Business and Human Rights as a Galaxy of Norms’, *supra* note 17.

B. Doctrinal Difficulties in Applying International Law to Corporations

The response to environmental harm by multinational businesses in armed conflict will likely require a mix of international and domestic legislation. Two elements of this equation are, by definition, unbound by borders: the environment and multinational corporations. Yet, at the same time, damage occurs and is treated in localized ways, first because the majority of armed conflicts in the world is now non-international armed conflicts²⁸ and, second, because domestic courts are likely to be the most experienced and best prepared to handle cases against corporate actors.²⁹

There are many differences between jurisdictions in terms of legal structures, cultures, traditions, resources, and stages of development, all of which have implications for the issues at hand.³⁰ In that regard, an international liability standard could have an important unifying power.³¹ However, any such international standard of liability would encounter doctrinal difficulties due to the uncertain status of non-State actors, including corporations, in international law. Indeed, the classical view remains that “[...] except through and by the force of treaty, corporations in general do not owe international legal obligations to respect human rights”, with international treaties generally imposing direct international legal obligations only on States.³² Alston calls it the *not-a-cat* syndrome, in which international law status is still defined by reference to the State: you’re either a cat (a State), or you’re not-a-cat (non-State actors, including businesses).³³

²⁸ See D. Pearlstein, ‘Armed Conflict at the Threshold’, 58 *Virginia Journal of International Law* (2019) 2, 371: “The post-Cold War period has seen wars involving non-state actors (non-international armed conflicts, or NIACs) eclipse wars between states as the primary source of armed conflict in the world”.

²⁹ K. Magraw, ‘Universally Liable? Corporate Complicity Liability Under the Principle of Universal Jurisdiction’, 18 *Minnesota Journal of International Law* (2009) 2, 495.

³⁰ Report of the UN High Commissioner for Human Rights, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: Explanatory Notes for Guidance*, UN Doc A/HRC/32/19/Add. 1, 12 May 2016, para. 3.

³¹ V. Grosswald Curran, ‘Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations’, 17 *Chicago Journal of International Law* (2016) 2, 415 [Grosswald Curran, ‘Harmonizing Parent Company Liability’].

³² Macklem, ‘Corporate Accountability Under International Law: The Misguided Quest for Universal Jurisdiction’, *supra* note 5, 281.

³³ P. Alston, ‘The “Not-a-Cat” Syndrome’, in P. Alston (ed.), *Non-State Actors and Human Rights* (2005), 5.

There are, however, at least two reasons why the difficulties associated with a classical, State-centric view of international legal obligations should not be overstated.

First, the classical view is actually undergoing radical changes, and it can now be “[...] credibly asserted that a contemporary reading of human rights instruments shows that non-State actors are also addressees of human rights norms.”³⁴ After the Tokyo and Nuremberg war crimes trials “[...] pierced the veil of State sovereignty and dispelled the myth that international law is for states only”,³⁵ non-State actors began looming ever larger on the horizons of international and human rights law.³⁶ A more nuanced view of legal personality is emerging which departs from a purely State-centric approach.³⁷ States arguably have a *vicarious* or *subsidiary* duty to protect human rights by regulating the behavior of private (non-State) actors, a finding which “[...] now belongs to the *acquis* of international human rights law.”³⁸ Fulfillment of this duty could take the form of States strengthening the legal framework on corporations and human rights, for example by establishing parent company or group liability regimes.³⁹ Regional human rights institutions have espoused this idea of States’ vicarious liability for non-State actors in their case law.⁴⁰ As we will see, this idea of indirectly imposing obligations on non-State actors (in our case, businesses) through State responsibility is central to the upcoming Draft BHR Treaty. The move towards a people-centered approach to international law will only be accelerated by the continuing rise of corporations on the global scene and a better recognition and understanding of environmental rights.⁴¹ Talk of recognition of corporate international legal personality tends to cause anxiety among those

³⁴ Reinisch, ‘The Changing International Framework for Dealing with Non-State Actors’, *supra* note 9, 72.

³⁵ H. Koh, ‘Transnational Public Law Litigation’, 100 *Yale Law Journal* (1991), 2358.

³⁶ Alston, ‘The “Not-a-Cat” Syndrome’, *supra* note 33, 5.

³⁷ Reinisch, ‘The Changing International Framework for Dealing with Non-State Actors’, *supra* note 9, 78.

³⁸ O. De Schutter, ‘Towards a New Treaty on Business and Human Rights’, 1 *Business and Human Rights Journal* (2015) 41, 44 [De Schutter, Towards a New BHR Treaty].

³⁹ Committee on Economic, Social and Cultural Rights, *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights*, UN Doc E/C.12/2011/1, 12 July 2011, 44 [CESCR, July 2011 Statement].

⁴⁰ Reinisch, ‘The Changing International Framework for Dealing with Non-State Actors’, *supra* note 9, 80.

⁴¹ M. Sornarajah, ‘State Responsibility for Harms by Corporate Nationals Abroad’, in C. Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 496.

who seek to decrease, not increase, the legitimacy of corporate participation on the world stage,⁴² but this ignores the fact that legal personality may be limited and does not imply the full set of rights and duties of States, making fears about granting *corporate rights* irrelevant.⁴³

Secondly, in the end, determinations of international personhood do not matter. For example, the concept of international legal personality has sometimes been held “[...] as a shield against the proposition that international criminal law duties can, and do, legitimately and meaningfully extend beyond natural persons”⁴⁴ – but ultimately, the legal personality debate plays no real argumentative role in clarifying the obligations, rights, and capacities of corporations. Noting the circularity of the argument (proving legal personality of corporations in order to impose obligations, and doing so by arguing that companies have international obligations), Reinisch wearily commented that “[t]ruly, the suspicion that the whole matter of international legal personality forms a vast intellectual prison [...] is sometimes hard to suppress.”⁴⁵

The question of the legal personality of businesses under international law is far from settled and continues to generate debate, including in the context of business and human rights.⁴⁶ The extent of its practical impact on corporate

⁴² J. Kyriakakis, ‘International Legal Personality, Collective Entities, and International Crimes’, in N. Gal-Or, C. Ryngaert & M. Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings* (2015), 93.

⁴³ *Ibid.*, 94.

⁴⁴ *Ibid.*, 101.

⁴⁵ Reinisch, ‘The Changing International Framework for Dealing with Non-State Actors’, *supra* note 9, 72. See also N. Gal-Or, M. Noortman & C. Ryngaert, ‘Introduction; Responsibilities of the Non-State Actor in Armed Conflict and the Market Place’, in N. Gal-Or, C. Ryngaert & M. Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings* (2015), 3: “Forcing [non-State actors such as corporations] into the so-called pigeon-hole of legal personality or international subjectivity by measuring it against the State has remained an unsuccessful intellectual exercise. The discourse on the rights of the NSA has been attempting to avoid this conundrum by referring to NSA’s rights as established via participation, not as of inherent subjectivity. Our study follows this strategy of circumvention by focusing on obligations and responsibility as arising from NSA’s *participation* in, and – possibly adverse – impact on, international affairs. It thus continues to plow in this yet barren field in public international law.”

⁴⁶ For examples of the discussion surrounding the legal personality of businesses in the BHR context, see C. Holt, S. Stanton & D. Simons, ‘The Zero Draft Legally Binding Instrument on Business and Human Rights: Small Steps Along the Irresistible Path to Corporate Accountability’ (2018), available at <https://www.business-humanrights.org/>

accountability, however, remains to be seen, particularly in the context of increasingly blurred boundaries between the international and domestic legal spheres.⁴⁷

C. Business, Armed Conflict, and the Environment: A Venn Diagram

Contemporary conflicts are increasingly characterized by the involvement of private actors such as corporations.⁴⁸ Similarly, the connection between conflict and the exploitation of natural resources for commercial gain is well documented⁴⁹. Academic literature has often explored the link between i) businesses and armed conflict, ii) armed conflict and environmental harm, and iii) environmental harm and businesses.

Yet surprisingly little has been written on the three-dimensional interaction of all three components (business, armed conflict, environmental harm), at the intersection of which Draft Principles 10 and 11 can be found. The section below explores the links between those components through the prism of four paradigmatic examples of that Venn diagram between business, armed conflict, and environmental harm.

The first example is that of *land grabs*, or land acquisitions that are undertaken without the evicted party's consent or that otherwise violate their human rights.⁵⁰ Land grabs involve the forcible displacement of communities,

en/the-zero-draft-legally-binding-instrument-on-business-and-human-rights-small-steps-along-the-irresistible-path-to-corporate-accountability (last visited 26 May 2020), and N. Bernaz, 'The Draft UN Treaty on Business and Human Rights: The Triumph of Realism Over Idealism' (2018), available at <https://www.business-humanrights.org/en/the-draft-un-treaty-on-business-and-human-rights-the-triumph-of-realism-over-idealism> (last visited 26 May 2020).

⁴⁷ A.-M. Slaughter & W. Burke-White, 'The Future of International Law is Domestic (or, The European Way of Law)', 47 *Harvard International Law Journal* (2006) 2, 327, 350.

⁴⁸ Sriram, Martin-Ortega & Herma, *War, Conflict and Human Rights: Theory and Practice*, *supra* note 14, 80.

⁴⁹ R. Mares, 'Corporate and State Responsibilities in Conflict-Affected Areas', 83 *Nordic Journal of International Law* (2014), 294. The strong correlation between dependence on natural resources and increased risk of conflict is a facet of the *resource curse*, as discussed in e.g. War on Want, 'Fanning the Flames: The Role of British Mining Companies in Conflict and the Violation of Human Rights' (2007), available at <http://curtisresearch.org/wp-content/uploads/Fanning-the-Flames.pdf> (last visited 26 May 2020).

⁵⁰ Following the widely used definition in the Tirana Declaration issued by the International Land Coalition in 2011.

violating a wide spectrum of human rights, including the right to food and water, and also often lead to severe environmental degradation.⁵¹ Land grabs, and corporate grabs in particular, are on the rise globally.⁵² For example, in recent years, Southeast Asia has witnessed a surge in corporate-driven land deals that can often be distinguished by their international nature, far-reaching size, and involvement of transnational corporations. Such deals include agricultural investments (e.g. for rubber and palm oil) as well as large-scale projects driven by extractive industries.⁵³ Land grabs can take such proportions that they arguably amount to international crimes – a position taken by international lawyers who, in 2014, asked the Prosecutor of the ICC to investigate massive land-grabbing and associated crimes, including environmental crimes, committed in Cambodia.⁵⁴

Land-grabbing often acts as a driver of armed conflict and instability, as noted in a 2016-2017 Rights and Resources Initiative Report.⁵⁵ In Colombia, for example, land grabs, insecure rights, and unequal land distribution exacerbated the 50-year civil war, which relied on seized lands as a key funding source.⁵⁶ In Liberia, conflict over land and resources was identified as a root cause of the civil war that ended in 2003.⁵⁷ In Mali, tenure insecurity and weak natural resource management have been recognized as significant factors of conflict that needed to be addressed to ensure lasting peace and stability.⁵⁸ Environmental war crimes, property crimes, and expropriation are inextricably intertwined with conflict, feeding off each other in a cycle wherein atrocities inflicting damage on the environment can, unless remediated as part of post-conflict transition, simply

⁵¹ Friends of the Earth Europe, 'Land & Land-Grabbing', available at <http://www.foeeurope.org/land-grabbing> (last visited 26 May 2020).

⁵² Kearney, 'Transforming Adversary to Ally: Mobilizing Corporate Power for Land Rights', *supra* note 6, 100.

⁵³ Y. Kanosue, 'When Land is Taken Away: States' Obligations under International Human Rights Law Concerning Large-Scale Projects Impacting Local Communities', 15 *Human Rights Law Review* (2015) 4, 643, 645.

⁵⁴ J. Crawford, 'Could Cambodia be Test for New ICC Move on Land Grabs?', JusticeInfo.net (2016) available at <https://www.justiceinfo.net/en/tribunals/icc/29554-could-cambodia-be-test-for-new-icc-move-on-land-grabs.html> (last visited 26 May 2020).

⁵⁵ Rights and Resources Initiative, 'From Risk and Conflict to Peace and Prosperity: The Urgency of Securing Community Land Rights in a Turbulent World', *Annual Review 2016-2017* (2017), 25.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, 26.

⁵⁸ *Ibid.*, 26.

reactivate competition over resources and reignite fighting.⁵⁹ With the centrality of land to livelihoods and poverty reduction in post-war torn areas, land grabs regularly attract disputes and controversy in post-conflict regions,⁶⁰ leading to a volatile environment in which large-scale land acquisitions can spark political instability.⁶¹

Another example of intersection consists of commercial activities leading to human displacement outside the context of land grabbing. Such was the case in South Sudan, where commercial exploitation of oil resources was found to be a major driver behind the Sudanese government's *scorched earth* policy that displaced thousands of people.⁶² The ecological impact of conflict-related human displacement was recognized by the ILC itself in Draft Principle 8, which addresses the potential environmental strain caused by massive displacement of civilian populations. Such was the case in the Democratic Republic of Congo, for example, where thousands of internally displaced refugees, the vast majority of which lived with host communities or in rudimentary shelters in makeshift camps, led to large-scale environmental degradation (e.g. deforestation to meet energy and housing needs, wildlife poaching, charcoal trade as a way to earn money, exponential unplanned urbanization leading to waste management issues).⁶³

A third illustration of the intersection between business, armed conflict, and the environment can be found in the rights of indigenous people, whose "[...] special relationship [with] their environment [...]"⁶⁴ is explicitly recognized in Draft Principle 5. Indigenous communities are often violently deprived of their rights in the context of commercial activities, such as mining.⁶⁵ Failure to

⁵⁹ Drumbl, 'Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation and Development', *supra* note 25, 5.

⁶⁰ S. Mabikke, 'Escalating Land Grabbing in Post-Conflict Regions of Northern Uganda', Conference paper presented at the International Conference on Global Land Grabbing (2011), ii.

⁶¹ E. Gorman, 'When the Poor Have Nothing Left to Eat: The United States' Obligation to Regulate American Investment in the African Land Grab', 75 *Ohio State Law Journal* (2014) 1, 199, 204.

⁶² HR Council, *Report of the Commission on Human Rights in South Sudan*, UN Doc A/HRC/40/69, 21 February 2019.

⁶³ UN Environment Programme, *The Democratic Republic of the Congo: Post-Conflict Environmental Assessment Synthesis for Policy Makers* (2011), 26.

⁶⁴ *Report of the International Law Commission to the Seventy-First session*, UN Doc A/74/10, 20 August 2019, 225.

⁶⁵ A. Gedicks, 'Transnational Mining Corporations, the Environment, and Indigenous Communities', 22 *Brown Journal of World Affairs* (2015) 1, 129.

respect the rights of local communities can snowball into violent confrontations and even in some instances undermine national stability, as was the case in 2016 in Ethiopia, where the government's decision to clear forestland for an investment project led to civil and political unrest so severe that a country-wide state of emergency was declared.⁶⁶ Conversely, armed conflict may also have the effect of increasing existing vulnerabilities to environmental harm or creating new types of environmental harm on indigenous territories, thereby affecting the survival and well-being of the peoples connected to it.

A fourth example of corporate links to environmental harm in the context of armed conflict is the war crime of pillaging. Draft Principle 18 restates the prohibition of pillage and its applicability to natural resources. Indeed, illegal exploitation of natural resources is a driving force for many armed conflicts and, in particular, non-international armed conflict in recent decades.⁶⁷ Pillage often causes major environmental strain on affected areas.⁶⁸ One emblematic example of this link between natural resources and violence is the Democratic Republic of Congo, where natural resources are widely acknowledged to have played a key role in the country's complex cycle of conflict.⁶⁹ The commentary is "[...] unanimous that the real reason for the protracted armed conflict that has been going on in that country since 1993 is the exploitation of the country's

⁶⁶ F. Horne, 'Anger Boiling Over Ethiopia: Declaration of State of Emergency Risks Further Abuses', Human Rights Watch (2016), available at <https://www.hrw.org/news/2016/10/11/anger-boiling-over-ethiopia> (last visited 26 May 2020).

⁶⁷ According to the UN Environment Programme, 40 per cent of internal armed conflicts over the past 60 years were related to natural resources, and since 1990 at least 18 armed conflicts have been fuelled directly by natural resources. See UN Environment Programme, *Renewable Resources and Conflict: Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflicts* (2012), 14.

⁶⁸ See for example United Nations, UN Environment Programme, *The Democratic Republic of the Congo: Post-Conflict Environmental Assessment Synthesis for Policy Makers* (2011), 26-28; UN Security Council *Report of the Panel of Experts Pursuant to Paragraph 25 of Security Council Resolution 1478 (2003) Concerning Liberia*, UN Doc S/2003/937, 2003, para. 14; UN Environment Programme-INTERPOL, *The Rise of Environmental Crime – A Growing Threat to Natural Resources Peace, Development and Security* (2016), 69. See also A. Lopez, 'Criminal Liability for Environmental Damage Occurring in Times of Non-International Armed Conflict: Rights and Remedies', 18 *Fordham Environmental Law Review* (2007) 2, 231.

⁶⁹ UN Environment Programme, *The Democratic Republic of the Congo: Post-Conflict Environmental Assessment Synthesis for Policy Makers* (2011), 24; UN Security Council, *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo*, UN Doc S/2002/1146, 16 October 2002.

mineral resources [...]”,⁷⁰ with many companies, especially Canadian and American corporations, entering into mineral exploitation deals with both the rebels and Kabila’s government. The volatile environment of resource-rich States creates opportunities for corporations to engage in resource theft, plunder, and other forms of illegal natural resource exploitation, which often brings further instability to conflict-riddled countries.⁷¹ Some of the most emblematic cases of corporate unaccountability have appeared in unstable and violence-ridden zones,⁷² due in part to the role of natural resources in initiating, escalating, and sustaining armed conflict.⁷³

Perhaps unsurprisingly, measures aimed at addressing the role of businesses in conflict have tended to be *siloed* and consider only two of the three components at the same time: business and environmental harm, environmental harm and armed conflict, or business and armed conflict. The latter has given rise to a wide array of corporate social responsibility initiatives aimed at safeguarding human rights in conflict-affected areas, from the 2000 Voluntary Principles for Security and Human Rights to the 2011 Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas produced by the Organization for Economic Co-operation and Development (OECD).⁷⁴ Conflict sensitive business practices, which have been on the rise since 2005,⁷⁵ are increasingly integrated into human rights due diligence.

The BHR world is cognizant of the need for specific regulation of businesses operating in conflict-affected areas, and UN Guiding Principle 7 explicitly acknowledges that some of the worst human rights abuses involving business occur in armed conflict situations “[...] where the human rights regime cannot be expected to function as intended [...]”. The commentary to UN

⁷⁰ P. Okowa, ‘Natural Resources in Situations of Armed Conflict: Is There a Coherent Framework for Protection?’, 9 *International Community Law Review* (2007) 3, 237, 239.

⁷¹ J. Tsabora, ‘Illicit Natural Resource Exploitation by Private Corporate Interests in Africa’s Maritime Zones during Armed Conflict’, 54 *National Resources Journal* (2014) 1, 181, 190.

⁷² Mares, ‘Corporate and State Responsibilities in Conflict-Affected Areas’, *supra* note 49, cites the example of Talisman in Sudan, Shell and other oil companies operation in a militarized Niger delta, and Freeport McMoran mining activities in Indonesia’s West Papua while an emergency was taking place.

⁷³ S. Wisner, ‘Criminalizing Corporate Actors for Exploitation of Natural Resources in Armed Conflict’, 16 *Journal of International Criminal Justice* (2018) 5, 964.

⁷⁴ Mares, ‘Corporate and State Responsibilities in Conflict-Affected Areas’, *supra* note 49, 295.

⁷⁵ Graf & Iff, ‘Respecting Human Rights in Conflict Regions: How to Avoid the Conflict Spiral’, *supra* note 19.

Guiding Principle 7 suggests a range of actions that both States and businesses can take to address such heightened risks, including for States to explore “[...] civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses [...]”.

The specific challenges and responses to business and human rights in conflict-affected regions were also addressed in a report to the Human Rights Council in 2011 titled “Business and human rights in conflict-affected regions: challenges and options towards State responses”.⁷⁶ It contains a list of recommendations for States to regulate business impacts in conflict-affected regions throughout the conflict cycle, including the suggestion that States “[...] should explore civil, administrative or criminal liability [...]” for businesses committing or contributing to gross human rights abuses.

This is echoed in the commentary to UN Guiding Principle 23:

“Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example). Business enterprises should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses.”

The link between armed conflict and corporate accountability has two components, both mirrored in the Draft Principles.

First, there is a growing recognition that multinationals wanting to operate in such volatile environments will need to conduct an enhanced due diligence process to identify risks of gross human rights abuse. Businesses will also be expected to act on the information uncovered through this enhanced due diligence process, which in extreme cases could “[...] result in dramatic

⁷⁶ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises John Ruggie, *Business and Human Rights in Conflict-Affected Regions: Challenges and Options Towards State Responses*, UN Doc A/HRC/17/32, 27 May 2011.

decisions of choosing to not conduct business in conflict zones [...]” at all.⁷⁷ This is reflected in Draft Principle 10 on corporate due diligence.

Second, it highlights the need for better access to remedy for harm occurring in so-called “high-risk host countries” (defined broadly by Skinner as countries that have a weak, ineffective, or corrupt judicial system)⁷⁸ which includes the majority of countries where international or non-international armed conflict is unfolding. This is addressed in Draft Principle 11 on corporate liability.

D. State Responsibility, Transnational Law and the Draft BHR Treaty

Beyond such voluntary initiatives and soft law requirements, such as those enshrined in the UN Guiding Principles, could the law of State responsibility help address corporate environmental harm in armed conflict?

Faced with the *geographies of injustice* conundrum discussed above, some international treaty bodies have certainly advocated a progressive approach to extraterritorial human rights protection,⁷⁹ calling on home States to take steps to facilitate greater access to State-based judicial mechanisms by those adversely affected by foreign business-related human rights impacts of business enterprises domiciled in the respective home States.

For example, a 2011 statement issued by the UN Committee on Economic, Social, and Cultural Rights (CESCR) issued a statement (the “CESCR July 2011 Statement”) inviting States “[...] to take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction.”⁸⁰ In 2017, the CESCR published a general comment⁸¹ relating specifically to economic, social, and cultural rights in the context of business

⁷⁷ Mares, ‘Corporate and State Responsibilities in Conflict-Affected Areas’, *supra* note 49, 303.

⁷⁸ G. Skinner, ‘Parent Company Accountability: Ensuring Justice for Human Rights Violations’, International Corporate Accountability Roundtable (2015), 10, available at <https://justice-project.org/wp-content/uploads/2017/07/pcap-report-2015.pdf> (last visited 26 May 2020).

⁷⁹ Augenstein, ‘Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Right to a Remedy’, *supra* note 10, 610.

⁸⁰ CESCR, July 2011 Statement, *supra* note 39, para. 5.

⁸¹ CESCR, *General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN Doc E/C.12/GC/24, 10 August 2017.

activities, in which it again exhorts States to “[...] take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction (whether they were incorporated under their laws, or had their statutory seat, central administration or principal place of business on the national territory)”. Such calls have also been made in specific contexts such as children’s rights, as seen in a 2013 general comment by the UN Committee on the Rights of the Child⁸² encouraging States to provide mechanisms, both judicial and non-judicial, to provide remedy “[...] for children and their families whose rights have been violated by business enterprises extraterritorially when there is a reasonable link between the State and the conduct concerned.”

Such exhortations to adopt a broad view of extraterritorial obligations are not limited to the human rights sphere. For example, Article 5(3) of the new Dutch model bilateral investment treaty requires contracting States to “[...] take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy [...]”.

Perhaps most emblematic of the international community’s willingness to consider extraterritorial protection of human rights is the Draft BHR Treaty currently under negotiation. The genesis of this draft treaty can be found in a September 2013 statement to the Human Rights Council,⁸³ which called for a legally binding international instrument on business and human rights. An intergovernmental working group was established within the UN framework in June 2014, with the task of drafting a binding treaty on human rights and business. A first draft (the *Zero Draft*) was published on 16 July 2018.⁸⁴

The drafting and negotiation process, which is still ongoing, has been bumpy so far, with divided opinions and reluctant engagement from some States and regional organizations. There has been considerable pushback from the European Union (EU), for example, which some say is at best a “[...] lack of

⁸² UN Committee on the Rights of the Child, *General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children’s Rights*, UN Doc CRC/C/GC/16, para. 44.

⁸³ Republic of Ecuador, Statement on behalf of a Group of Countries at the 24th Session of the Human Rights Council (2013), available at <https://www.business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf> (last visited 26 May 2020).

⁸⁴ ‘Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’, Zero Draft, 16 July 2018, available at <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> (last visited 26 May 2020).

substantive EU engagement [...]” in the process,⁸⁵ and at worst a decision to drop out of it altogether,⁸⁶ and which the EU defended on the basis of a need to “[...] balance human rights concerns with legitimate economic interests.”⁸⁷

A second, revised draft was published on 16 July 2019.⁸⁸ Intergovernmental negotiations continued during the 5th session of the working group on 14 to 18 October 2019, during which the EU noted its (and others’) continuing dissatisfaction with the draft instrument, as well as the fact that it would reserve its position until granted a formal negotiation mandate.⁸⁹

Although an in-depth analysis of the current Draft Treaty is outside the scope of this contribution, three features are worth noting. The first feature concerns the scope of the Draft Treaty. Article 6 contains the standard of legal liability, which would require States to have a “[...] comprehensive and adequate [...]” system of legal liability in place for corporate violations of human rights. This would include legal liability for a company who failed to prevent harm caused by another natural or legal person in the context of business activities, regardless of where the activity takes place. This seems like a broad provision, but two conditions are attached to that liability: the company must have had a contractual relationship with that person, and the company must “[...] sufficiently control [...]” or supervise the relevant activity that caused the harm, or should have foreseen the risk of abuse. This could considerably narrow the scope of the provision in practice, where supply chains can consist of numerous layers not

⁸⁵ Fédération internationale des droits de l’homme, ‘Citizens Demand the EU Stops Stalling on a Treaty to Ensure that Businesses Respect Human Rights’ (18 July 2019), available at <https://www.fidh.org/en/international-advocacy/european-union/citizens-demand-the-eu-stops-stalling-on-a-treaty-to-ensure-that> (last visited 26 May 2020).

⁸⁶ Friends of the Earth Europe, ‘Leak: EU to Back out of UN Treaty on Business and Human Rights’ (13 March 2019), available at <http://www.foeeurope.org/leak-eu-un-treaty-human-rights-130319> (last visited 26 May 2020).

⁸⁷ European Parliament Research Service, ‘Briefing: Towards a Binding International Treaty on Business and Human Rights’ (2018), available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI\(2018\)620229_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI(2018)620229_EN.pdf) (last visited 26 May 2020).

⁸⁸ ‘Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’, Revised Draft, 16 July 2019, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf (last visited 26 May 2020).

⁸⁹ See compilation of statements made at the HR Council, ‘Fifth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’, available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session5/Pages/Session5.aspx> (last visited 26 May 2020).

necessarily linked by contractual relationships.⁹⁰ Adjudicative jurisdiction for human rights violations amounting to crimes has also been narrowed, as the new draft contains no trace of the previous Article 10(11) in the Zero Draft, which required States to implement “[...] appropriate provisions for universal jurisdiction [...]” over such crimes. As we will see below, universal jurisdiction is a controversial topic, which may explain its removal from the recent draft. Although explicit references to universal jurisdiction are gone, the new Article 6(7) now contains a list of crimes for which States must ensure some sort of liability of corporations. This includes the core international crimes of war crimes, crimes against humanity and genocide as defined by the Rome Statute. If enacted, this provision would be significant in that it would align domestic laws with international criminal law – a welcome unification, but one which might however prove politically unpalatable for those States who are not party to the Rome Statute.

A second noteworthy feature is the contrast between Article 10(8) of the Zero Draft, which required States to provide for corporate criminal liability for human rights abuses amounting to criminal offences, and the first few words of Article 6(7), under which States are asked to provide liability for the listed crimes “[...] subject to their domestic law [...]”. Under the new Draft, States can also choose to provide criminal but also civil or administrative liability of legal persons for such crimes.

Finally, the current Draft is relevant to our discussion in that it addresses both the question of human rights impact of business activities in conflict situations, as well as the specific question of impact on the environment. Article 14 of the current draft requires special attention to be paid in the case of business activities in conflict-affected areas. Article 5(3)(e) requires enhanced human rights due diligence when conducting business activities in conflict areas or occupied territories, while Article 5(3)(a) and (c) provide for mandatory environmental impact assessment and public reporting on environmental standards.

Despite the opposition and controversy surrounding it, the Draft BHR Treaty is therefore a significant step forward in the pursuit of corporate accountability, including for environmental harm in armed conflict. Regulating corporate behavior through an international instrument binding on States

⁹⁰ T. Manandhar & P. Thielborger, ‘Bending the Knee or Extending the Hand to Industrial Nations? A Comment on the New Draft Treaty on Business and Human Rights’, *EJIL:Talk!* (23 August 2019), available at <https://www.ejiltalk.org/bending-the-knee-or-extending-the-hand-to-industrial-nations-a-comment-on-the-new-draft-treaty-on-business-and-human-rights/> (last visited 26 May 2020).

would also constitute an example of *transnational law* allowing bypassing of the debate on corporate personality in public international law. It is, however, still at the negotiating stage. The next two sections therefore look at existing regimes and mechanisms already in place to address such violations.

E. International Criminal Law and Argor-Heraeus

In 2013, Argor-Heraeus, one of the largest gold refineries in the world, became the subject of a domestic criminal investigation in Switzerland for pillaging Congolese natural resources. According to the criminal complaint filed with the Swiss Federal Prosecutor's Office by Non-Governmental Organization (NGO) TRIAL, in 2004-2005 the company bought approximately three tons of gold ore illegally mined in the wartorn region of Ituri by Congolese militia *Front des Nationalistes Intégrationnistes* (FNI), then shipped through intermediaries in Uganda and the Jersey Islands.⁹¹ Gold proceeds were then used to fund the ongoing war.⁹²

According to the complaint, Argor-Heraeus knew, or at least should have known, that the raw material it was acquiring was the proceeds of pillage, which is a war crime. This claim was based on evidence such as reports from the UN Group of Experts, NGO and media reports showing that the extent of pillaging in the Democratic Republic of Congo was a well-known fact in Switzerland at the time, and on data from the Ugandan ministry of mines and from other official sources indicating that Ugandan production represented only a small proportion of its gold exports.

In 2015, in a widely criticized decision, the Swiss Federal Prosecutor's Office dismissed the complaint for lack of evidence.⁹³ The decision found that

⁹¹ D. Muhlemann & S. Mbiyavanga, 'Natural Resources and Money Laundering: Commodity and Precious Metals Deals From the Perspective of Swiss Money Laundering Law' (2018), available at <https://www.oecd.org/corruption/integrity-forum/academic-papers/Muhlemann-Mbiyavanga.pdf> (last visited 26 May 2020); J. Stewart, 'Corporate War Crimes Begin', *Opinio Juris* (2013) available at <http://opiniojuris.org/2013/11/14/corporate-war-crimes-begin/> (last visited 26 May 2020).

⁹² Human Rights Watch, 'The Curse of Gold' (2005), available at <https://www.hrw.org/report/2005/06/01/curse-gold> (last visited 26 May 2020); UN SC, *Report of the Group of experts submitted pursuant to resolution 1616 (2005)*, UN Doc. S/2006/53, 23 December 2005, marginal note 8.

⁹³ Decision to dismiss proceedings dated 10 March 2015, translation made available by the Open Society Justice Initiative at <https://www.dropbox.com/s/xsgeuz7ihnpubi/Argor%20Decision%20-%20Formal%20English%20Translation.pdf?dl=0> (last visited 26 May 2020) [Decision to dismiss proceedings dated 10 March 2015].

there was a non-international conflict raging in the gold mining areas of Ituri, with widespread illegal mining of gold. It also found that Argor-Heraeus had “objectively” aided and abetted the militia in the commission of war crimes in Ituri, by refining the gold and adding to its value and thereby incentivizing the militia to continue its pillaging.⁹⁴ The Prosecutor, however, found the knowledge element to be lacking as there was “[...] no evidence that the accused [knew] of the intention of the FNI [...]”.⁹⁵ Argor-Heraeus trusted its intermediary when it told them that the gold came from legal sources in Uganda, and the Prosecutor found no evidence that the Swiss company knew about various public reports revealing the origin of the pillaged gold.

The Argor-Heraeus case study is at the intersection of corporate accountability and armed conflict. Although not strictly about environmental damage, it does concern a company’s potential complicity in a war crime that is often related to environmental harm. It also raises two wider issues relevant for the general debate on corporate accountability.

First, it raises the question of a company being prosecuted for war crimes before the only permanent international court created for that purpose, the ICC. As we will see in section *E.I. Prosecuting Legal Entities for International Crimes*, the absence of corporate criminal liability before the ICC makes the international prosecution of legal entities difficult, but a number of domestic regimes allow for the prosecution of companies for international crimes in national courts.

Second, although eventually dismissed, the Argor-Heraeus investigation arguably signals that, “[...] in the absence of prosecution of corporate entities by international courts, domestic courts are increasingly willing to act.”⁹⁶ Given the increasing role of transnational corporations in war crimes abroad, however, accountability would have to entail some sort of extraterritoriality mechanism, the most controversial version of which is universal jurisdiction. Section *E.II. Universal/Extraterritorial Jurisdiction* looks at the tools used by domestic courts to allow proceedings in situations where neither the territorial jurisdiction of the State nor the *classic* bases for extraterritorial jurisdiction are engaged, and at the expansion of domestic courts’ jurisdiction through universal or extraterritorial jurisdiction.

⁹⁴ *Ibid.*, 11.

⁹⁵ *Ibid.*

⁹⁶ O. Radics & C. Bruch, ‘Pillage, Conflict Resources and Jus Post Bellum’, in C. Stahn, J. Iverson & J. Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace* (2017), 160, 162.

The application of international criminal law to corporations before domestic courts could, if combined with extraterritorial jurisdiction, provide efficient avenues to address certain forms of corporate environmental harm (those constituting international crimes) occurring in armed conflict. Such a combination is not without its challenges, however, as we will see in Section *E.III. Challenges*.

I. Prosecuting Legal Entities for International Crimes

International criminal law addresses particularly grave abuses, such as war crimes, crimes against humanity, and genocide. There is a well-established history of prosecuting individuals before international tribunals and military courts for their role in international crimes committed in the context of business activities,⁹⁷ from the *1946 Zyklon B case*⁹⁸ to the *Media Case* before the International Criminal Tribunal for Rwanda⁹⁹.

Criminal liability of legal entities, on the other hand, is far more controversial, despite frequent arguments that there are specific advantages to holding legal persons criminally responsible, especially in the context of natural resource exploitation.¹⁰⁰ It has been argued that focusing on the company itself can in some cases maximize the possibility for reparations, “[...] since in case of a conviction, assets of the company itself could be forfeited [...]”.¹⁰¹ Corporate criminal liability may also offer a better response in cases where a particular corporate culture has encouraged the commission of abuses, making it hard to isolate individualized contributions.¹⁰²

As we have seen, doctrinal difficulties arise from the theory of subjectivity under which non-State actors (in this case, corporations) do not have legal personality under international law. Further complicating matters are philosophical objections to corporate criminal liability, on the basis that “[...] legal entities cannot be deemed to act independently and hence are not

⁹⁷ *Ibid.*, 160.

⁹⁸ *Case No. 9, The Zyklon B Case: Trial of Bruno Tesch and Two Others*, British Military Court, March 1946.

⁹⁹ *Prosecutor v. Nahimana et al*, Judgment, ICTR-99-52-A, 28 November 2007.

¹⁰⁰ Radics & Bruch, ‘Pillage, Conflict Resources and Jus Post Bellum’, *supra* note 96, 162.

¹⁰¹ *Ibid.*

¹⁰² C. Ryngaert, ‘Accountability for Corporate Human Rights Abuses: Lessons From the Possible Exercise of Dutch National Criminal Jurisdiction Over Multinational Corporations’, 29 *Criminal Law Forum* (2018) 1, 4.

blameworthy [...]”.¹⁰³ A more pragmatic obstacle is the fact that the only global permanent criminal court, the ICC, does not currently have jurisdiction over businesses as such.¹⁰⁴

1. No Current Prospects of Prosecutions at the ICC

While the concept of criminal corporate liability was discussed during the negotiation of the Rome Statute, States ultimately opted to exclude corporations from the jurisdiction of the ICC at the Rome Conference in 1998.¹⁰⁵ The lack of jurisdiction over corporate entities limits the usefulness of the ICC in relation to corporate crimes such as environmental harm, which is often carried out by groups acting for a profit motive.¹⁰⁶ Former ICC Prosecutor Moreno Ocampo previously stated that companies complicit in human rights violations could be investigated by the Office of the Prosecutor (“OTP”), possibly with a view to indicting corporate executives.¹⁰⁷ In its 2016 Policy Paper on Case Selection, the OTP also stated that it would give particular consideration to “[...] crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land [...]”.¹⁰⁸ The Policy Paper raised expectations among those

¹⁰³ Alexandra Garcia, ‘Corporate Liability for International Crimes: A Matter of Legal Policy Since Nuremberg’, 24 *Tulane Journal of International & Comparative Law* (2015) 1, 127. Corporate criminal liability is the subject of considerable doctrinal debate. For an excellent critique of all sides of the debate, see James G. Stewart, ‘A Pragmatic Critique of Corporate Criminal Theory’, 16 *New Criminal Law Review* (2013) 261.

¹⁰⁴ *Rome Statute of the International Criminal Court*, 17 July 1988, UN Doc. A/CONF.183/9, Article 25(1).

¹⁰⁵ See discussions on this in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, A/CONF.183/13 (Vol. II), 133-136.

¹⁰⁶ M. Gillett, ‘Eco-Struggles: Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict’, in C. Stahn, J. Iverson & J. Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace* (2017), 224.

¹⁰⁷ M. Shinn, ‘The 2005 Business & Human Rights Seminar Report: Exploring Responsibility and Complicity, 8 December 2005, London’ (2005), available at <http://www.scu.edu.tw/hrp/Teng/TengText3.pdf> (last visited 26 May 2020): “The ICC cannot investigate corruption, or other crimes not connected with its statute. However, some companies have been known to support groups who kill to gain control of a gold mine, for example, knowing that this could be a crime (knowledge is a required condition for prosecution). The ICC could prosecute under these circumstances”.

¹⁰⁸ Office of the Prosecutor of the International Criminal Court, ‘Policy Paper on Case Selection and Prioritisation’ (15 September 2016), para. 41.

campaigning for increased scrutiny of the human rights impacts of business activity, by bringing welcome focus to crimes committed with the complicity of the private sector, such as land grabs or exploitation of resources.¹⁰⁹

In the absence of trials against businesspeople, however, concerns were voiced regarding the ICC's readiness to act against corporate complicity in international crimes.¹¹⁰ Nevertheless, current ICC Prosecutor Bensouda recently confirmed that prosecution of international crimes committed in the context of business activities was high on her Office's agenda. In an oral statement given to the 2019 International Congress of Penal Law,¹¹¹ Bensouda noted that, although the ICC had so far focused on traditional cases involving government and military leaders, it could also under certain circumstances exercise jurisdiction over individuals committing or contributing to international crimes through business activities. Although the Rome Statute is anthropocentric and aims to protect human life, Bensouda added that:

“[...] business activities can directly impact human life. In some cases, the degree of the impact of business activities on human life may be sufficiently serious for those activities to reach the threshold of constituting Rome Statute crimes. As an example, certain organized industrial activities can cause serious injuries to physical health, or they may force people to leave their land [which could] potentially amount to crimes against humanity.”

¹⁰⁹ For a discussion of the significance and limitations of the Policy Paper, see N. Bernaz, 'An Analysis of the ICC Office of the Prosecutor's Policy Paper on Case Selection and Prioritization from the Perspective of Business and Human Rights', 15 *Journal of International Criminal Justice* (2017) 3, 527.

¹¹⁰ C. Ryngaert & H. Struyven, 'Threats Posed to Human Security by non-State Corporate Actors: The Answer of International Criminal Law', in C. Ryngaert & M. Noortmann (eds), *Human Security and International Law* (2014), 118. It should be noted that charges of complicity in crimes against humanity were brought against businessman Joshua Arap Sang before the ICC and confirmed in 2012. In facts similar to the "Media" case in Rwanda, Sang was charged by virtue of his influence as a prominent radio broadcaster who used his radio show to fan the flames of violence during mass crimes in post-election 2007-2008 in Kenya. The case, however, was terminated in 2016 for lack of evidence – see *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027-Red-Corr (Trial Chamber V(A)), 5 April 2016.

¹¹¹ Statement of ICC Prosecutor Fatou Bensouda, International Congress of Penal Law (2019, available at https://www.dropbox.com/s/gmma9oambjpg0wd/ICC_Prosecutor_Fatou_Bensouda_statement_AIDP_Congress_Rome.mp4?dl=0 (last visited 26 May 2020).

She also noted that crimes punished under the Rome Statute often overlapped with other types of crimes, such as land grabbing and the destruction of the environment, which in turn often fuel social conflicts and the commission of crimes punished under the Rome Statute.

Despite such ambitious statements, and despite hopes that international criminal procedures would bolster international human rights scrutiny of corporations,¹¹² the lack of corporate liability before the ICC means that prosecution of legal persons for environmental crimes committed in armed conflict is inevitably limited at the international level.

2. Jurisdiction of Domestic Courts Over International Crimes Committed by Businesses

Although the ICC might not be able to prosecute legal persons, a large number of domestic courts have jurisdiction over war crimes perpetrated by companies.¹¹³ The ICC framework still has a role to play in this respect, as countries sometimes choose to implement the Rome Statute into their domestic law without making a distinction between legal and natural persons,¹¹⁴ effectively importing international criminal law in national legal systems (some of which explicitly recognize corporate criminal liability).¹¹⁵ The UN Guiding Principles

¹¹² Reinisch, 'The Changing International Framework for Dealing with Non-State Actors', *supra* note 9, 87: "Another potential for a truly international human rights scrutiny of non-state actors may lie in the development of international criminal procedures. The example of the Nuremberg Tribunal already shows that it is not only individuals whose activities may be investigated, but also corporations."

¹¹³ J. G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (2011), 79.

¹¹⁴ O. De Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations', background paper to the seminar organized with the Office of the UN High Commissioner for Human Rights in Brussels 3-4 November 2006 (2006), 2 [De Schutter, 'Extraterritorial Jurisdiction'].

¹¹⁵ See for example, a 26 April 2016 Survey by law Firm Clifford Chance, showing corporate criminal liability in place in most EU countries, such as the UK, France, Italy, Spain, the Netherlands, Denmark and Austria, Clifford Chance, 'Corporate Criminal Liability' (2019), available at https://www.cliffordchance.com/briefings/2016/04/corporate_criminalliability.html (last visited 26 May 2020). In Germany, a draft bill is currently making its way through the legislative process, see M. Kock *et. al*, 'Germany's Corporate Sanctions Act: The Path to Corporate Criminal Liability' (2019), available at <http://www.mondaq.com/germany/x/845680/Corporate+Crime/Germanys+Corporate+Sanctions+Act+The+Path+To+Corporate+Criminal+Liability> (last visited 26 May 2020). As noted by Stahn, domestic legal systems have tended to diverge

acknowledge this extended reach of the Rome Statute through domestic jurisdictions, in particular in the Commentary to UN Guiding Principle 23, which notes “[...] the expanding web of potential corporate legal liability arising from [...] the incorporation of the provisions of the Rome Statute of the ICC in jurisdictions that provide for corporate criminal responsibility [...]”.

The international criminal law framework offers at least two advantages for holding corporate entities to account for environmental harm caused in armed conflict. First, by operating on the premise that natural persons (individuals) can have certain international obligations, international criminal law has, in a way, transcended the State-centric approach of international law.¹¹⁶ It is thus a more natural vehicle to impose international obligations on other non-State actors (including collective entities such as businesses). Second, it carries a heavy normative weight.¹¹⁷

II. Universal/Extraterritorial Jurisdiction

As explained above, a common issue with corporate crime, and especially crime committed by multinational corporations, is the discrepancy between the *nationality* of the corporation committing the act, and the territory on which the act is committed.

Although a State’s jurisdiction is classically conceived as territorial, it can also be exercised extraterritorially in certain scenarios. This includes the case in which particularly heinous crimes may be prosecuted by any State, acting in the name of the international community, where the crime meets with universal reprobation.¹¹⁸ This is commonly referred to as the *universality principle*, leading to a form of jurisdiction called *universal jurisdiction*, which applies to crimes

in their approach to corporate criminal responsibility, with common law jurisdictions generally recognising such responsibility, while continental legal traditions are more diverse. See C. Stahn, ‘Liberals vs. Romantics: Challenges of an Emerging Corporate International Criminal Law’, 50 *Case Western Reserve Journal of International Law* (2018) 1/2, 91.

¹¹⁶ Kyriakakis, ‘International Legal Personality, Collective Entities, and International Crimes’, *supra* note 42, 98. See also Vazquez arguing that extending international criminal law obligations to corporations does not imply any deep challenge to orthodox conceptions of international law, in ‘Direct vs. Indirect Obligations of Corporations under International Law’, 43 *Columbia Journal of Transnational Law* (2005) 3, 944.

¹¹⁷ M. Lawry-White, ‘Victims of Environmental Harm During Conflict’, in C. Stahn, J. Iverson & J. Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace* (2017), 389.

¹¹⁸ De Schutter, ‘Extraterritorial Jurisdiction’, *supra* note 114, 22.

considered so harmful that “[...] the perpetrators of such crimes are deemed to be *hostes humani generis* — enemies of all humankind — who do not deserve safe haven anywhere in the world.”¹¹⁹

Unsurprisingly, given this line of reasoning, notions of universal jurisdiction have traditionally been reserved for criminal proceedings.¹²⁰ The Nuremberg Tribunals established the first modern notion of universal jurisdiction,¹²¹ while also sketching the first iteration of corporate complicity.¹²²

Some treaties require States to establish and exercise national jurisdiction in respect of offences with which the State may have no connection.¹²³ Several regional instruments and academic works also address the topic, such as the African Union Model Law on Universal Jurisdiction¹²⁴, the Cairo-Arusha Principles on Universal Jurisdiction,¹²⁵ and the 2001 Princeton Principles on Universal Jurisdiction.¹²⁶ In theory, universal jurisdiction has the potential to counter some of the negative effects of economic globalization, as it reasserts the State’s regulatory capacity (which the rise of transnational economic actors was threatening to marginalize),¹²⁷ and could therefore help combat the impunity of corporations for international crimes which they commit or in which they are complicit. Indeed, universal jurisdiction has been touted by some as “[...] the method most likely to achieve corporate observation of human rights [...]”,¹²⁸ which would make domestic courts the best forum to prosecute businesses. States themselves appear generally to agree on the legality of universal jurisdiction in

¹¹⁹ See *Report of the International Law Commission to the Seventieth Session*, UN Doc A/73/10 (2018), para. 6 (Annex A) [Jalloh Report].

¹²⁰ Magraw, ‘Universally Liable? Corporate Complicity Liability Under the Principle of Universal Jurisdiction’, *supra* note 29, 460.

¹²¹ *Ibid.*, 461.

¹²² *Ibid.*, 470.

¹²³ E.g. genocide under the 1948 Genocide Convention, the “grave breaches” (war crimes) of the 1949 Geneva Conventions and of 1977 Additional Protocol I, and torture under the 1984 Convention against Torture.

¹²⁴ Executive Council of the African Union, *Model National Law on Universal Jurisdiction over International Crimes*, Twenty-First Ordinary Session 9-13 July 2012 (2012).

¹²⁵ Africa Legal Aid, *The Cairo-Arusha Principle on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspectives*, adopted at the Follow-up Expert Meeting held at Arusha (2002).

¹²⁶ Princeton University, Program in Law and Public Affairs, *Princeton Principles on Universal Jurisdiction* (2001).

¹²⁷ De Schutter, ‘Extraterritorial Jurisdiction’, *supra* note 114, 7.

¹²⁸ Magraw, ‘Universally Liable? Corporate Complicity Liability Under the Principle of Universal Jurisdiction’, *supra* note 29, 493.

certain circumstances,¹²⁹ and on the fact that it is, in principle, a useful and important tool in combating impunity.¹³⁰

The benefits of international criminal law are compounded when combined with universal jurisdiction, especially as an increasing number of States have extraterritorial jurisdiction provisions which could apply to legal persons. Domestic systems have increasingly used concepts of universal jurisdiction to hold companies to account for international crimes through the enactment of Rome Statute-implementing legislation,¹³¹ thereby further expanding the web of liability in which corporations can potentially be caught. From a conceptual perspective, universal jurisdiction is also well suited to respond to environmental crimes. As described, the universality principle is based on the idea that some crimes are so heinous that they require a forceful response from all members of the community. This was traditionally the case for piracy, and later for terrorism, which was described by De Schutter as “[...] our modern equivalent to piracy which all States have not only an interest in combating, but an obligation to do so [...]”.¹³² Environmental harm, with its borderless and potentially catastrophic consequences on all life whether human or not, arguably fits that category too.

The United Nations Environment Programme (UNEP) is also of the view that universal jurisdiction can play a significant role in bridging gaps in the enforcement of international environmental law. Environment-related crimes include corporate crime in the forestry sector, illegal exploitation and sale of gold and minerals, illegal fishing, trafficking in hazardous waste and chemicals, and threat finance using wealth generated illegally from natural resources to support non-State armed groups and terrorism. The UNEP also underlined the negative effects of such crimes on the environment, future generations, Governments, and legal businesses.¹³³

As we see below, however, the combination of international criminal law and universal jurisdiction is not without its challenges.

¹²⁹ Although, as noted in E.III. Challenges, how far the concept extends is still the subject of considerable debates.

¹³⁰ Jalloh Report, *supra* note 119, para. 7.

¹³¹ Magraw, ‘Universally Liable? Corporate Complicity Liability Under the Principle of Universal Jurisdiction’, *supra* note 29, 475.

¹³² De Schutter, ‘Extraterritorial Jurisdiction’, *supra* note 114, 3.

¹³³ Report of the UN Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction*, UN Doc A/72/112, 22 June 2017, 10.

III. Challenges

When envisaging the application of international criminal law to corporations before domestic courts, four issues come to mind.

First, and perhaps most obviously, is that, under customary international law, “[...] the scope of universal jurisdiction is limited to crimes such as genocide, crimes against humanity, war crimes and torture [...]”.¹³⁴ Non-treaty based international criminal law is therefore a limited avenue for addressing other human rights violations by corporate non-State actors.¹³⁵ To the extent that it is recognized, the principle of universal jurisdiction only applies to the most severe crimes. Environmental harm would therefore need to be *repackaged* as a core international crime in order for universal jurisdiction (and international criminal law) to operate. This is not a fatal flaw, as the current international framework offers a few crimes onto which environmental harm could be *grafted*. The war crime of pillage, for example, could offer a framework for holding corporate actors responsible for the exploitation of mineral and other resources.¹³⁶

Second, universal jurisdiction provisions can sometimes trigger fears of hegemonic use, on the basis that such provisions “[...] have allowed the industrialized States to reach situations occurring on the territory of developing States [...]”.¹³⁷ At the UN, such concerns are regularly voiced, in particular, by the African Group, the Latin American and Caribbean Group, and the Non-Aligned Movement, who have expressed the view that nationals of less powerful States have been the only real targets of universal jurisdiction, while nationals of more powerful States have largely been exempt.¹³⁸ There is an undeniable potential for abuse in provisions allowing courts in the Global North to adjudicate on matters occurring in the Global South in the name of human rights. With respect to corporate accountability, however, the reverse argument might be made. Prosecution of Western corporate actors could

¹³⁴ Magraw, ‘Universally Liable? Corporate Complicity Liability Under the Principle of Universal Jurisdiction’, *supra* note 29, 460.

¹³⁵ Ryngaert & Struyven, ‘Threats Posed to Human Security by non-State Corporate Actors: The Answer of International Criminal Law’, *supra* note 110, 133.

¹³⁶ Wisner, ‘Criminalizing Corporate Actors for Exploitation of Natural Resources in Armed Conflict’, *supra* note 73, 971. See also Bernaz, ‘An Analysis of the ICC Office of the Prosecutor’s Policy Paper on Case Selection and Prioritization From the Perspective of Business and Human Rights’, *supra* note 109.

¹³⁷ De Schutter, ‘Extraterritorial Jurisdiction’, *supra* note 114, 7.

¹³⁸ Jalloh Report, *supra* note 119, para. 9.

“[...] provide the greatest deterrent against continued trafficking of conflict resources [which in turn] would also help restore faith in the international justice system, which is currently subject to intense criticism over the concern that Africans have been over represented as targets for crime [...]”¹³⁹

Third, there are also practical and procedural problems with domestic courts using universal jurisdiction. This includes the possibility of concurrent proceedings, inconsistent outcomes stemming from varying interpretations of the Rome Statute, as well as the possibility of corruption at the domestic level which would make such domestic trials a sham.¹⁴⁰ However, the likelihood of these issues could be reduced by domestic courts through the use of various legal doctrines such as international comity, *forum non conveniens*, collateral estoppel, or *res judicata*¹⁴¹.

Fourth, broad conceptions of universal jurisdiction itself are far from being unanimously accepted. *Pure* universal jurisdiction is, and always has been, a hotly debated concept. A good illustration of this can be found in the individual opinion of International Court of Justice President Guillaume in the *Arrest Warrant* case concerning the validity of a Belgian arrest warrant for Congolese foreign minister Abdoulaye Yerodia for alleged war crimes and crimes against humanity. In an individual opinion appended to the judgment of 14 February 2002, President Guillaume states:

“International criminal law has itself undergone considerable development and constitutes today an impressive legal corpus. It recognizes in many situations the possibility, or indeed the obligation, for a State other than that on whose territory the offence

¹³⁹ Wisner, ‘Criminalizing Corporate Actors for Exploitation of Natural Resources in Armed Conflict’, *supra* note 73, 981. Although note Tsabora, ‘Illicit Natural Resource Exploitation by Private Corporate Interests in Africa’s Maritime Zones During Armed Conflict’, *supra* note 71, 190, who warns that overreliance on support from Western States is problematic in that “[...] such states are less eager to lend support and offer assistance where the transnational problems are traceable to entities domiciled in the Western states [...]”.

¹⁴⁰ Magraw, ‘Universally Liable? Corporate Complicity Liability Under the Principle of Universal Jurisdiction’, *supra* note 29, 496.

¹⁴¹ *Ibid.*, 496. It should be noted that *forum non conveniens* is not without its challenges, particularly when framed through the issue of access to remedy for human rights violations – see below.

was committed to confer jurisdiction on its courts to prosecute the authors of certain crimes where they are present on its territory. International criminal courts have been created. But at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined 'international community'. Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward."¹⁴²

Years later, the debate is still ongoing, as evidenced by recent discussions taking place at the Sixth Committee of the UN General Assembly. The Committee, which is the primary forum for the consideration of legal questions in the General Assembly, took up the issue of universal jurisdiction in 2009, and in 2018 the ILC itself decided to include universal criminal jurisdiction in its long-term program¹⁴³.

Despite agreement on at least *a narrow form* of universal jurisdiction, and despite widespread application of (variations of) it throughout State practice, it is clear that no wide-ranging unified theory of universal jurisdiction has emerged in customary international law. Perhaps a more palatable version of the universality principle could be found in more narrow concepts of extraterritorial jurisdiction,¹⁴⁴ in which at least some sort of link must be found with the State in which proceedings are taking place (e.g. the perpetrator and/or the victim are located on the State's territory). Indeed, although the universality principle is not based on a particular connection between the crime and the State seeking to

¹⁴² Separate opinion of President Guillaume, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3, 44, para. 15.

¹⁴³ See Jalloh Report, *supra* note 119.

¹⁴⁴ Note that some consider universal jurisdiction to be exclusive of extraterritorial jurisdiction (see e.g. Jalloh Report, *supra* note 119, para. 16), while others consider universal jurisdiction to be a version (albeit an extreme one) of extraterritorial jurisdiction. See for example International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction* (2009), 14: "Unlike *the other forms* of extraterritorial jurisdiction listed above, the universality principle is not based on a particular connection between the case and the state exercising jurisdiction." (emphasis added). See also De Schutter, 'Extraterritorial Jurisdiction', *supra* note 114, 15.

exercise jurisdiction, in practice, many States attach conditions to the exercise of universal jurisdiction that require a connection.¹⁴⁵

F. Transnational Tort Litigation and Vedanta

Not all environmental harms caused by businesses in armed conflict will reach the threshold of international crimes. Instead, some instances might be better addressed using private law. In this respect, one way by which to address corporate environmental harm is the recent expansion of the tortious concept of duty of care.¹⁴⁶

For this discussion, the English case of *Vedanta v Lungowe*¹⁴⁷ is used as a case study. In 2015, a group of 1,826 Zambian citizens living in the Chingola District in northern Zambia brought a claim before the English high court against two legal entities: Vedanta Resources PLC (“Vedanta”), the parent company of a multinational group listed on the London Stock Exchange and employing some 82,000 people worldwide, and Konkola Copper Mines PLC (“KCM”), a public company incorporated in Zambia and a subsidiary of Vedanta, who has ultimate control over it. KCM is the owner of the Nchanga Copper Mine, a mining site containing processing plants, an underground mine, and the second largest open cast mine in the world.¹⁴⁸

The claimants were “[...] very poor members of rural farming communities [...]”¹⁴⁹ whose only source of drinkable water and irrigation for their crops came from watercourses which they claimed had been damaged by repeated discharges of toxic matter from the Nchanga Copper Mine, from 2005. The claims were pleaded in common law negligence and breach of statutory duty of care. While the claim against KCM was based on its direct operation of the mine, the claim against parent company Vedanta was said to arise by reason of the “[...] very high level of control and direction that the first defendant exercised at all material

¹⁴⁵ International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction*, *supra* note 144, 151.

¹⁴⁶ “Duty of care” is a Common Law concept under which a non-contractual legal obligation arises which, if breached, can give rise to the tort of negligence.

¹⁴⁷ *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)* [2019] UKSC 20 [*Vedanta Decision*].

¹⁴⁸ N.N., ‘The Nchanga Mine’, available at <http://kcm.co.zm/our-operations/mining/nchanga-mine/> (last visited 26 May 2020).

¹⁴⁹ *Vedanta Decision*, *supra* note 147, para. 1.

times over the mining operations of the second defendant and its compliance with applicable health, safety and environmental standards [...]”¹⁵⁰

The United Kingdom Supreme Court had to determine whether the courts of England and Wales had jurisdiction against both the parent company and the subsidiary. The claimants relied on EU law, and in particular what is commonly known as the Brussels Regulation Recast¹⁵¹ to establish jurisdiction over Vedanta as an *anchor defendant* for the purposes of attracting the English courts’ jurisdiction over the claim against KCM. This would allow the claimants to conduct proceedings in England rather than in Zambia, where the villagers said it would have been virtually impossible for them to obtain justice given the unavailability of legal aid, the lack of conditional fee arrangements, and an inadequate legal infrastructure to handle such a case. The defendants, on the other hand, claimed this was an abuse of European law.

On 10 April 2019, the Supreme Court handed its judgment, in which it found that there had been no abuse of EU law and that the claimants had presented a real triable issue – allowing the case to proceed to trial.¹⁵² While the Court recognized that it would be an abuse of EU rules to allow claimants to sue an English-domiciled *anchor* defendant solely to pursue a claim against a foreign co-defendant (who, in this scenario, is the only real target of the claim), it nevertheless found that this exception to jurisdiction should be applied strictly. While establishing jurisdiction of the English courts over subsidiary KCM was identified as a key factor in the claimant’s decision to litigate in England, the Court found that they also had a *bona fide* claim, disclosing a “[...] real triable issue [...]” and a desire to obtain judgment against parent company Vedanta rather than merely against its subsidiary KCM.

One of the critical factors in determining whether or not there was a “triable issue” was whether Vedanta sufficiently intervened in the management of the mine owned by its subsidiary to have incurred, *itself* (rather than by vicarious liability), a common law duty of care to the claimants. Vedanta tried to argue that a finding of duty of care owed by Vedanta “[...] would involve a novel

¹⁵⁰ *Ibid.*, para. 3.

¹⁵¹ EP Regulation of 12 December 2012, OJ 2012 L 351.

¹⁵² Note that this appeal dealt solely with the issue of jurisdiction, i.e. the ability of the English courts to hear the claims brought by the claimants against Vedanta and KCM. It made no determination with regard to liability of Vedanta or KCM, which will be dealt with later at a substantive hearing. As of May 2020, the proceedings were ongoing in the Queen’s Bench Division, see procedural history detailed in *Lungowe and others v. Vedanta Resources PLC and another company* [2020] EWHC 749.

and controversial extension of the boundaries of the tort of negligence [...]”, an argument by which the Court was left unconvinced.

A noteworthy feature of *Vedanta* is how it engaged the parent company’s direct liability, rather than relying on arguments about *piercing the corporate veil*, a concept originally meant to encourage risk-taking and innovation,¹⁵³ which has had the unfortunate impact of limiting ways for victims of the conduct of a subsidiary company to seek reparation by filing a claim against the parent company in the home State of the latter.¹⁵⁴ *Vedanta* highlights several issues which are relevant to the discussion of corporate accountability for environmental harm. First, it forms part of a wider global jurisprudential trend¹⁵⁵ in which courts in various jurisdictions have been increasingly willing to allow claims to be pursued against parent companies for the actions of their subsidiaries (section *F.I. Global Trend Towards Parent Company Liability*). Second, it highlights the need to fully engage with other, non-judicial aspects of BHR, including mandatory reporting and human rights due diligence (section *F.II. (Public) Knowledge is Power: Impact of Public Materials and Mandatory Reporting*). Finally, the challenges associated with private claims for corporate accountability will be examined in section *F.III. Challenges*.

I. Global Trend Towards Parent Company Liability

Private law claims are brought by individuals or communities who have been directly or indirectly affected by the actions of the company. Depending on the legal system, claims can be based on a statutory provision, general principles of law, legal precedent or some other basis (e.g. custom).¹⁵⁶ Private claims have their place in the accountability toolkit, as “[...] unlike a criminal prosecution, a

¹⁵³ A. Yilmaz Vastardis & R. Chambers, ‘Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?’, 67 *International & Comparative Law Quarterly* (2018) 2, 394.

¹⁵⁴ De Schutter, ‘Towards a New BHR Treaty’, *supra* note 38, 48.

¹⁵⁵ G. Holly, ‘Access to Remedy Under the UNGPs: Vedanta and the Expansion of Parent Company Liability’, *EJIL: Talk!* (31 October 2017), available at <https://www.ejiltalk.org/if-the-pleading-represents-the-actuality-vedanta-access-to-remedy-and-the-prospect-of-a-duty-of-care-owed-by-a-parent-company-to-those-affected-by-acts-of-subsidiaries/> (last visited 26 May 2020).

¹⁵⁶ Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: Explanatory Notes for Guidance*, UN Doc. A/HRC/32/19/Add. 1, 12 May 2016, 13.

civil action based on a human rights tort makes it possible for a victim to receive compensation from his or her abuser [...].¹⁵⁷

Private international law, which determines the competence of domestic courts to hear disputes involving a foreign element,¹⁵⁸ is also lagging behind globalization as it often requires a territorial nexus for the exercise of jurisdiction – and in doing so, is “[...] based on a map of the world which is clearly out of touch with the global political economy [...]”.¹⁵⁹ This poses the same problems as with criminal sanctions: in a borderless market, where harm often occurs through companies that are either directly foreign or shell companies for foreign companies, how can civil claims bridge the accountability gap? The answer can be found in an emerging trend of transnational tort litigation, in which a number of cases before national courts have considered the issue of parent company liability.

Comparative law shows an increased willingness on the part of courts to recognize the potential existence of a duty of parent companies to exercise reasonable care in monitoring and controlling their subsidiaries in relation to human rights and environmental protection.¹⁶⁰ In some circumstances, a duty of care is found to exist which place a subsidiary’s actions within the jurisdictional ambit of the courts of the State in which the parent company is incorporated. In terms of applicable law, cases like these are often framed through the concept of negligence. While the specific elements of negligence vary among regimes and jurisdiction, a formulation common to many jurisdictions is: (a) the existence of a duty of care towards affected persons; and (b) the breach of the applicable standard of care, which (c) resulted in harm or injury (i.e. causation). In addition, the existence of a duty of care (as well as the relevant standard of care) will often depend on whether the harm was, or should have been, foreseeable to the defendant.¹⁶¹

¹⁵⁷ A. McConville, ‘Taking Jurisdiction in Transnational Human Rights Tort Litigation: Universality Jurisdiction’s Relationship to *Ex Juris Service*, *Forum Non Conveniens* and the Presumption of Territoriality’, in C. Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 157.

¹⁵⁸ Augenstein, ‘Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Rights to a Remedy’, *supra* note 10, 596.

¹⁵⁹ H. Muir-Watt, ‘Private International Law Beyond the Schism’, 2 *Transnational Legal Theory* (2011) 3, 385.

¹⁶⁰ Holly, ‘Access to Remedy Under the UNGPs: Vedanta and the Expansion of Parent Company Liability’, *supra* note 155.

¹⁶¹ Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, *supra* note 156.

This section moves to look at the use and impact of tortious liability in a range of domestic jurisdictions which have been identified as particularly active for environmental claims against corporations¹⁶²: the United Kingdom, Canada, the Netherlands, and the United States (US).

1. Parent Company Liability in the United Kingdom

The United Kingdom has been a fertile ground for addressing corporate harm caused overseas. This trend has been budding for the past two decades, arguably starting with the 1997 House of Lords case of *Connelly v RTZ Corporation*,¹⁶³ and reaching a high point with the 2012 Court of Appeal ruling in *Chandler v Cape*.¹⁶⁴ In the latter decision, the Court held that, under certain circumstances, a parent company could owe a legal duty of care to employees of its subsidiaries.

Vedanta and other recent cases¹⁶⁵ have addressed the question of whether parent corporations owe a duty of care to affected communities due to the level of control it exercised over its subsidiary. The *Okpabi* case recently clarified some aspects of this issue.¹⁶⁶ In that case, Nigerian communities brought claims against the parent company of oil conglomerate Shell and its Nigerian subsidiary Shell Petroleum Development Company for years of systematic and ongoing pollution

¹⁶² See for example Allen & Overy LLP, 'Environmental and Social Issues Bring Litigation Risks Home to Multinationals', *Corporate Disputes Magazine*, July-September 2019 Issue, available at <https://www.corporatedisputesmagazine.com/environmental-and-social-issues-bring-litigation-risks-home-to-multinationals> (last visited 26 May 2020). Although unrelated to environmental harm, another notable (albeit ultimately unsuccessful) case of parent company liability in Europe includes the KiK case in Germany, in which a lawsuit was brought by four Pakistani plaintiffs affected by a fire in a factory belonging to a supplier of German fashion retailer KiK in Pakistan, which killed 258 people. The claim sought to establish KiK's joint responsibility for fire safety deficiencies, but was thrown out because of statutory limitations – see press release by the European Center for Constitutional and Human Rights, 'German Court Dismisses Pakistani's Complaint Against KiK: KiK Evades its Legal Responsibility' (10 January 2019), available at <https://176903.seu2.cleverreach.com/m/11183014/0-c9e83767087bd1f118b3ace17b2ef8fb> (last visited 26 May 2020).

¹⁶³ *Connelly v RTZ Corporation PLC* [1997] UKHL 30, [1998] AC 854.

¹⁶⁴ *Chandler v Cape plc* [2012] EWCA Civ 525.

¹⁶⁵ Although unrelated to environmental harm, the Unilever case (*AAA & Ors. v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532) is also worth noting in that respect.

¹⁶⁶ *Okpabi & Ors. v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2018] EWCA Civ 191 [*Okpabi* Decision].

caused by Shell's operations. The High Court held in 2017 that Royal Shell was merely a holding company which did not exercise any control over its "wholly autonomous" Nigerian subsidiary. On appeal, the Court of Appeal found that mandatory corporate policies and standards could not, on their own, meet the *arguable case* threshold¹⁶⁷. Claimants needed to demonstrate "[...] an arguable case that [the parent] controlled [the subsidiary's] operations or that it had direct responsibility for practices or failures which are the subject of the claim [...]"¹⁶⁸. The Court of Appeal clarified that it was not looking only for general control over policies, but for "material control" over the subsidiary's operations¹⁶⁹. The Court recognized an extensive set of mandatory group-wide policies but treated them as mere "[...] best practices which are shared across a business operating internationally [...]", rather than a means by which the company holds itself out as exercising supervision it does not in fact exert.¹⁷⁰

On 24 July 2019, however, the United Kingdom Supreme Court granted the claimants leave to appeal.¹⁷¹ Although the reasons for granting the leave to appeal in *Okpabi* are not public, it is worth noting that the *Vedanta* Supreme Court judgment, which came out only a few months prior, is likely to have had an impact on the decision. In *Vedanta*, the Supreme Court explicitly refused to "[...] seek to shoehorn all cases of the parent's liability into specific categories [...]", on the basis that "[...] there is no limit to the models of management and control which may be put in place within a multinational group of companies [...]"¹⁷². This could indicate that it wishes to retain a level of flexibility, by allowing itself to disregard legal boundaries and ownership in cases where a commercial group acts as a single commercial undertaking in management terms.

¹⁶⁷ *Okpabi* Decision, *supra* note 166, paras. 89 and 122.

¹⁶⁸ *Ibid.*, para. 127.

¹⁶⁹ *Ibid.*, para. 122.

¹⁷⁰ *Ibid.*, paras. 121 and 129.

¹⁷¹ The leave to appeal was confirmed by the claimants' solicitors, English law firm Leigh Day, in a press release, 'Supreme Court Grants Permission to Appeal to Nigerian Communities in Their Fight Against Shell' (26 May 2020), available at <https://www.leighday.co.uk/News/2019/July-2019/Supreme-Court-grants-permission-to-appeal-to-Niger> (last visited 26 May 2020). The appeal is scheduled to be heard in June 2020.

¹⁷² *Vedanta* Decision, *supra* note 147, para. 51: "At one end, the parent may be no more than a passive investor in separate businesses carried out by its various direct and indirect subsidiaries. At the other extreme, the parent may carry out a thoroughgoing vertical reorganisation of the group's businesses so that they are, in management terms, carried out as if they were a single commercial undertaking, with boundaries of legal personality and ownership within the group becoming irrelevant, until the onset of insolvency, as happened within the Lehman Brothers group."

What the Supreme Court has to say in the *Okpabi* appeal will be followed closely in all corners of the legal sphere, from human rights defenders to in-house corporate counsels. Additionally, whether a parent company's stated group-wide policies can create a duty of care in scenarios where the parent does not actively enforce them is an important question that many hope the Court will clarify.

2. Parent Company Liability in Canada

In recent years, an increasing number of international plaintiffs have bought claims against Canadian parent companies for the wrongful activities of their foreign subsidiaries, particularly for their harmful mining operations. In *Choc v. Hudbay Minerals*,¹⁷³ for example, the Superior Court of Ontario allowed a claim against mining corporation Hudbay Minerals for human rights abuses committed by its subsidiary against indigenous people at the subsidiary-owned nickel mine in Guatemala. The plaintiffs alleged *inter alia* that Hudbay Minerals had been directly negligent in failing to prevent the abuse, on the basis of previous statements it had made with regards to corporate social responsibility.

In *Garcia v. Tahoe Resources*,¹⁷⁴ a claim was brought against a parent company, mining corporation Tahoe Resources, for the actions of private security personnel hired by its subsidiary operating the Escobal mine in Guatemala. The plaintiffs' claim was based *inter alia* on the significant control exercised by Tahoe over its wholly-owned subsidiary, on Tahoe's public corporate social responsibility policies and on its commitments to the Voluntary Principles on Security and Human Rights. Tahoe argued that Guatemala was the appropriate forum, but the British Columbia Court of Appeal concluded that there was a real risk of there not being a fair trial, given the alignment of interests between the powerful mining company and the Guatemalan State. On 30 July 2019, the case reached a settlement and Tahoe Resources' new owner, company Pan American Silver, published an apology acknowledging violations of human rights at the Escobal mine and vowing to increase human rights due diligence efforts.¹⁷⁵

In *Araya v. Nevsun Resources*,¹⁷⁶ a claim was brought against mining corporation Nevsun Resources in relation to a mine operated by its indirect

¹⁷³ *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414.

¹⁷⁴ *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39.

¹⁷⁵ Press release by Pan American Silver, 'Pan American Silver Announces Resolution of Garcia v. Tahoe Case' (30 July 2019), available at <https://www.prnewswire.com/news-releases/pan-american-silver-announces-resolution-of-garcia-v-tahoe-case-300893365.html> (last visited 26 May 2020).

¹⁷⁶ *Araya v. Nevsun Resources Limited*, 2017 BCCA 401.

subsidiary in Eritrea. The claimants were Eritrean refugees who had been conscripted into Eritrea's "National Service Program", which they claimed constituted a form of slavery which Nevsun facilitated indirectly.¹⁷⁷ Nevsun's application for an order declining jurisdiction was rejected based on evidence of corruption in the Eritrean legal system, and on the risk of interference by the ruling party and national military. The Court of Appeal for British Columbia endorsed the first instance judge's finding that a fair trial would be particularly difficult for the claimants

"[...] if they chose to commence legal proceedings in which they make the most unpatriotic allegations against the State and its military, and call into question the actions of a commercial enterprise which is the primary economic generator in one of the poorest countries in the world [...]"

The Court also considered the gravity of the human rights abuses alleged to have taken place. Nevsun Resources filed an appeal with the Supreme Court of Canada, which in January 2019 dismissed Nevsun's motion to stay, dismiss, or strike the claim on the basis of *forum non conveniens*. On 28 February 2020, a majority of the Supreme Court of Canada held that Canadian courts had jurisdiction over the claims, allowing the claims to proceed to the merits stage before the British Columbia courts.¹⁷⁸

3. Parent Company Liability in the Netherlands

Five interrelated claims for environmental harm have been brought before the Dutch civil courts against parent company Royal Dutch Shell and former parent company Shell Petroleum N.V., as well as Nigerian subsidiary SPDC and former subsidiary Shell Transport and Trading Company. For the first time, a Dutch multinational company is being sued in the Netherlands for environmental damage and human rights abuses allegedly caused abroad by its foreign subsidiaries. Like in *Vedanta*, the cases against the parent company were

¹⁷⁷ See also Report of the Special Rapporteur on the situation of human rights in Eritrea, *Report on the situation of human rights in Eritrea*, UN Doc A/HRC/26/45, 13 May 2014, describing the national service as an indefinite conscription, through which conscripts are rounded up and forced to spend most of their working lives in the service of the State, working under duress and in harsh conditions.

¹⁷⁸ *Nevsun Resources Limited v. Araya*, 2020 SCC 5.

filed under European law, with the Dutch companies acting as *anchors* to bring a suit against the subsidiaries.

In December 2015, the Court of Appeal at The Hague held that the Dutch parent company could be held liable for environmental damage caused by the operation by the Nigerian subsidiary of a leaky oil pipeline. In reaching that decision, it drew explicitly on English case law (notably *Chandler v Cape* and *Caparo v Dickman*). It also stated that a parent company could be liable on the basis of a culpable failure to act, whether or not it was actively involved in the subsidiary's operations.¹⁷⁹

The Netherlands is also the scene of the European instalment of the *Kiobel* litigation, in which four widows brought a claim against Shell's parent company over its alleged role in the unlawful arrest, detention and execution of their husbands following a brutal crackdown on protests by Ogoni people against Shell's environmental pollution. The case was initiated after similar proceedings were brought and dismissed in the US (see below). Unlike other cases mentioned above, however, in the Dutch *Kiobel* litigation the claimants explicitly refused to base their claims against the parent companies on the Anglo-Saxon legal concepts of piercing the corporate veil and crossing the corporate veil, shareholders' liability or tort or negligence – preferring to base their claims on fundamental rights enshrined in the African Charter on Human and Peoples Rights and the Nigerian constitution.¹⁸⁰ This refusal to invoke tort law was likely to avoid statutory limitations, and led the Dutch Court to reject Shell's invocation of the *Okpabi* Court of Appeal decision.¹⁸¹ On 1 May 2019, the District Court of The Hague issued an interim ruling in favor of the plaintiffs, in which it found that the court has jurisdiction over the case, allowing the case to proceed to trial.

4. Alien Tort Statute in the United States

No discussion of extraterritoriality and transnational tort would be complete without a mention of the 1789 Alien Tort Statute ("ATS", sometimes referred to as the Alien Tort Claims Act), and what was until recently described as the "[...] booming transnational tort litigation in the US [...]".¹⁸² The ATS is

¹⁷⁹ *Eric Barizaa Dooh of Goi and others v. Royal Dutch Shell Plc and Others*, para 3.2 [*Eric Barizaa Decision*].

¹⁸⁰ *Ibid.*, para 4.8.

¹⁸¹ *Ibid.*, para. 4.28.

¹⁸² Reinisch, 'The Changing International Framework for Dealing with Non-State Actors', *supra* note 9, 88.

another way of deploying tort law in transnational cases but, unlike in other jurisdictions, it does so “[...] via international customary law [...]”.¹⁸³ The ATS allows non-US citizens to file civil lawsuits in the US federal courts for violations of the *the law of nations*, thereby converting a *jus cogens* violation (violation of human rights so grave as to be against international customary law, or “the law of nations”)¹⁸⁴ into an actionable domestic tort. In its modern incarnation, the ATS has been held to apply to private actors in relation to international crimes of genocide, war crimes, and crimes against humanity.¹⁸⁵

The ATS is a bit of an oddity. When hearing ATS claims, US courts have often turned to international *criminal* law for guidance as it refers to international law, even though the ATS itself only provides for *civil* liability.¹⁸⁶ It has also been argued that “[...] United States tort law is functionally more equivalent to civilian criminal law than to civilian tort law [...]”,¹⁸⁷ further blurring the lines between the traditional civil/criminal categorizations. On its face, the ATS allows for universal jurisdiction over civil claims, and indeed the form of extraterritorial jurisdiction it created has been seen as a “spectacular example” of “[...] the inventive use by victims of certain legislations, whose primary aim was not necessarily to establish a form of extraterritorial jurisdiction [...]”.¹⁸⁸ However, it has led to the usual criticism of extraterritorial jurisdiction, including concerns about US courts “[...] setting themselves up as universal judges of atrocities committed abroad [...]”¹⁸⁹

Its applicability, however, is now drastically reduced. The 2013 US Supreme Court decision in *Kiobel v Royal Dutch Petroleum Co* was the first nail in the coffin of ATS-based actions against foreign corporations,¹⁹⁰ as the Court formulated the jurisdictional requirement that cases should “touch and concern”

¹⁸³ C. Wells & J. Elias, ‘Catching the Conscience of the King: Corporate Players on the International Stage’, in P. Alston (ed.), *Non-State Actors and Human Rights* (2005), 152.

¹⁸⁴ V. Grosswald Curran, ‘Mass Torts and Universal Jurisdiction’, 34 *University of Pennsylvania Journal of International Law* (2013) 4, 799 [Grosswald Curran, Mass Torts].

¹⁸⁵ Wells & Elias, ‘Catching the Conscience of the King: Corporate Players on the International Stage’, *supra* note 183, 153.

¹⁸⁶ Ryngaert & Struyven, ‘Threats Posed to Human Security by non-State Corporate Actors: The Answer of International Criminal Law’, *supra* note 110, 118.

¹⁸⁷ Grosswald Curran, ‘Mass Torts’, *supra* note 184, 804.

¹⁸⁸ De Schutter, ‘Extraterritorial Jurisdiction’, *supra* note 114, 6.

¹⁸⁹ A Cassese, *International Law* (2005), 393.

¹⁹⁰ J. Paust, ‘Responsibilities of Armed Opposition Groups and Corporations for Violations of International Law and Possible Sanctions’, in N. Gal-Or, C. Ryngaert & M. Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings* (2015), 122.

US territory with “sufficient force” – and found that a mere corporate presence in the US fell short of this. In 2018, the US Supreme Court held in *Jesner v Arab Bank* that the ATS did not permit federal courts to recognize causes of action against foreign corporations. As a result, any hopes of the US tackling corporate complicity through the ATS¹⁹¹ have been quashed.

II. (Public) Knowledge is Power: Impact of Public Materials and Mandatory Reporting

As we have seen in the aforementioned cases, parent company liability often requires a *hook* in order to allow courts of the parent company’s jurisdiction to rule over disputes involving a subsidiary’s actions. In this regard, a particularly noteworthy paragraph in the *Vedanta* judgment considers the impact of parent companies implementing group-wide policies, and of published materials that could suggest a level of control over subsidiaries:

“53. Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, it seems to me that the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken.”

The Supreme Court noted that *Vedanta* had published materials

“[...] in which it asserted its responsibility for the establishment of appropriate group-wide environmental control and sustainability standards, for their implementation throughout the group by training, and for their monitoring and enforcement [...]”¹⁹²

¹⁹¹ Ryngaert & Struyven, ‘Threats Posed to Human Security by non-State Corporate Actors: The Answer of International Criminal Law’, *supra* note 110, 103.

¹⁹² *Vedanta* Decision, *supra* note 147, para. 55.

One report, entitled *Embedding Sustainability*, stressed that the oversight of all Vedanta's subsidiaries rested with the board of Vedanta itself, and made particular reference to problems with discharges into water and to the particular problems arising at the Nchanga mine.

Similarly, the Court of Appeal at The Hague, in the aforementioned Dutch case of *Eric Barizaa Dooh of Goi and others v. Royal Dutch Shell Plc and others*, stated that a duty of care was particularly likely to exist if the defendant parent company “[...] has made the prevention of environmental damage by the activities of group companies a spearhead and is, to a certain degree, actively involved in and managing the business operations of such companies, which is not to say that without this attention and involvement a violation of the duty of care is unthinkable and that culpable negligence with regard to the said interests can never result in liability.”¹⁹³ This assertion suggests a willingness from the Dutch court to use the codes of conduct voluntarily adopted by the company as a basis for establishing its duty of care, as well as the standard of overview and monitoring expected from the parent company.¹⁹⁴

Could linking a parent company's duty of care to its creation and implementation of global human rights policies act as an incentive for group companies not to have policies at all, so as to limit potential liability? Such an argument would appear somewhat shortsighted in the current regulatory environment, in which companies are increasingly required by law to report and intervene throughout their supply chains. New legislation is regularly being adopted both at the regional and national level that imposes mandatory human rights due diligence requirements on certain categories of companies. In other words, it is getting harder and harder for companies to justify not having global human rights policies and procedures.

Under the 2016 French *Loi de vigilance*, for example, companies of a certain size are required to identify risks of negative human rights impacts throughout their supply chains (including abroad) and how they plan to address such risks.¹⁹⁵ Those who thought this was just another box-ticking exercise may have underestimated the determination of French civil society, as the first judicial action under the *Loi de vigilance* was brought in June 2019 by a group of six

¹⁹³ *Eric Barizaa* Decision, *supra* note 179, para 6.9.

¹⁹⁴ EP, Directorate-General for External Policies, ‘Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries’ (2019), 77 available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf) (last visited 03 June 2020).

¹⁹⁵ Article L. 225-102-4.-I of the French Commercial Code (*Code de commerce*).

NGOs against oil company Total for the latter's failure to address risks linked to a large-scale extractive project in Uganda, which put 50,000 at risk of forced displacement and could have a disastrous environmental impact, in its vigilance plan.¹⁹⁶ The company failed to take remedial action, leading the NGOs to apply to the courts for provisional measures.¹⁹⁷ The application was rejected in January 2020 for lack of jurisdiction, a decision which the claimant NGOs say they are considering appealing.¹⁹⁸ A similar judicial action was launched against Total around the same time, this time by fifteen local authorities and five NGOs.¹⁹⁹

Mandatory human rights due diligence and reporting requirements are likely to be an ever more present feature of States' regulatory arsenal, with multinational corporations required to identify and disclose both human rights risks and the way they plan on addressing such risks.²⁰⁰ A sign of the times, on 28 April 2020, European Commissioner for Justice Didier Reynders pledged his

¹⁹⁶ See L. Caramel, 'Devoir de Vigilance: Total Devant la Justice Française Pour les Actes de sa Filiale en Ouganda', *Le Monde* (12 December 2019), available at https://www.lemonde.fr/economie/article/2019/12/11/devoir-de-vigilance-total-devant-la-justice-pour-les-actes-de-sa-filiale-en-ouganda_6022480_3234.html (last visited 26 May 2020).

¹⁹⁷ See E. Monin, 'Projet Pétrolier en Ouganda: Le Groupe Total Assigné en Référé Pour Manquement à son Devoir de Vigilance', *France Info* (23 October 2019), available at https://www.francetvinfo.fr/monde/afrique/projet-petrolier-en-ouganda-le-groupe-total-assigne-en-refere-pour-manquement-a-son-devoir-de-vigilance_3671767.html (last visited 26 May 2020).

¹⁹⁸ See press update, 'Total Assigné en Justice Pour Manquement à son Devoir de Vigilance Climatique', *Reporterre* (30 January 2020), available at <https://reporterre.net/Total-assigne-en-justice-pour-manquement-a-son-devoir-de-vigilance-climatique> (last visited 26 May 2020).

¹⁹⁹ V. Collen, 'Réchauffement Climatique: Total Assigné en Justice par des Collectivités Locales', *Les Echos* (28 January 2020), available at <https://www.lesechos.fr/industrie-services/energie-environnement/rechauffement-climatique-total-assigne-en-justice-par-des-collectivites-locales-1166991> (last visited 26 May 2020).

²⁰⁰ At the time of writing, Germany is considering introducing legislation similar to the French *Loi de vigilance*, see, J.-M. Hauteville, 'Responsabilité Sociale: Berlin Envisage de Mettre au pas les Multinationales Allemandes', *Le Monde* (29 July 2019), available at https://www.lemonde.fr/economie/article/2019/07/29/responsabilite-sociale-berlin-envisage-de-mettre-au-pas-les-multinationales-allemandes_5494563_3234.html (last visited 26 May 2020). Berthet describes a "legislative tide" across domestic jurisdictions, with the mood shifting towards support for the adoption of legislation imposing mandatory human rights due diligence. See A. Berthet, 'Momentum Builds for Mandatory Human Rights Due Diligence', *Opinio Juris* (13 August 2019), available at <http://opiniojuris.org/2019/08/13/emerging-voices-momentum-builds-for-mandatory-human-rights-due-diligence/> (last visited 26 May 2020).

support for mandatory human rights due diligence and announced the bloc's intention to introduce legislation to that effect in 2021.²⁰¹

This trend towards increasing scrutiny is likely to lead to some level of mandatory disclosure of risks to the environment, too. EU law already requires member States to implement rules requiring large companies to disclose certain information on specific challenges they encounter such as environmental protection and respect for human rights.²⁰² More, rather than less, mandatory disclosure is to be expected. On 23 July 2019, for example, the European Commission published a communication titled "Stepping up EU Action to Protect and Restore the World's Forests", explaining that the Commission is considering improving company reporting on the impact that their activities have on deforestation and forest degradation.²⁰³ On 2 December 2019, over a hundred civil society organizations and trade unions published an open call for the establishment of a mandatory human rights and environmental due diligence framework for businesses operating in the EU.²⁰⁴ Norway, Finland, and Germany have all, in the scope of one month in late 2019, expressed a willingness to enshrine mandatory human rights reporting in law.²⁰⁵

²⁰¹ B. Fox, 'New Human Rights Laws in 2021, Promises EU Justice Chief', EurActiv (30 April 2020), available at <https://www.euractiv.com/section/global-europe/news/new-human-rights-laws-in-2021-promises-eu-justice-chief/> (last visited 26 May 2020).

²⁰² EP and Council Directive 2014/95/EU, 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330, 15 November 2014.

²⁰³ Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 23 July 2019, COM(2019) 352 final, 14.

²⁰⁴ Joint statement signed by NGOs and trade unions, 'A Call for EU Human Rights and Environmental Due Diligence Legislation' (2 December 2019), available at http://corporatejustice.org/news/final_cso_eu_due_diligence_statement_2.12.19.pdf (last visited 26 May 2020).

²⁰⁵ For Germany, see Decision of the 32nd Party Congress of the CDU Party, 22-23 November 2019, available (in German) at https://www.cdu.de/system/tdf/media/images/leipzig2019/32._parteitag_2019_sonstige_beschluesse_2.pdf?file=1 (last visited 26 May 2020); for Norway, see Draft Bill on Transparency in Supply Chains and Due Diligence, autumn 2019, available (in Norwegian) at: <https://www.regjeringen.no/contentassets/6b4a42400f3341958e0b62d40f484371/195794-bfd-etikkrapport-web.pdf> (last visited 26 May 2020); and in Finland see press release by the Finnish Ministry of Foreign Affairs, 2 December 2019, available here: https://um.fi/current-affairs/-/asset_publisher/gc654PySnjTX/content/suomi-ehdottaa-eu-lle-yritykset-ja-ihmisoikeudet-toimintasuunnitelmaa (last visited 26 May 2020).

Coupled with judicial willingness to consider parent company liability, such requirements could create a particularly effective blend of judicial and non-judicial measures, with policies established through mandatory due diligence used as a *hook* allowing courts to find a duty of care owed by parent companies. Interestingly, it could also support arguments that companies such as Argor-Heraeus should have known about human rights abuses occurring down their supply chain, potentially increasing the chances of accountability through criminal liability as well.

III. Challenges

The road to corporate accountability through parent company liability is unlikely to be a smooth ride. In particular, cases such as *Vedanta* are likely to cause a resurgence of the doctrine of *forum non conveniens*,²⁰⁶ in which courts decline jurisdiction on the basis that they are not the appropriate forum for the action,²⁰⁷ traditionally a significant obstacle to access to justice.²⁰⁸ In *Vedanta*, however, the limitations of *forum non conveniens* were countered with a variation of the doctrine of *forum necessitatis* which allows domestic courts to assert jurisdiction when there is no other forum available in which the plaintiffs could pursue their claim. The Supreme Court found that, despite all the factors connecting the case to Zambia,²⁰⁹ England could be considered the proper forum to try the case if substantial justice was unavailable to the parties in Zambia.²¹⁰

Access to justice could therefore become the jurisdictional *hook* through which arguments of *forum non conveniens* could be defeated and non-EU-domiciled defendants anchored to claims against EU-domiciled anchor defendants. This could be particularly powerful when coupled with the fact

²⁰⁶ G. Holly, 'A *Non Conveniens* Revival – The Supreme Court's Approach to Jurisdiction in *Vedanta*', *Opinio Juris* (24 April 2019), available at <http://opiniojuris.org/2019/04/24/vedanta-v-lungowe-symposium-a-non-conveniens-revival-the-supreme-courts-approach-to-jurisdiction-in-vedanta> (last visited 26 May 2020).

²⁰⁷ McConville, 'Taking Jurisdiction in Transnational Human Rights Tort Litigation: Universality Jurisdiction's Relationship to Ex Juris Service, Forum Non Conveniens and the Presumption of Territoriality', *supra* note 157, 188.

²⁰⁸ Augenstein, 'Threats Posed to Human Security by non-State Corporate Actors: The Answer of International Criminal Law', *supra* note 10, 595, n 13. See also C. Liu, 'Escaping Liability via *Forum Non Conveniens*: Conoco Phillips's Oil Spill in China', 17 *University of Pennsylvania Journal of Law and Social Change* (2014) 2, 137; and CESCR July 2011 Statement, *supra* note 39, para. 43.

²⁰⁹ Listed at *Vedanta* Decision, *supra* note 147, para 85.

²¹⁰ *Vedanta* Decision, *supra* note 147, para. 87.

that “[...] in Europe, *forum necessitatis* jurisdiction has been considered to flow from member States’ human rights obligations to ensure access to justice under Article 6 of the European Convention of Human Rights [...]”.²¹¹ This line of argument was explicitly encouraged by the UN Committee on Economic, Social, and Cultural Rights in a 2011 statement: “[T]he extent to which an effective remedy is available and realistic in the alternative jurisdiction should be an overriding consideration in judicial decisions relying on *forum non conveniens* considerations.”²¹²

Although the law seems to be making great strides in the area of parent company liability, it has been noted that cases like *Vedanta* or the Shell litigation in the Netherlands “[...] are rather exceptional and far from suggesting any systematic concern of European private international law with the extraterritorial protection of human rights against corporate-related violations [...]”.²¹³ In addition, States might also be reluctant to accept expansive extraterritorial jurisdiction in civil matters, something which was noted during negotiations of Draft Principle 11 and which led to a change of wording, with the original phraseology proposed in the report (“necessary [...] measures to ensure”) replaced by wording which signifies lesser normative value (“appropriate [...] measures aimed at ensuring”).²¹⁴

G. Conclusion

It is often pointed out that few domestic cases of corporate complicity, whether criminal or civil, have been successful to date. This could be the result of a variety of factors, including the lack of an available forum, lack of resources, and prosecutorial strategies that fail to prioritize these types of cases. As courts “[...] strain to apply analytical frameworks ill-adapted to the contemporary mobility and deterritorialization of capital and products [...]”,²¹⁵ multinational

²¹¹ Augenstein, ‘Threats Posed to Human Security by non-State Corporate Actors: The Answer of International Criminal Law’, *supra* note 10, 597. See also *Nait-Liman v Switzerland*, ECtHR Application No. 51357/07, Judgment of 15 March 2018, for a comparative law analysis of European jurisdictions.

²¹² CESCR July 2011 Statement, *supra* note 39, para. 44.

²¹³ Augenstein, ‘Threats Posed to Human Security by non-State Corporate Actors: The Answer of International Criminal Law’, *supra* note 10, 598.

²¹⁴ V. Jakjimoska & E. Amani, ‘Protecting the Environment in Non-International Armed Conflicts: Are We There Yet?’, *EJIL: Talk!* (16 July 2019), available at <https://www.ejiltalk.org/protecting-the-environment-in-non-international-armed-conflicts-are-we-there-yet/> (last visited 26 May 2020).

²¹⁵ Grosswald Curran, ‘Harmonizing Parent Company Liability’, *supra* note 31, 414.

corporations involved in environmental harm and human rights abuses abroad continue to operate in a general climate of legal impunity. Domestic law remedies the world over have been found to be “[...] patchy, unpredictable, often ineffective and fragile [...]”,²¹⁶ with challenges exacerbated in cross-border cases.

The tide, however, could soon be turning. While the Draft Principles are non-binding, they represent a chance to galvanize discussions of protection of the environment in armed conflict when negotiating binding instruments such as the future BHR treaty. The legal conversation is increasingly concerned with both corporate accountability and the protection of the environment. In July 2019, in direct response to the publication of the Draft Principles, a group of scientists published an open letter in the journal *Nature*,²¹⁷ calling for a Fifth Geneva Convention that would make environmental damage a war crime. The intersection between business, armed conflict, and the environment is also the subject of discussion in the BHR community, as evidenced by the topics discussed at the UN annual Forum on BHR held in November 2019,²¹⁸ which included topics such as corporate crimes in conflict situations, environmental protection, and extraterritorial regulation. Similarly, the push for the inclusion of ecocide as an international crime under the Rome Statute is gaining exponential momentum,²¹⁹ further exposing the link between businesses, environmental harm, and situations of armed conflict. Norms enshrined at the treaty level

²¹⁶ UN Secretary-General, *Human Rights and Transnational Corporations and Other Business Enterprises: Notes by the Secretary-General*, UN Doc A/71/291 (4 August 2016), 23.

²¹⁷ S. M. Durant & J. C. Brito, ‘Stop Military Conflicts From Trashing Environment’, 478 *Nature* (2019) 571.

²¹⁸ UN Forum on Business and Human Rights, Concept Note, ‘Time to act: Governments as Catalysts for Business Respect for Human Rights’, available at <https://www.ohchr.org/Documents/Issues/Business/ForumSession8/ConceptNote.pdf> (last visited 26 May 2020).

²¹⁹ See, in the scope of a couple of months, ‘Imagine Jair Bolsonaro Standing Trial for Ecocide at The Hague’, *The New York Times* (21 September 2019), available at <https://www.nytimes.com/2019/09/21/sunday-review/bolsonaro-amazon-fire.html> (last visited 26 May 2020); A. Kwadrans, ‘The ICC: A Potential Avenue for Accountability for Ecocide?’, *IntLawGrrls* (2 December 2019), available at <https://ilg2.org/2019/12/02/icc-assembly-of-states-parties-symposium-the-icc-a-potential-avenue-for-accountability-for-ecocide/> (last visited 26 May 2020); J. Mehta, ‘Ecocide as an Atrocity Crimes – An Idea Whose Time is Overdue’, *JusticeInfo.Net* (2 December 2019), available at <https://www.justiceinfo.net/en/justiceinfo-comment-and-debate/opinion/43104-ecocide-atrocity-crime-idea-time-overdue.html> (last visited 26 May 2020). For a discussion of the structural limitations that could hamper the usefulness of including ecocide as a crime under the Rome Statute, see Drumbl, ‘Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation and Development’, *supra* note 25, 10.

trickle down into domestic law, leading to further cross-fertilization between the two levels.

Concepts of extraterritorial jurisdiction and liability (both civil and criminal) for harm caused directly or indirectly by multinational corporations are also gaining ground. Universal jurisdiction and extraterritorial corporate accountability have both been identified in legal literature²²⁰ as ideal conduits for the theory of *salience* mentioned in our introduction. Environmental concerns in particular are central to Dworkin's notion salience, as the global environment movement continues to gain traction and pro-environmental objectives are becoming "widely held norms".²²¹ In this context, salience would also increase accountability for corporate wrongs, as businesses will be increasingly unable to "[...] hide behind the consent of States that have self-interested reasons not to subject their corporations with restrictions that the majority of people and states consider necessary [...]".²²²

Similarly, international criminal law standards will likely permeate an increasing number of legal systems (both domestic and supranational), businesses are likely to be increasingly found to owe a duty of care to victims of corporate abuse throughout the world, and the due diligence requirement will increasingly go from soft law to hard normative standards. Such developments will make BHR law increasingly salient, leading to "[...] a further advancement in the protection of human rights from adverse corporate impact [and] a reduction in corporation contribution to social and armed conflict [...]".²²³

²²⁰ Dennison, 'Taking Salience Seriously: the Viability of Ronald Dworkin's Theory of Salience in the Context of Extra-Territorial Corporate Accountability', *supra* note 26, 8.

²²¹ *Ibid.*, 18.

²²² *Ibid.*, 21.

²²³ Martin-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last', *supra* note 26, 74.

Enhancing Environmental Protection During Occupation Through Human Rights

Karen Hulme*

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* Professor Karen Hulme, School of Law, University of Essex, UK.

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Abstract

Environmental protection is not specifically included in treaty law relating to State obligations during situations of occupation. While clearly not of the same scale as damage caused to the environment during armed conflict, damage caused during occupation is often similar in nature – largely due to those who seek to exploit any governance vacuum and a failure to restore damaged environments. What can human rights offer in helping to protect the environment during occupations? What protection can be offered by an analysis of environmental human rights law?

A. Introduction

Typical environmental damage caused during occupation includes looting and killing of species, scorched earth policies involving the destruction of agricultural areas and forests, the contamination of rivers and wells necessary for human subsistence, excessive natural resource exploitation, and environmental harm through the neglect of maintenance of facilities, such as nature reserves, coal mines, and dams.¹ While perhaps not on the same scale as damage caused during the conflict phase, environmental damage during occupation can still be substantial. In protracted occupations, environmental protection is particularly fundamental to the life, health, and survival of the population.

Momentum has grown over recent years in the main United Nations fora to address environmental damage caused by the full spectrum of conflict scenarios, including during occupation.² Indeed, progress on the International Law Commission's (ILC) mandate for the *Protection of the Environment in relation to Armed Conflicts* (PErAC)³ has resulted in the adoption of twenty-eight Draft Principles⁴, three of which specifically relate to situations of occupation. Occupation law itself requires specific duties of, and places limitations on, occupying States but does not specifically refer to the *environment* as such. Yet,

¹ See for example, United Nations Environment Programme (UNEP), *Assessment of Environmental "Hot Spots" in Iraq* (2005), 84-93 [UNEP, Hot Spots in Iraq]; UNEP, *Afghanistan: Post-Conflict Environmental Assessment* (2003), 14 [UNEP, Afghanistan]; See the Polish Forestry Case, UNWCC No.7150, The United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948), 496 [Polish Forestry Case]; *Case Concerning Armed Activities on the Territory of the Congo* (DRC v. Uganda), Judgement, ICJ Reports 2005, 168, 171 [DRC v. Uganda]; Organisation for Security and Co-operation in Europe (OSCE), *Assessment of Environmental Damage in Eastern Ukraine and Recovery Priorities* (2017) [OSCE, Ukraine]; UNEP, *Desk Study on the Environment in the Occupied Palestinian Territories* (2003) 26, 88-87, 96-102 [UNEP, OPT].

² UNEA Resolution 2/15 (2016), *Protection of the Environment in Areas Affected by Armed Conflict*, UNEP/EA.2/Res.15, 27 May 2016; UNEP and Environmental Law Institute, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (2009).

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

⁴ *Text and Titles of the Draft Principles Provisionally Adopted by the Drafting Committee of the International Law Commission on First Reading on the Seventy-First Session, Protection of the Environment in Relation to Armed Conflicts*, UN Doc A/CN.4/L.937, 6 June 2019 [Draft Principles].

analysis of the true potential of human rights law in enhancing environmental protection during occupation is still in its infancy.⁵ This contribution seeks to add to current knowledge by drawing on the full range of *environmental human rights* to draw out a more complete picture of obligations during occupation, and, thus, to enhance guidance for States.

In her first report as ILC Special Rapporteur, Marja Lehto considered the environmental protection afforded in the situation of occupation.⁶ Interestingly, the Special Rapporteur drew on the environmental protection afforded by the human right to health as one source of obligations on occupying forces.⁷ The resultant ILC Draft Principles clearly acknowledge this influence, but what if, instead, a broader *environmental human rights* approach were taken to protection of the environment in occupation?⁸ Consequently, this contribution seeks to catalyze the momentum created by the adoption of the Draft Principles by expanding the human rights analysis. Notably, the current ILC Draft Commentary to the Draft Principles⁹ recognizes an obligation on Occupying States to “[...] take proactive measures to address immediate environmental problems”¹⁰ and the possible need for “active interference” in the laws and institutions concerning the environment of the occupied territory.¹¹ Drawing from environmental human rights more broadly, therefore, this contribution will also help to generate concrete guidance for States of which *proactive measures* and *active interferences* are required, not just for the short term but also for the longer term, as occupation becomes more protracted. Most importantly,

⁵ For analysis of human rights obligations in relation to the exploitation of natural resources see D. Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (2015); for environmental human rights obligations in post-conflict situations see K. Hulme, ‘Using a Framework of Human Rights and Transitional Justice for Post-Conflict Environmental Protection and Remediation’ in C. Stahn, J. Iverson & J.S. Easterday, *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (2017).

⁶ *First Report on the Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, Special Rapporteur*, UN Doc A/CN.4/720, 30 April 2018, 10, paras. 10-99 [Lehto, First Report].

⁷ *Ibid.*, 63-76.

⁸ The contribution will largely focus on the notion of *belligerent occupation* in international armed conflict, note Roberts’ analysis of seventeen different types of occupation, A. Roberts, ‘What is Military Occupation?’, 55 *British Yearbook of International Law* (1984) 1, 249.

⁹ *Report of the International Law Commission to the Seventy-First Session*, UN Doc A/74/10, 29 April - 7 June and 8 July - 9 August 2019 [ILC Draft Commentary].

¹⁰ *Ibid.*, para.11, 275.

¹¹ *Ibid.*, para.12, 275.

developing greater understanding of how environmental human rights apply in occupation allows the possibility for injured parties to seek recourse from international human rights mechanisms.¹²

There is no universally binding treaty obligation specific to a right to a healthy environment. Instead, extensive analysis evidences a series of human rights relevant to the protection of the environment, some of which are based in universally binding human rights, often referred to as the *greening* of human rights.¹³ Consequently, this contribution will, by necessity, attempt to distil from State practice the core obligations of this series of *environmental human rights* as drawn from general international law. This contribution suggests both a new way to view *environmental human rights* and uses this approach to add to the literature. As a final word of caution, in focusing on environmental human rights obligations, this contribution does not seek to suggest that environmental law obligations are not relevant during times of occupation.¹⁴ Instead, the aim is to test what could be achieved using human rights.

Following a brief analysis of the law governing occupation (Section B) and the ILC Draft Principles (Section C), this contribution will explore State practice on *environmental human rights* (Section D). This analysis will evaluate the extent of binding obligations in terms of *minimum core* duties of protection. Using these findings, the final section will contain some guidance for States, which builds upon the environmental protection recognized by the ILC's recently adopted Draft Principles.

B. Environmental Damage and the Law of Occupation

This section will analyze the provision for environmental protection within the law of occupation and, more specifically, how human rights laws applies during occupation.

¹² N. Lubell, 'Human Rights Obligations in Military Occupation' 94 *International Review of the Red Cross* (2012) 885, 317, 319.

¹³ D. R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (2012); J.R. May & E. Daly, *Global Environmental Constitutionalism* (2014); See J.H. Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Mapping Report*, UN Doc A/HRC/25/53, 30 December 2013 [Knox, December 2013 Report].

¹⁴ Admittedly the continuation of environmental laws and its applicability on an extra-territorial basis for the occupier is not settled law, see *Draft Articles on the Effects of Armed Conflicts on Treaties, With Commentaries* (2011) 2(II) Yearbook of the International Law Commission, Articles 6 and 7.

Occupation is a defined legal situation wherein territory of one State is “[...] actually placed under the authority [...]” of the armed forces of another State (Article 42 of the 1907 Hague Regulations).¹⁵ Accordingly, Article 42 stipulates that occupation “[...] extends only to the territory where such authority has been established and can be exercised”. The test is commonly referred to as one requiring “[...] effective control over foreign territory”.¹⁶ Consequently, occupation law also extends to situations in which the occupying forces meet with no resistance, as well as to territorial administration provided by an international organization.¹⁷ The situation of occupation is a legally interesting one, therefore, in terms of the duties placed on the foreign power temporarily in charge of territory of a displaced State government. With the growing imperative globally of ensuring environmental protection, what limits and obligations are placed on such *temporary* stewards is becoming more important – particularly in situations of protracted occupation.

The principal duty of the occupier is to administer the territory, essentially by restoring and ensuring, as far as possible, public order and security,¹⁸ on the one hand, and civil life, including ensuring the welfare of the local population, on the other.¹⁹ For example, the initial stages of occupation may be typified by a

¹⁵ *Regulations Respecting the Laws and Customs of War on Land, Annexed to the 1907 Convention (IV) Respecting the Laws and Customs of War on Land*, 18 October 1907, (1910) UKTS 9, Cd.5030 [1907 Hague Regulations].

¹⁶ International Committee of the Red Cross, *Expert Meeting: Occupation and other Forms of Administration of Foreign Territory*, report prepared and edited by Tristan Ferraro (2012), available at <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4094.pdf> (last visited 22 January 2020), 8 [ICRC, Occupation Expert Meeting]; *DRC v. Uganda*, *supra* note 1, 229, paras. 172-180; International Committee of the Red Cross (ICRC), *Commentary of 2016 to Article 2 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I)*, paras. 301-304, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518> (last visited 22 January 2020); Y. Dinstein, *The International Law of Belligerent Occupation*, (2009), 43; E. Benvenisti, *The International Law of Occupation*, 2nd ed. (2012), 43 [Benvenisti, *Occupation*].

¹⁷ M. Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’, 16 *European Journal of International Law* (2005) 4, 661, 687-689.

¹⁸ Article 43, *1907 Hague Regulations*, *supra* note 15. The original wording is “safety”, but this is believed to be a mistranslation from the Original French text, see E.H. Schwenk, ‘Legislative Power of the Military Occupier under Article 43, Hague Regulations’, 54 *Yale Law Journal* (1945) 2, 393.

¹⁹ *Jam’iat Iscan Al-Ma’almoun Al-Tha’auniya Al-Mahduda Al-Mauliya, Cooperative Association Legally registered at the Judea and Samaria Area Headquarters v. IDF Commander in Judea*

level of insecurity and instability. In ensuring recognition of the interests of the occupied population, the occupier is expected to work towards the restoration of human rights, certainly so if the occupation becomes more protracted.²⁰ In such situations, the concept of *public order and safety* must necessarily be broadened, as recognized in Israeli jurisprudence, to include welfare, health, hygiene, and “[...] other such matters to which human life in modern society is connected.”²¹ Thus, the immediate duty on the occupier clearly requires positive obligations in order to ensure sufficiently stable governance of the territory, and the emphasis is upon ensuring law and order and a return to normality for the population. However, dependent on the security situation, and whether the occupying force has sufficient control in fact, it is recognized as an obligation of due diligence and that the occupying State may not be able to fulfil the full spectrum of obligations immediately.²²

In addition to the law of occupation, human rights treaties continue to apply in situations of occupation as it is generally recognized that such rights “belong to the people” and so “[...] protection devolves with territory [...]”.²³ Treaties ratified by the occupier when acting in occupied territory on an extra-territorial basis also remain applicable.²⁴ The exact basis of applicability, however,

and Samaria et al., HCJ 393/82, Judgment of 28 December 1983, para. 37 [Jam’iat Iscan Case]; note Articles 27-34 and 47-78, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 12 August 1949*, 75 UNTS 287 [1949 Geneva Convention IV]; see also Schwenk, *supra* note 18, 398; D. Kretzmer, ‘The law of belligerent occupation in the Supreme Court of Israel’, 94 *International Review of the Red Cross* (2012) 885, 207, 216-222; E. Benvenisti, *The International Law of Occupation* (1993), 53.

²⁰ Benvenisti, *Occupation*, *supra* note 16, 78; Sassòli, *supra* note 17, 679.

²¹ *Jam’iat Iscan Case*, *supra* note 19, para. 18.

²² Eritrea-Ethiopia Claims Commission, *Partial Award: Western Front, Aerial Bombardment and Related Claims – Eritrea’s Claims 1, 3, 5, 9-13, 14, 19, 21, 25 & 26* (2005), para. 27 [EECC, Western Front]; F. J. Hampson, ‘The Relationship Between International Humanitarian Law and Human Rights Law From the Perspective of a Human Rights Treaty Body’ 90 *International Review of the Red Cross* (2008) 871, 549, 568; Lubell, *supra* note 12, 322; Benvenisti, *Occupation*, *supra* note 16, 76.

²³ Human Rights Committee, *General Comment No. 26: General Comment on Issues Relating to the Continuity of Obligations to the International Covenant on Civil and Political Rights*, UN Doc CCPR/C/21/Rev.1/Add.8/Rev.1, 8 December 1997, para. 4; note the view that the US and Israel may be persistent objectors to the continuity of human rights obligations during occupation, see Benvenisti, *Occupation*, *ibid.*, 14-15.

²⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 178-180, paras. 106-112; the ICJ held Uganda responsible for breaches of human rights obligations carried out when an *occupying power*

is less settled. The dominant approach, arguably, is rooted in the jurisdictional requirement of “[...] effective control over territory”, found in both regimes.²⁵ Furthermore, the precise methodology and parameters of the co-application of human rights law alongside occupation law remain unclear, with many suggestions of the need for a rule-by-rule analysis and interpretation.²⁶

The authors of the comprehensive 2005 *Customary Humanitarian International Law Study* openly used international human rights instruments to “[...] support, strengthen and clarify analogous principles of international humanitarian law”.²⁷ Thus, where the two obligations share the same objective, generally the protection of civilians and civilian objects, co-application can work by allowing human rights instruments and jurisprudence to help interpret obligations in the law of occupation in a mutually reinforcing way.²⁸ In this way, in her analysis for the ILC’s PErAC work, Special Rapporteur Lehto opened a gateway to environmental human rights through the obligation on the occupying power of ensuring and maintaining public health and hygiene in the occupied territory,²⁹ arguing that human rights law could be used to “enrich and

in the DRC, *DRC v. Uganda*, *supra* note 1, paras. 178-180 and 216-220; see also *Loizidou v. Turkey*, ECtHR Application No. 15318/89, Judgment of 18 December 1996; *Al-Skeini and Others v. The United Kingdom*, ECtHR Application No. 55721/07, Judgment of 7 July 2011, paras. 139-145; the Human Rights Committee of the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 [ICCPR] confirmed the Covenant’s applicability to “[...] anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party” in *General Comment No. 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10 [Comment 31]; the Committee on Economic, Social and Cultural rights (CESCR) has made a similar observation as regards the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (ICESCR) at *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, E/C.12/1/Add.90, 26 June 2003, para. 31.

²⁵ ICRC, *Occupation Expert Meeting*, *supra* note 16, 61-67; note also the development of the *State agent authority* approach in the jurisprudence of the ICJ and European Court of Human Rights, Lubell, *supra* note 12, 319-324.

²⁶ ICRC, *Occupation Expert Meeting*, *supra* note 16., 64.

²⁷ J.-M. Henckaerts & L. Doswald-Beck, *Customary Humanitarian International Law, Volume I: Rules* (2005), xxxvii.

²⁸ An immense body of jurisprudence, institutional and academic writing has been dedicated to this topic. See for example, G. Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (2015); R. Kolb, & G. Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (2013); D. Murray *et al*, *Practitioners’ Guide to Human Rights Law in Armed Conflict* (2016).

²⁹ *1949 Geneva Convention IV*, *supra* note 19, Art. 56; Lehto, *First Report*, *supra* note 6, para. 65.

deepen³⁰ these rules of the law of occupation. This approach allowed the Special Rapporteur to expand the *healthcare* concept within the law of occupation to encompass the threats to health caused by environmental contaminants and pollution, disease, as well as environmental degradation and, in some contexts, the depletion of natural resources.³¹ A similar approach would allow expansion of the occupier's obligation to ensure *food* supplies of the occupied population³² to include the environmental dimensions of the human rights to food and water.³³ In the same way, environmental human rights obligations can help interpret the principal duty of the occupier of ensuring security and restoring social functions, including the welfare of the occupied population.³⁴

Adopting such a norm-by-norm approach, however, does not appear to be a very systematic way to analyze environmental protection during occupation – principally, as there is no central notion of protection of the *environment* in occupation law to be interpreted, but only a selection of potential, but rather peripheral terms, such as *food* and *health*. This contribution suggests, therefore, that a more effective approach is in establishing the *minimum core obligations* of the body of environmental human rights, since, by definition, minimum core obligations remain binding at all times.³⁵ Clearly, moving beyond this core of obligations, individual States may have higher standards due to specific treaty obligations.

³⁰ Lehto, *First Report, ibid.*, para. 59.

³¹ *Ibid.*, para. 66 and the sources referenced.

³² *1949 Geneva Convention IV, supra* note 19, arts. 55 and 59 (emphasis added).

³³ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No.15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/2002/11, 20 January 2003, para. 37(a-c) [General Comment No. 15]. See generally M. Tignino, 'The Right to Water and Sanitation in Post-Conflict Legal Mechanisms: An Emerging Regime?', in E. Weintal, J. Troell & M. Nakayama, *Water and Post-Conflict Peacebuilding* (2014), 383.

³⁴ Note the ILC Draft Commentary for the proposition that environmental protection is a "[...] widely recognized public function of the modern State", and, therefore, environmental protection fits within the obligations to ensure *public order and safety* and the welfare of the civilian population for Article 43 of the 1907 Hague Regulations, *ILC Draft Commentary, supra* note 9, 268, 269, referencing the "[...] widely recognized public function [...]" argument advanced by K. Conca, *An Unfinished Foundation: The United Nations and Global Environmental Governance* (2015), 108.

³⁵ CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (art. 2, para. 1 of the Covenant)*, UN Doc E/1991/23-E/C.12/1990/8 and Corr.1, annex III, 14 December 1990, paras. 9-10; note some expert opinions at ICRC, *Occupation Expert Meeting, supra* note 16, 65.

Identifying the minimum core obligations also recognizes that States always have a core duty of obligations whatever the realities of the security situation on the ground, thus assuming that it may not be able to fulfil the entire spectrum of obligations immediately and to their full³⁶, but must work towards this. On this point, the jurisprudence of the European Court of Human Rights relevant to occupation suggests a flexible approach in that the level of protection is commensurate with the extent of control.³⁷ Furthermore, the minimum core approach also aligns with the tripartite approach within economic, social, and cultural rights to *respect, protect and fulfil* as these obligations generally become more onerous on the State as it moves from *respect* (refrain from interfering with the enjoyment of human rights), through *protect* (protect against human rights abuses by third parties) to *fulfil* (positive action to facilitate the enjoyment of human rights).³⁸ The focus on minimum core obligations as the starting point for analysis also recognizes the nature of environmental human rights, which tend to be obligations of progressive realization based on the availability of State resources and circumstances, which is particularly relevant to occupation.³⁹

C. ILC Draft Principles on Protection of the Environment in Relation to Occupation

This section will analyze the recently adopted ILC Draft Principles as these substantially add to the international practice in this area and, hence, offer a new way to conceive of environmental protection during occupation. The three Draft Principles are as follows:

³⁶ Hampson, *supra* note 22, 568; Lubell, *supra* note 12, 322-334.

³⁷ See the applicants' similar arguments of a proportionate approach in *Bankovic and Others v. Belgium and Others*, ECtHR, Application No. 52207/99, Judgment of 12 December 2001, paras. 52 and 75. Lubell prefers *contextual* approach, see Lubell, *supra* note 12, 322; and Murray prefers a *dividing and tailoring approach* to human rights obligations, see Murray *et al*, *supra* note 28, 62-63; based on the language drawn from *Al-Skeini and Others v. The United Kingdom*, ECtHR, Application No. 55721/07, Judgment of 7 July 2011, para. 137.

³⁸ See Comment 31, *supra* note 24, para. 6; para. 7 stipulates that "Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations"; ICESCR, Article 2.

³⁹ Lehto recognizes that economic, social and cultural rights are particularly relevant for occupied territory, especially due to the aspect of progressive realization, which takes into account resource constraints that are also a feature of occupation, Lehto, *First Report*, *supra* note 6, para. 61.

Principle 20: General obligations of an Occupying Power

1. An Occupying Power shall respect and protect the environment of the occupied territory in accordance with applicable international law and take environmental considerations into account in the administration of such territory.
2. An Occupying Power shall take appropriate measures to prevent significant harm to the environment of the occupied territory that is likely to prejudice the health and well-being of the population of the occupied territory.
3. An Occupying Power shall respect the law and institutions of the occupied territory concerning the protection of the environment and may only introduce changes within the limits provided by the law of armed conflict.

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 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: 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.

The three Draft Principles above relate specifically to the situation of occupation (numbered 20-22), although others may also apply depending on the circumstances.⁴⁰ Since the law of occupation does not specifically include reference to the *environment*, these three Draft Principles are very welcome in advancing law and practice in this area. Especially welcome is the definitive statement regarding protection of the environment in Draft Principle 20(1), which recognizes the requirement on the occupier to “[...] respect and protect the environment [...]” of the occupied territory and take “[...] environmental considerations into account [...]” in the administration of such territory.⁴¹

⁴⁰ *ILC Draft Commentary*, *supra* note 9, 268.

⁴¹ *Draft Principles*, *supra* note 4.

The *respect and protect* formula makes clear that the obligation adopts a human rights framing and is a reflection of the co-application of human rights as part of the “applicable international law”, as explained in the ILC Draft Commentary.⁴² However, the exact *applicable law* is still unclear, hence this contribution aims to help clarify this aspect, as well as explore and firm up the “environmental considerations” required of Occupying Powers.⁴³ Linking with Draft Principles 10 and 11 on corporate due diligence and liability, the inclusion of *protect* within Draft Principle 20(1) may also capture the requirement that the occupier must take measures to prevent third parties from causing environmental damage, such as individuals, companies, and armed non-State actors.

In her First Report, Special Rapporteur Lehto included extensive analysis of the environmental rights dimensions of the human right to health, but it was the ILC Drafting Committee that added Draft Principle 20(2). This provision clarifies the existence of a due diligence obligation on occupying States to “[...] prevent significant harm to the environment [...]”. As is well known, conflict and other crises typically lead to wide-ranging destruction of the environment and to gaps in the management and governance of environmental resources.⁴⁴ Going further, reading the Draft Commentary, it becomes apparent that the provision in fact was designed to recognize that occupiers “[...] may have to take proactive measures to address immediate environmental problems”.⁴⁵ This is a very positive clarification of the law as regards environmental protection.

In another respect, however, the wording of Draft Principle 20(2) is somewhat problematic. As currently drafted, Draft Principle 20(2) appears to require a cumulative causal connection, namely that such significant environmental harm also be “[...] likely to prejudice the health and well-being of the population”. One again needs to read the Draft Commentary for clarification, since here it is mentioned that reading these clauses as imposing two cumulative thresholds is contrary to the ILC’s express instructions.⁴⁶ In

⁴² *ILC Draft Commentary, supra* note 9, 269.

⁴³ *Ibid.*, 268-271.

⁴⁴ K. Hulme, *War Torn Environment: Interpreting the Legal Threshold* (2004); B. Sjöstedt, ‘The Role of Multilateral Environmental Agreements in Armed Conflict: ‘Green-keeping’ in Virunga Park: Applying the UNESCO World Heritage Convention in the Armed Conflict of the Democratic Republic of the Congo’, 82 *Nordic Journal of International Law* (2013) 1, 129; D. Jensen & S. Lonergan (eds), *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding* (2012), see also the post-conflict assessments by UNEP.

⁴⁵ *ILC Draft Commentary, supra* note 9, 275.

⁴⁶ *Ibid.*, 273.

addition, the second clause is also arguably both redundant and overly limiting, and it introduces unnecessary anthropocentrism. The focus on health in the provision ignores the co-application of other human rights. As will be analyzed in this contribution, and as alluded to in the Draft Commentary, these other human rights go further than simply “health and well-being”.⁴⁷

Draft Principle 20(3) reflects occupation law’s *conservationist* approach to the existing laws of the State under occupation, namely, conserving the law and institutions of the occupied territory until that State’s government retakes control.⁴⁸ Principally, the law of the occupied State itself continues in force “unless absolutely prevented”⁴⁹, which obligation clearly includes any existing environmental and human rights laws of the occupied State, although it should be highlighted that many States have a host of laws on the books, so to speak, but little environmental protection may be observed in practice. Thus, helpfully, the Draft Commentary to Draft Principle 20(3) suggests that “[...] some active interference in the law and institutions concerning the environment of the occupied territory may thus be required [...]”, while also acknowledging the legal limits imposed by Article 43.⁵⁰

The longer an occupation lasts, the Draft Commentary continues, “[...] the more evident is the need for proactive action [...]”⁵¹ to ensure environmental protection. Yet the limits of such action are not very clear at present.⁵² Furthermore, as Weir has highlighted, to fulfil the obligation in Draft Principle 20(3), “[...] while the legislation of the occupied territory can be respected, without ensuring that the occupied territory has the capacity and resources to implement the protections stemming from its legislation, this principle may lack meaning in practice [...]”.⁵³ Therefore, there should arguably be explicit acknowledgement that the occupier has a duty to ensure sufficient capacity and adequate resourcing of those institutions.

⁴⁷ *Ibid.*, 271-274.

⁴⁸ Sassòli, *supra* note 17, 661.

⁴⁹ Article 43, *1907 Hague Regulations*, *supra* note 15 and Article 64 of the *1949 Geneva Convention IV*, *supra* note 19, recognize the temporary *trusteeship* of the occupying power.

⁵⁰ *ILC Draft Commentary*, *supra* note 9, 275.

⁵¹ *Ibid.*, 274-275.

⁵² For recent issues raised by the transformational/liberationist nature of the Iraqi occupation, see A. Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’, 100 *American Journal of International Law* (2006) 3, 580.

⁵³ D. Weir, Conflict and Environment Observatory, ‘How Should the Environment be Protected in Situations of Occupation?’ (2018), available at <https://ceobs.org/how-should-the-environment-be-protected-in-situations-of-occupation/> (note the author was using the previous numbering of Draft Principle 19(2)) (last visited 01 February 2020).

Draft Principle 21 focuses on the permitted use of the natural resources of the occupied territory. In an important and evocative selection of terminology, the Draft Principle eschews the historic notion of usufruct⁵⁴ for the seminal notion of *sustainable use* and the minimization of environmental harm.⁵⁵ The crux is in preventing the over-exploitation of natural resources, recognizing the temporary character of occupation, and so safeguarding the occupied State's property and means of subsistence. Finally, Draft Principle 22 reflects the law on State responsibility, requiring due diligence by the occupier to ensure significant transboundary environmental harm does not emanate from the occupied territory.⁵⁶

The ILC Draft Principles provide valuable clarification of environmental protection obligations during occupation. This contribution will elucidate whether a broader exploration of environmental human rights law helps to provide more detail regarding what *proactive measures* and *active interferences* might be required.

D. Environmental Human Rights

I. Introduction to Environmental Human Rights

This section will examine the current state of *environmental human rights* and establish the methodology for the distillation of the *minimum core* of those rights that should at all times be observed.

Central to the enjoyment of most human rights is undoubtedly the need for a healthy environment, which provides the necessary basis from which most other human rights are possible, such as the human rights to development, food, water, health, and even the right to life itself.⁵⁷ Many human rights that are protected in the two 1966 International Covenants (namely the ICCPR and

⁵⁴ Article 55, *1907 Hague Regulations*, *supra* note 15. For a detailed analysis of usufruct, see A. Borkowski, *Textbook on Roman Law*, 2nd ed, (1997). Privately owned resources and property is protected from confiscation and pillage (Articles 46 and 47, 1907 Hague Regulations), but can be requisitioned for the army's needs but must be paid for in cash as far as possible (Article 52, 1907 Hague Regulations).

⁵⁵ The rules on usufruct are fully reflected however, see *ILC Draft Commentary*, *supra* note 9, 276-277.

⁵⁶ See the sources references in the *ILC Draft Commentary*, *ibid*, 279-280, including Principle 21, 'Stockholm Declaration of the United Nations Conference on the Human Environment', *26 Yearbook of the United Nations* (1972), 319 [Stockholm Declaration].

⁵⁷ See *ibid.*, *Stockholm Declaration*, para.1 & Principle 1.

ICESCR)⁵⁸ have, thus, already been developed with a *greener* side to them, where the environmental component of the right is emphasized. For example, the right to life now extends beyond killings by State agents to include also considerations of how air pollution and toxic contamination can impact a healthy life,⁵⁹ and, more recently, the need to “[...] preserve the environment and protect it against harm, pollution and climate change caused by public and private actors”.⁶⁰ The greening of rights, particularly economic, social, and cultural rights, has occurred on a global level, and, thus, human rights have been infused with environmental protection.⁶¹ As the two Covenants are universally binding, all the attendant environmental human rights developed from these instruments are also universally binding.

In addition, a number of regional human rights treaties explicitly recognize a separate human right to a healthy environment (or words to that effect),⁶² alongside a growing number of States in their national laws.⁶³ The *right to environment*, as these rights are labelled, tends to be a broader approach to that achieved by *greening* existing rights, emphasizing also the promotion of conservation as well as the prevention of ecological degradation beyond that which has an impact on human health or related property rights.⁶⁴ Thus, the

⁵⁸ *Supra* note 24.

⁵⁹ Note the deliberations in the Human Rights Committee of the ICCPR, *General comment no. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life : revised draft / prepared by Yuval Shany et Sir Nigel Rodley, Rapporteurs*, CCPR/C/GC/R.36/Rev.6, 16 November 2016, para.28; see also the Indian jurisprudence on the constitutional right to life, *Subhash Kumar v. State of Bihar*, Judgment of 9 January 1991, 1991 1 SCC (1) 598.

⁶⁰ Human Rights Committee, *General Comment No. 36 (2019) Article 6: Right to Life, of the International Covenant on Civil and Political Rights*, UN Doc CCPR/C/GC/36, 3 September 2019, para. 62 [General Comment No. 36].

⁶¹ J. H. Knox, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/37/59, 24 January 2018, paras. 12-27 [Knox, January 2018 Report].

⁶² Four regional systems recognize the right to a *healthy* environment, or similar: *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, 14 November 1988, Art. 11; *African Charter on Human and Peoples' Rights*, 27 June 1981, Art. 24; Article 38, *Arab Charter on Human Rights*, 22 May 2004, Art. 38; *ASEAN Human Rights Declaration*, 18 November 2012, Art. 28(f), available at <https://aichr.org/wp-content/uploads/2018/10/ASEAN-Human-Rights-Declaration.pdf> (last visited 02 February 2020).

⁶³ Boyd, *supra* note 13, lists 92 States that had adopted such a right (by c.2012), 53-57.

⁶⁴ CESCR, *Statement in the Context of the Rio+20 Conference on 'the Green Economy in the Context of Sustainable Development and Poverty Eradication', adopted by the Committee*

right to environment generally provides much-needed protection for soil and water quality, and even the protection of biodiversity in ensuring viable and healthy ecosystems.⁶⁵

Consequently, according to one author's analysis, 178 States have recognized the right to a healthy environment.⁶⁶ Importantly, of the four key States who do not recognize a right to a healthy environment (China, the United States, Canada, and Australia), only the US is not party to ICESCR, but is party to the ICCPR and so is subject to the expanded, *greened* interpretation of the right to life.⁶⁷ In 2018, John Knox, the first UN Special Rapporteur on the right to a healthy environment, opined that it was time that the UN formally recognized a global right to a healthy environment.⁶⁸ Knox set out the 2018 *Framework Principles on Human Rights and the Environment*,⁶⁹ involving sixteen basic obligations of States drawn from human rights law.⁷⁰ Due to the greening of global rights, in particular, Knox opined that State obligations to respect, protect, and fulfil human rights "[...] apply in the environmental context no less than in any other",⁷¹ and, thus, that the creation and "[e]xplicit recognition" of a specific right in a treaty instrument had proven to be unnecessary.⁷²

The human rights obligations will need to be analyzed for each State acting as an occupying power on an individual basis, taking into account its

at its forty-eighth session, 30 April-18 May 2012, UN Doc E/C.12/2012/1, 4 June 2012, para.6(e); CESCR, *Report of the Committee on Economic, Social and Cultural Rights for the Thirty-Second and Thirty-Third sessions: Consideration of Reports submitted by States Parties under Articles 16 and 17: Ecuador*, UN Doc E/C.12/2004/9, 26 April-14 May 2004, 8-26 November 2004, para. 278 [CESCR, Ecuador].

⁶⁵ See the Indian jurisprudence on the constitutional right to life, *Subhash Kumar v. State of Bihar*, *supra* note 59; and Costa Rican jurisprudence on protecting biodiversity and groundwater, *Luis Arturo Morales Campos, Recurso de amparo*, expediente 11-002110-0007-CO, 10 May 2011; *Caribbean Conservation Corporation and Others v. Costa Rica* (Green Turtles Case), Sala constitucional de la corte suprema de justicia Costa Rica, Decision 01250-99, 15 February 1999. A. Palmer & C. A. R. Robb (eds), *International Environmental Law Reports, Volume 4: International Environmental Law in National Courts* (2005), 186-196.

⁶⁶ See Boyd, *supra* note 13, 92.

⁶⁷ *General Comment No. 36*, *supra* note 60, para. 62.

⁶⁸ J. H. Knox, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, A/73/188, 19 July 2018, para. 37 [Knox, July 2018 Report].

⁶⁹ *Knox, January 2018 Report*, *supra* note 61.

⁷⁰ *Ibid.*, para. 8.

⁷¹ *Ibid.*, para. 12.

⁷² *Ibid.*, para. 13.

own domestic practice, as well as regional and international obligations. As a starting point, the current contribution seeks to establish what could be classed as the *minimum core obligations* of States as evidenced either as a customary international law rule or general principle of international law.⁷³ Beyond the core minimum, States may have additional obligations drawn from their own treaty membership.

II. Establishing the Minimum Core of Environmental Human Rights

There has been a great deal written on environmental human rights over the past two decades, analyzing key State developments, cases, or regional rights regimes, and specific approaches to embodying rights, such as that of procedural rights or constitutional rights.⁷⁴ This contribution will draw from these sources, noting any limitations,⁷⁵ to try to discern a set of core obligations for one overarching set of environmental human rights. The aim is, partly, to provoke discussion on the selection made of core obligations and their formulation, as well as to provide a minimum core basis for applicability during occupation.

⁷³ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgement, ICJ Reports 1986, 114; R. R Baxter, 'Multilateral Treaties as Evidence of Customary International Law', 41 *British Yearbook of International Law* (1965-66), 275.

⁷⁴ See for example, Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment*, *supra* note 13; May & Daly, *Global Environmental Constitutionalism*, *supra* note 13; O.W. Pedersen, 'The Ties That Bind: The Environment, the European Convention on Human Rights and the Rule of Law', 16 *European Public Law* (2010) 4, 571; A. Boyle, 'Human Rights or Environmental Rights? A Reassessment', 18 *Fordham Environmental Law Review* (2007) 3, 471, 487; D. Shelton, 'Human Rights and the Environment: What Specific Environmental Rights have been Recognized?', 35 *Denver Journal of International Law & Policy* (2006) 1, 129; S.J. Turner *et al.* (eds), *Environmental Rights: The Development of Standards* (2019).

⁷⁵ Depending on the relevant rights system, environmental human rights may contain limitation clauses, be subject to derogation as well as obligations of progressive realisation, note ICESCR, Art. 2(1). See generally M. Sepulveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (2003).

1. Freedom From Environmental Harm

a. Ensuring a Baseline Level of Environmental Health

It is clearly recognized at the global level that the achievement of most human rights necessitates an environment of at least a baseline level of quality, or *environmental health*.⁷⁶ It is commonly phrased in terms of an “[...] undeniable link between the protection of the environment and the enjoyment of other human rights”.⁷⁷ Thus, access to unpolluted air, soil, and water is not simply a *luxury*, but is a necessity for basic human subsistence and survival.⁷⁸ The human rights to health, water, shelter, and food, for example, all include a quality requirement that the necessary natural resources must be safe from contamination.⁷⁹ *General Comment No.15 on the Right to Water*, for example, addresses the need for drinking and bathing water to “be safe”, and, therefore, “[...] free from micro-organisms, chemical substances and radiological *hazards* that constitute a threat to a person’s health”,⁸⁰ referencing World Health Organization (WHO) Guidelines for Drinking Water Quality. Furthermore, the right to health is probably the most extensive in requiring the State to prevent and reduce the “[...] population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health”.⁸¹ The right to health, “[...] embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life [...]”, specifically referencing “a *healthy environment*”.⁸² But the right to health includes not only the direct

⁷⁶ *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23, 12 July 1993; *Stockholm Declaration*, *supra* note 56, Principle 1.

⁷⁷ *Kawas-Fernández v. Honduras (Merits, Reparations and Costs)*, Judgment of 3 April 2009, IACtHR Series C, No. 196, para. 148.

⁷⁸ H. Shue, *Basic Rights: Subsistence, Affluence and United States Foreign Policy* (1980), 23; Sax identifies the right to a healthy environment as forming part of welfare State ideology, J. L. Sax, ‘The Search for Environmental Rights’, 6 *Journal of Land Use & Environmental Law* (1990), 93, 95; T. Hayward, *Constitutional Environmental Rights* (2005), 210.

⁷⁹ For example, CESCR, *General Comment No. 14 (2000) The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/2000/4, 11 August 2000, para.12(a)-(d) [General Comment No. 14]; *General Comment No.15, supra* note 33, para. 12(b); ICESCR, *General Comment 12, The Right to Adequate Food (Art. 11)*, UN Doc E/C.12/1999/5, 12 May 1999, para. 8 [General Comment 12].

⁸⁰ *General Comment No. 15, supra* note 33, para. 12(b).

⁸¹ *General Comment No. 14, supra* note 79, para. 15.

⁸² *Ibid.*, para. 4 (emphasis added).

impacts on health from contaminated water, for example, but also detrimental environmental conditions that “[...] indirectly impact upon human health” under the notion of the “[...] right to healthy natural and workplace environments”⁸³ such as unlawful air, water, and soil pollution through industrial waste.⁸⁴ The Committee on Economic, Social, and Cultural Rights (CESCR) has stipulated more broadly that, in regards to environmental pollution, the right to health is violated by “[...] the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries”.⁸⁵

Most recently, the fundamental, non-derogable right to life has also been interpreted at the international, regional, and domestic levels to require positive measures designed to protect people from the serious risks posed by environmental pollution. The new, ground-breaking *General Comment No. 36 on the Right to Life*, adopted by the Human Rights Committee of the International Covenant of Civil and Political Rights (ICCPR),⁸⁶ expresses the right to life in terms more akin to a right to a healthy environment.⁸⁷ Consequently, State parties are directed to:

“[...] ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.”⁸⁸

Regional systems have also clarified State obligations under the right to life as including severe environmental pollution or risk to life.⁸⁹ In the jurisprudence of the European Court of Human Rights, for example, the Court refers to

⁸³ *Ibid.*, para.15.

⁸⁴ *Ibid.*, para. 34.

⁸⁵ *General Comment No. 14*, *supra* note 79, para. 51.

⁸⁶ *General Comment No. 36*, *supra* note 60.

⁸⁷ *Ibid.*, para. 62.

⁸⁸ *Ibid.*, para. 62.

⁸⁹ *Report on the Situation of Human Rights in Ecuador (1997)*, IACHR Country Reports, OEA/Ser.L/V/II.96 Doc 10 rev. 1, 24 April 1997; *Öneriyildiz v. Turkey*, ECtHR Application No. 48939/99, Judgment of 30 November 2004; *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005, IACtHR Series C, No. 125 [Yakye Axa Case].

“[...] industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites [...]”,⁹⁰ while in finding a breach of the right to life, in *The Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria* case, the African Commission on Human Rights held, the “[...] pollution and environmental degradation to a level humanly unacceptable has made it [sic] living in the Ogoni land a nightmare.”⁹¹ Right to life jurisprudence is probably at its most expansive in certain domestic constitutional settings, however, such as India and Bangladesh.⁹² Here, the right to a healthy environment was judicially crafted out of the constitutionally protected right to life, to require “[...] the protection and preservation of environment, ecological balance *free from pollution of air and water*, sanitation without which life cannot be enjoyed”,⁹³ and has helped the Indian Supreme Court to tackle air, water, and soil pollution.⁹⁴ In sum, the right to a baseline of environmental health is inherent in all of the rights-based approaches, whether that involves the greening of other rights or the specific rights guaranteeing a healthy environment.

There are limitations, however, in existing practice on the baseline level of environmental hazard or harm. Under the European Convention on Human Rights, protection against harmful pollution requires some human harm, or, at least, a risk to humans, generally from living within the vicinity of the source of pollution or harm.⁹⁵ There are also issues concerning where the baseline threshold of environmental health is set. Notably, recognizing that the standard of a pristine environment is unobtainable, there is a need to establish an

⁹⁰ *Öneryildiz v. Turkey*, *supra* note 89, 24, para. 71.

⁹¹ African Commission on Human and People’s Rights, *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, ACHPR/COMM/A044/1, May 27 2002, para. 67 [SERAC v. Nigeria]; see also *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Communication No. 279/03, 296/05, AHRLR 100, 27 May 2009, 153.

⁹² *Dr. M. Farooque v. Bangladesh*, 49 DLR (AD) 1997, 1.

⁹³ *Virender Gaur v. State of Haryana*, Judgement of 24 November 1994, Case No. 9151/1994, 1995 2 SCC 577 (emphasis added). See also *Subhash Kumar v. State of Bihar*, *supra* note 59, which opened the door to such judicial activism and the consequent expansion of environmental protection in India.

⁹⁴ *M.C. Mehta v. Union of India & ors*, Judgment of 5 April 2002, 2002 4 SCC 356; see also A. Rosencranz & M. Jackson, ‘The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power’, 28 *Columbia Journal of Environmental Law* (2003) 2, 223; *Tirupur Dyeing Factory Owners Ass. v. Noyyal River Protection Ass. & et. al.*, Civil Appeal, No. 6776/2009; *A.P. Pollution Control Board II v. Prof. M.V. Nayudu & Ors* [2000] INSC 679; and Boyd, *supra* note 13, 175-183.

⁹⁵ *Kyrtatos v. Greece*, ECtHR Application No. 41666/98, Judgment of 22 May 2003, paras. 52-53; *Öneryildiz v. Turkey*, *supra* note 89.

acceptable baseline level of allowable environmental pollution.⁹⁶ That standard will naturally need to adapt due to the circumstances, such as the level of environmental health expected to be achieved during armed conflict will clearly be lower than allowable during peacetime. When contemplating the minimum core obligation of the right for a healthy life with dignity, environmental human rights law in the European and African regional systems already establish a required baseline level of environmental health, as evidenced above, and thus a baseline level of environmental health that it is not lawful to drop below. Similarly, Sax argues that a “[...] standard of maximum permissible exposure to environmental hazards could be articulated in terms of a minimal standard of permissible exposure to mortal hazard”.⁹⁷

Finally, in terms of an implementation timeframe, while analogous economic, social, and cultural rights are subject to the obligation of progressive realization, it must be recognized that certain aspects of the obligation are immediate, including the requirement to adopt a plan towards their realization and to undertake concrete steps in that direction using the maximum available resources.⁹⁸

b. Managing Environmental Risk

The second, broader dimension discernible from environmental human rights obligations is the right to live free of serious environmentally-related hazards to life.⁹⁹ While risk is clearly inherent in the jurisprudence of the European Court of Human Rights through a series of cases dealing with toxic pollution,¹⁰⁰ it is possibly heightened when we move beyond the industrial pollution paradigm. In *Budayeva and Others v. Russia* (2008),¹⁰¹ the European Court of Human Rights had to rule on issues of State inaction in preventing a

⁹⁶ Sax, *supra* note 78, 100.

⁹⁷ Sax, *ibid.*

⁹⁸ CESCR, *General Comment No. 3: The Nature of States Parties' Obligations, Art. 2, para. 1 of the Covenant*, UN Doc E/1991/23-E/C.12/1990/8 and Corr.1, annex III, 14 December 1990, para. 9.

⁹⁹ To note the wording by Sax, *supra* note 78, 100.

¹⁰⁰ Most cases are dealt with under Article 8 of the ECHR, such as *López Ostra v. Spain*, ECtHR Application No. 16798/90, Judgment of 9 December 1994; *Taskin v. Turkey*, ECtHR Application No. 46117/99, Judgment of 10 November 2004; *Tătar v. Romania*, ECtHR Application No. 67021/01, Judgment of 27 January 2009; *Cordella and Others v. Italy*, ECtHR Application Nos. 54414/13 and 54264/15, Judgment of 24 January 2019.

¹⁰¹ ECtHR Application Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of 20 March 2008.

recurring natural disaster, namely flooding and mudslides which caused several deaths. In cases of natural disasters, the Court held that only foreseeable and clearly identifiable impacts on the right to life would breach Article 2.¹⁰² This was not a problem in the instant case due to the State's knowledge of the risk from previous incidents, clear advance warning from the Russian agency tasked with monitoring the river and dam, the State's failure to subsequently repair the dam, and its failure to issue a warning to the nearby population.¹⁰³

While there is clearly an overlap with the pollution dimension of the right, this aspect refers more to the creation of a situation of risks to life or State inaction in the face of such risks. One example, therefore, drawn from the Budayeva case would be inadequate disaster risk management.¹⁰⁴ As with the pollution dimension, the right would be breached due to the foreseeability of the injury or risk of injury and the level of due diligence of the State in mitigating the injury or risks.¹⁰⁵ This approach is also reflected in *Öneryildiz v. Turkey* (2004),¹⁰⁶ where the severe risks to life were known to the State. The European Court of Human Rights assessed the “[...] weight to be attached to the issue of respect for the public's right to information [...]” and observed that the Turkish Government “[...] have not shown that any measures were taken in the instant case to provide the inhabitants of the Ümraniye slums with *information enabling them to assess the risks* they might run as a result of the choices they had made” [i.e., building their homes on a waste heap].¹⁰⁷ Specifically, therefore, within the right to life, the European Court of Human Rights has recognized a *positive obligation* on the State to ensure the right to receive information about significant health risks, which “[...] would allow him to assess any risk to which he had been exposed

¹⁰² *Ibid.*, paras. 135-137. The Court recognized the applicability of Article 2 (right to life) to “[...] any activity, whether public or not [...]”, *ibid.*, para. 130.

¹⁰³ *Ibid.*, para. 29. See also *Kolyadenko and Others v. Russia*, ECtHR Application Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, Judgment of 28 February 2012; see also *Özel and Others v. Turkey*, ECtHR Application Nos. 14350/05, 15245/05 and 16051/05, Judgment of 17 November 2015.

¹⁰⁴ See *Rio+20 Outcome Document of the United Nations Conference on Sustainable Development, The Future We Want*, A/CONF.216/L.1, 19 June 2012; *Sendai Framework for Disaster Risk Reduction 2015-2030*, United Nations, 2015, available at http://www.preventionweb.net/files/43291_sendaiframeworkfordrren.pdf (last accessed 3 August 2019).

¹⁰⁵ See in particular *Fadeyeva v. Russia*, ECtHR Application No. 55723/00, Judgment of 9 June 2005, para.128.

¹⁰⁶ *Öneryildiz v. Turkey*, *supra* note 89.

¹⁰⁷ *Ibid.*, para. 108 (emphasis added).

[...].¹⁰⁸ The same approach has also been endorsed in the Advisory Opinion of the Inter-American Court.¹⁰⁹ Similarly, in *SERAC v. Nigeria*, heard in the African Commission on Human and Peoples' Rights, Nigeria was required to provide information, *inter alia*, on health and environmental risks to help protect the population against the serious pollution by the oil industry.¹¹⁰

Similarly, a key part of environmental risk management that is observable within human rights jurisprudence around the globe is the use of environmental impact assessments (EIA),¹¹¹ as well as the creation of emergency plans and effective advance warning systems, undertaking inventories of hazardous and dangerous substances and activities, and close monitoring and regulation of such activities.¹¹² Indeed, going further, breach of relevant environmental standards, contaminant safety standards, or licensing requirements, is often a precursor for the finding of a human rights violation.¹¹³ The jurisprudence, therefore, tends to reinforce the need for State compliance with applicable environmental requirements.¹¹⁴ Indeed, this recognition is also reinforced in the new *General Comment No.36 on the Right to Life*, which emphasizes that the obligation of

¹⁰⁸ Emphasis added. *Roche v. the United Kingdom*, ECtHR Application No. 32555/96, Judgment of 19 October 2005, para. 167, the plaintiff had participated in chemical and biological weapons testing at Porton Down.

¹⁰⁹ *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights*, Advisory Opinion OC-23/18 of 15 November 2017, IACtHR, Series A, No. 23, available at http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf (last visited 2 August 2019), para. 225 [Advisory Opinion No. 23 (Colombia)].

¹¹⁰ *SERAC v. Nigeria*, *supra* note 91, para. 68 (emphasis added).

¹¹¹ The ICJ has found the obligation of conducting an EIA to be part of general international law (especially in the sense of a transboundary context of a shared resource), see *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, para. 204; *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, 665, para. 104; see also Advisory Opinion No. 23 (Colombia), *supra* note 109, para. 160.

¹¹² See for example *Guerra and Others v. Italy*, ECtHR Application No. 116/1996/735/932, Judgment of 19 February 1998; *López Ostra v. Spain*, *supra* note 100; *Fadeyeva v. Russia*, *supra* note 105.

¹¹³ *Guerra v. Italy*, *ibid.*; *Taskin v. Turkey*, *supra* note 100.

¹¹⁴ A. Boyle, 'Human Rights or Environmental Rights? A Reassessment', 18 *Fordham Environmental Law Review* (2007) 3, 471, 487; Advisory Opinion No. 23 (Colombia), *supra* note 109, para. 146 and Conclusion B.5.

State parties under international environmental law “[...] should thus inform the content [...]” of the human right.¹¹⁵

Central to managing risk, therefore, is the timely gathering of information and its provision to those at risk. The UN Special Rapporteur’s *Framework Principles on Human Rights and the Environment*, for example, require public education and access to environmental information.¹¹⁶ As recognized in the jurisprudence, the provision of information is even more important in situations of public emergency, particularly when faced with unknown and potentially life-threatening levels of environmental risk. Furthermore, the greater or more complex the risk, arguably the broader the education dimension needs to be so that people are better protected. In peacetime conditions, environmental human rights also emphasize public participation in environmental decision-making and meaningful access to justice in environmental matters.¹¹⁷ These dimensions will be more important as occupation becomes protracted.

c. Conserving a Healthy Environment in the Broader, Ecological Sense

Analyzing State practice within human rights monitoring bodies, as well as the practice of those bodies in interpreting treaty obligations, it starts to become apparent that there is a broader ecological approach being adopted. As will be shown, at times this approach moves beyond the strict confines of requiring a baseline level of environmental protection for human health and well-being, to reflect an approach more akin to environmental conservation.

Notably, in the principal case interpreting the right to a healthy environment contained in Article 24 of the African Charter, the African Commission in *SERAC v. Nigeria* required the State “[...] to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources”.¹¹⁸

¹¹⁵ *General Comment No. 36*, *supra* note 60, para. 62.

¹¹⁶ Framework Principles 6 and 7, see Knox, *January 2018 Report*, *supra* note 61, 10, paras.15-19.

¹¹⁷ See *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, UNTS 2161, 447; *Taskin v. Turkey*, *supra* note 100; *Case of the Saramaka People v. Suriname*, Judgment of 28 November 2007, IACtHR Series C, No. 172, paras. 133-154 [Saramaka Case]; and Principle 10, ‘United Nations Conference on Environment and Development: Rio Declaration on Environment and Development’, 31 *International Legal Materials* (1992) 4, 874, 878.

¹¹⁸ *SERAC v. Nigeria*, *supra* note 91, para. 52 (emphasis added).

Most recently the Advisory Opinion of the Inter-American Court of Human Rights in interpreting the right to a healthy environment, protected in the San Salvador Protocol,¹¹⁹ stressed that the right

“[...] unlike other rights, protects the components of the environment, such as forests, rivers, seas and others, as legal interests in themselves, even in the absence of certainty or evidence about the risk to individual persons [...] because of its importance to the other living organisms with whom the planet is shared, also deserving of protection in themselves.”¹²⁰

The inclusion of conservation measures within the scope of such rights, and the prevention of ecological degradation beyond that which has an impact on human health or related property rights, goes well beyond the notion of survival rights or welfare State notions of ensuring a healthy environment.

Broader notions of *environmental health* are also evidenced in the CESCR's Concluding Observations for the global rights to health, water, and food, for example, included within its remit, such as those commending State action on dealing with deforestation, waste, and desertification.¹²¹ In the context of the Rio+20 Conference in 2012, the CESCR stated that, as part of the right to health, there is a “[...] need to conserve [...] natural habitat and sustainable uses of natural resources[...].”¹²² Specific mention is made of the “[...] equilibrium of the ecosystem”¹²³ in regards to indigenous communities who receive enhanced protection. Endorsing the Aichi Biodiversity Targets,¹²⁴ and Target 14 in particular, which refers to ecosystem services to human health and well-being,

¹¹⁹ *Supra* note 62.

¹²⁰ Advisory Opinion No. 23 (Colombia), *supra* note 109, para. 62 [translation from Spanish].

¹²¹ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Paraguay*, 4 January 2008, UN Doc E/C.12/PRY/CO/3, para.10; *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Tunisia*, 14 May 1999, UN Doc E/C.12/1/Add.36, para. 8; *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Bolivia*, UN Doc. E/C.12/BOL/CO/2, 8 August 2008, para. 9.

¹²² *Statement of the Committee on Economic, Social and Cultural Rights in the Context of the Rio+20 Conference (June 2012) on 'the Green Economy in the Context of Sustainable Development and Poverty Eradication'*, adopted by the Committee at its forty-eighth session, 30 April-18 May 2012, UN Doc E/C.12/2012/1, 4 June 2012, para. 6(e).

¹²³ CESCR, *Ecuador*, *supra* note 64, para. 278.

¹²⁴ Decision adopted by the conference of the parties to the convention on biological diversity at its tenth meeting, UN Doc UNEP/CBD/COP/DEC/X/2, 29 October 2010, 9, target 14.

the WHO promotes ecosystem integrity and the integration of ecosystem management considerations into health policy in order to secure water and food security and protection from diseases.¹²⁵ Also recognized is the objective of Aichi Target 15, which refers to the enhancement of ecosystem resilience.¹²⁶

Further evidence of an entrenchment of this conservation-minded approach of the *right to a healthy environment* can be witnessed in domestic human rights practice. For example, in the South American context, in interpreting the right to a “[...] balanced and healthful ecology [...]” the Philippine Supreme Court held that the right “[...] carries with it the correlative duty to refrain from impairing the environment.”¹²⁷ Similarly, the Costa Rican Constitutional Court, applying the right to a healthy and ecologically balanced environment, requires that special protection be given to biodiversity and groundwater.¹²⁸ Notably, the 2008 judgment¹²⁹ found that species extinction violates the right to a healthy environment, a decision which created protection for the highly endangered leatherback turtles from the annual harvest at Las Baulas National Park.¹³⁰ Some South American countries have gone much further to create constitutional protections extending to *rights of Mother Nature*.¹³¹

In the Asian context, in a clear example of an expanded greening approach, the right to life jurisprudence in India, Bangladesh, Sri Lanka, and Pakistan can be viewed as a precursor to the new *General Comment No. 36 on the Right to Life*.¹³² Taking a broader, environmental approach to the management of forestry and wildlife conservation, in the Godavarman series of cases, the Indian

¹²⁵ World Health Organization, *Our Planet, Our Health, Our Future: Human Health and the Rio Conventions: Biological Diversity, Climate Change and Desertification*, 2011, available at http://www.who.int/globalchange/publications/reports/health_riocoventions.pdf (last accessed on 3 August 2019), 20.

¹²⁶ *Ibid.*, 20.

¹²⁷ ‘The Philippines: Supreme Court Decision in *Minors Oposa v Secretary of the Department of the Environment and Natural Resources (DENR)*’, 33 *International Legal Materials* (1994), 173, 188.

¹²⁸ *Luis Arturo Morales Campos, Recurso de amparo*, Sala constitucional de la corte suprema de justicia Costa Rica, Decision 05839 - 2011, 10 May 2011.

¹²⁹ *Clara Emilia Padilla Gutiérrez, Recurso de amparo*, Sala constitucional de la corte suprema de justicia Costa Rica, Decision 18529 - 2008, 16 December 2008.

¹³⁰ See also the earlier judgment in *Caribbean Conservation Corporation and Others v. Costa Rica* (Green Turtles), *supra* note 65; Palmer & Robb, *supra* note 65, 186-196.

¹³¹ May and Daly, *supra* note 13, 257 for the constitutional provisions of Ecuador and Bolivia; Boyd, *supra* note 13, 70, 139-140.

¹³² *Supra* note 60, para. 62.

Supreme Court has adjudicated on issues of deforestation, mining,¹³³ logging,¹³⁴ impacts of clearing forest for a *recreational park* on a bird sanctuary,¹³⁵ and the reintroduction of endangered species,¹³⁶ all under the remit of the constitutional right to life.

Added to this practice is the fact that more than half of all States have adopted a specific constitutional right to a healthy environment,¹³⁷ and there is, therefore, a substantial evidential base of convergent practice on the inclusion of broader conservation issues within the environmental human rights law, as well as the universally-applicable greened rights to life, health, water, and food, for example.¹³⁸ Thus, while all such provisions are still rooted in human rights, the approach seen here appears to be a very far-reaching environmental protection goal. Such views suggest, therefore, that people are not impacted by environmental degradation only in the narrow sense of pollution of their land or their own immediate health concerns, but also by the broader impacts of a reduction in ecosystem function and genetic diversity. The adoption of the concept of *health and well-being* in the ILC Draft Principle 20(2), therefore, appears to be a rather narrow approach to take given the evidence presented here.

2. Summary: A Minimum Core of Environmental Human Rights

Drawing on the examination of State practice above, the minimum core obligations of environmental human rights could be conceived as follows:

1. Ensuring a baseline level of environmental health, so as to meet the needs of the population, such as adequate food and water sources, and a healthy life itself;

¹³³ *T.N. sS Thirumulpad v. Union of India & Ors* (2008) 2 SCC 222; *T.N. Godavarman Thirumulpad v. Union Of India & Ors* [2011] INSC 587.

¹³⁴ *T.N. Godavarman Thirumulpad v. Union of India* (1996) 9 SCC 982.

¹³⁵ *T.N. Godavarman Thirumulpad v. Union Of India & Ors* [2010] INSC 1058 para. 66.

¹³⁶ *T.N. Godavarman Thirumulpad v. Union Of India & Ors* [2012] INSC 114.

¹³⁷ J.H. Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Compilation of Good Practices*, UN Doc A/HRC/28/61, 3 February 2015, para. 73.

¹³⁸ J.H. Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/25/53, 30 December 2013, para. 28 for Knox's view that States should "[...] accept these statements as evidence of actual or emerging international law". The Report details his findings from the mapping exercise of treaty obligations and State practice.

2. Managing environmental risk, to ensure the collection and provision of environmental risk information; and
3. Conserving a healthy environment in the broader, ecological sense.

These three dimensions will help focus the analysis of potential human rights protection for the environment during occupation, while also adopting the tripartite obligations of respect, protection, and fulfilment. Naturally, there is a level of interpretation of obligations by the author in the analysis that follows, which draws on the environmental human rights analysis provided in the previous section.

The analysis will adopt the QAAA approach to the normative content of the rights, wherein the right is centred around the following four key elements: quality, availability, accessibility, and acceptability.¹³⁹ *Quality* will be taken to refer to the right to live in an environment that is not harmful to health and which affords the ability to live a life in dignity, protected from environmental hazards, whether man-made or natural, and which is culturally acceptable. *Availability* will be taken as requiring a safe and healthy environment free from dangerous contaminants and other hazards. *Accessibility* is usually measured in terms of physical and economic accessibility, access to information, and non-discrimination. Finally, *acceptability* will be taken to require that everyone is able to live in an environment that maintains a baseline level of environmental health and one that is safe from environmental hazards.

E. Applying the Environmental Human Rights to Occupation

I. Ensuring a Baseline Level of Environmental Health

Respect: The Occupier must refrain from the creation of significant pollution and environmental health risks in the occupied territory, thus ensuring an environment of a decent quality. Clearly, the security and stability of the occupation will need to be taken into account when fulfilling the right, but the starting point must be that the occupier is environmentally responsible in its approach, meaning that it must avoid the creation of additional environmental risks or sources of contamination in its activities and protect the population from the creation of such risks by third parties. At minimum, this obligation would

¹³⁹ See *General Comment No. 15*, *supra* note 33, para. 12; *General Comment No. 14*, *supra* note 79, para. 12.

entail taking *environmental considerations* into account in accordance with ILC Draft Principle 20(1), and would clearly be breached by deliberate actions by the occupier to move new polluting industries into the occupied territory¹⁴⁰ as well as the use of toxic materials or destruction of polluting facilities, even in retreat or as defensive mechanisms. Notable examples of the latter point include the systematic destruction of the Iraqi oil wells in occupied Kuwait in 1991,¹⁴¹ the creation of 110 kilometers of oil-filled trenches along its Saudi Arabian border,¹⁴² and the aerial spraying of herbicides to clear vegetation adjacent to the Israeli wall.¹⁴³

The occupier must respect existing access rights to the environment or natural resources, namely by refraining from moving people away from their traditional sources of access to the environment or environmental resources or restricting access to existing rights over resources.¹⁴⁴ Thus, the slaughter of livestock and destruction of agricultural areas and forests, the contamination of water resources and wells, and broader scorched earth policies would all clearly be violations.¹⁴⁵ The obligation of non-discrimination in environmental rights

¹⁴⁰ Al-Haq, *Environmental Injustice in Occupied Palestinian Territory: Problems and Prospects* (2015), 24 [Al-Haq report].

¹⁴¹ A total of 727 wells is given by M. AlSarawi, M.S. Massoud & S.A. Wahba, 'Physical Properties as Indicators of Oil Penetration in Soils Contaminated with Oil Lakes in the Greater Burgan Oil Fields, Kuwait' 102 *Water, Air and Soil Pollution* (1998), 1.

¹⁴² S.A.S. Omar, N.R. Bhat and A. Asem, 'Critical Assessment of the Environmental Consequences of the Invasion of Kuwait, the Gulf War and the Aftermath', in T.A. Kassim and D. Barceló (eds), *Environmental Consequences of War and Aftermath* (2009), 141, 153.

¹⁴³ CESCR, *Concluding Observations on the Fourth Periodic Report of Israel*, E/C.12/ISR/CO/4, 12 November 2019, para. 44.

¹⁴⁴ Note the war crime of pillage, Article 47, *1907 Hague Regulations*, *supra* note 15; Article 33, *1949 Geneva Convention IV*, *supra* note 19; *DRC v. Uganda*, *supra* note 1, para. 248; Dinstein, *supra* note 16, chapter 9. Property can only be seized or exploited in order to meet the occupier's own military or security needs, to defray the expenses involved in the occupation or to protect the interests and the well-being of the inhabitants. For the comprehensive analysis of the exploitation of environmental resources and minerals see Dam-de Jong, *supra* note 5.

¹⁴⁵ EECC, Western Front, *supra* note 22, para. 29; *Eritrea-Ethiopia Claims Commission – Partial Award: Central Front, Ethiopia's Claim 2*, 2004, para. 97 [EECC, Central Front]; Polish Forestry Case, UNWCC, *United Nations War Crimes Commission*, *supra* note 1, 496; *Al-Haq Report*, *supra* note 140, 37, 66-67; *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine, Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the Situation of Human Rights in the Palestinian Territories Occupied [...] Since 1967*, E/CN.4/2006/29, 17 January 2006, para. 48; *UNEP, OPT*, *supra* note 1, 28.

policies and approaches links to the notion of environmental justice, preventing the occupier from creating additional environmental hazards in the occupied territory, for example by building new polluting industries, dumping hazardous waste or redirecting watercourses, all of which have occurred in the occupied Palestinian territories.¹⁴⁶

Protect: The occupier must secure enjoyment of the same rights to the population of the occupied territory by regulating the activities of third parties, including businesses, individuals, and armed groups. Securing the safety of the population from additional sources of contamination caused by third parties would require identifying contaminated and dangerous sites, undertaking environmental risk assessments, and preparing an action plan to deal with existing sources of threats, such as instituting cordons around damaged industrial facilities and securing toxic chemicals, heavy metals, and other hazardous substances as safety measures against looting. For example, in occupied Iraq, looting of chemical facilities was common and the spillage of toxic substances caused environmental health hazards for the local population,¹⁴⁷ with reports of a “[...] cloud of heavy, acrid smoke up to 2 km across, causing respiratory problems for local residents”.¹⁴⁸ At one site, looting led to the dumping of toxic chemicals and hazardous pesticides as well as the release of radioactive uranium oxide.¹⁴⁹ Such dangers will arguably add to a heightened sense of insecurity and may undermine the relative stability of the occupied territory, thus securing dangerous chemicals and facilities against looters could also fit within the principal duty of restoring security and normality under Article 43 of the 1907 Hague Regulations. The looting and uncontrolled exploitation of natural resources by individuals and companies may also cause hazardous pollution due to the use of unconventional or unregulated techniques, in addition to other rights and property violations.¹⁵⁰ The occupier, therefore, has a duty to undertake “[...] appropriate measures to prevent [...]” illegal exploitation of natural resources in the occupied territory.¹⁵¹

To ensure protection of the population against the threats caused by third parties, regulatory measures of industry, emergency planning, and oversight may

¹⁴⁶ *Al-Haq Report*, *supra* note 140, 24 and 67-68; UNEP, *OPT*, *ibid.*, 86-87.

¹⁴⁷ See looting from the Al Qa Qaa Complex which manufactured munitions in *UNEP, Environment in Iraq: UNEP Progress Report*, (2003) 7 [UNEP, *Environment in Iraq*]; looting from the Al Doura refinery in Khan Dhari, UNEP, *Hot Spots in Iraq*, *supra* note 1, 84-93.

¹⁴⁸ UNEP, *Hot Spots in Iraq*, *ibid.*, 84-93.

¹⁴⁹ Tuwaitha nuclear research facility, UNEP, *Hot Spots in Iraq*, *ibid.*, 36.

¹⁵⁰ *DRC v. Uganda*, *supra* note 1, para. 248.

¹⁵¹ *Ibid.*

be required, and will certainly become more important in protracted or large-scale occupations. Creating the Ministry of Environment in occupied Iraq in 2003, for example, the Coalition Provisional Authority (CPA) included as part of its functions, “[...] the protection of [...] residents of Iraq from environmental risks to human health and from [...] pollutants”¹⁵² and required the Ministry to “[...] develop policies, run environmental programs and promulgate and enforce standards[...]” of environmental protection.¹⁵³ To help combat the risks caused by looters, the CPA changed Iraqi law to impose greater prison sentences for attacks of looting and sabotage of electrical and oil infrastructure facilities, on the basis that these “[...] undermine efforts to improve the condition of the Iraqi [...]” people.¹⁵⁴ It is unclear if such *active interference* in the laws and institutions of the occupied territory was what was contemplated by the ILC when creating Draft Principle 20(2).

Fulfil: To work towards fulfilment of its obligations, the occupier should ensure repairs to damaged facilities and infrastructure. It must institute repairs, including emergency repairs, and decontamination of water resources and supplies (e.g. rivers, wells, and water desalination infrastructure) to ensure access to a minimum of safe drinking and bathing water and sanitation, combating the spread of contagious diseases and epidemics,¹⁵⁵ and institute clean-up and decontamination measures of agricultural areas, and maintenance of waste and other sources of contamination to ensure the survival needs of the population. For example, in Afghanistan, the water supplies were overwhelmed by wastewater infiltration and were heavily contaminated with *E. coli* and coliforms,¹⁵⁶ representing “[...] a severe threat to public health [...]”¹⁵⁷ In Iraq, large volumes of waste were created due to the scale of damaged buildings and military debris, including waste contaminated with depleted uranium shells and asbestos.¹⁵⁸ The CPA initiated (and funded) a waste management program, collecting over 1

¹⁵² Section 2(1), Coalition Provisional Authority Order Number 44, Ministry of Environment, CPA/ORD/11 Nov 2003/44, available at https://govinfo.library.unt.edu/cpa-iraq/regulations/20031126_CPAORD44.pdf (last accessed 2 August 2019) [CPA, Order Number 44].

¹⁵³ *Ibid.*, Section 2(2). Note the particular value for the Iraqi occupation authority (CPA) of SC Res.1483, UN Doc S/RES/1483 (2003), 22 May 2003.

¹⁵⁴ Preamble, Coalition Provisional Authority, Order No. 31: *Modifications of Penal Code and Criminal Proceedings Law*, CPA/ORD/10 Sep/31, 10 September 2003 [CPA, Order Number 31]; Sassòli, *supra* note 17, 678.

¹⁵⁵ Article 56, 1949 Geneva Convention IV, *supra* note 19.

¹⁵⁶ UNEP, *Afghanistan*, *supra* note 1, 34.

¹⁵⁷ *Ibid.*

¹⁵⁸ UNEP, *Environment in Iraq*, *supra* note 147, 16.

million cubic meters of waste from the streets of Baghdad.¹⁵⁹ Thus, using an environmental human rights approach, the role of the occupier is necessarily expanded to include greater environmental protections or remediation, which may serve as examples of the *more diversified measures* suggested for Draft Principle 20(2).

As occupation becomes more protracted, the occupier should be increasingly required to work towards the restoration and remediation of agricultural areas, which must also include the removal of munitions, including toxic and explosive remnants of war. The removal of dangerous munitions and remnants will also aid in ensuring security, as recognized by parties to the 1980 United Nations 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,¹⁶⁰ since such explosive remnants will prohibit a return to normality by the civilian population, especially agricultural workers. The observance of environmental human rights could deliver similar duties of risk assessment and clean-up as contained in specialized de-mining obligations, particularly focusing on the more immediate threats to the right to life. Even in States experiencing ongoing conflict, human rights monitoring bodies have, for example, frequently commented on insufficient State action in regard to clearance of landmines or other explosive remnants of war (ERW).¹⁶¹ A similar clearance obligation, therefore, could extend to occupied territory in the fulfilment of human rights. However, the fulfilment of such obligations of remediation will clearly be dependent on the resources available to the occupier as well as within the occupied territory, including technical expertise and equipment.

II. Managing Environmental Risk

Respect: A basic obligation to provide environmental risk information and advice to the population is clearly relevant where the occupier creates new risks, but also in ensuring the welfare of the population more broadly as regards existing risks. The creation of new risks by the occupier should be minimized, hence the requirement to undertake a risk assessment of the potential environmental

¹⁵⁹ *Ibid.*

¹⁶⁰ 10 April 1981, 19 *International Legal Materials* (1980) 1523.

¹⁶¹ *Concluding observations of the Committee on Economic, Social and Cultural Rights: Bosnia and Herzegovina*, E/C.12/BIH/CO/1, 24 January 2006, paras. 9; Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child, Cambodia*, CRC/C/15/Add.128, 28 June 2000, para. 58.

pollution.¹⁶² As such, the toxic air pollution created in Iraq and Afghanistan by unsafe waste disposal, such as the use of so-called open-air burn pits to destroy ammunition and war materiel,¹⁶³ should have been preventable with basic environmental risk practices. Converting existing and readily adaptable risk assessment tools, such as the Rapid Environmental Impact Assessment methodology,¹⁶⁴ albeit designed to address the environmental impact of fast-onset natural disasters, could certainly be a valuable approach for occupying forces to take. Similar use could be made of existing chemical safety standards, such as those adopted under the European Union's REACH regulation, concerning the registration, evaluation, authorization, and restriction of chemicals.¹⁶⁵ Thus, procedural obligations of environmental risk assessments could provide a particularly valuable practical measure in assessing both existing and potential environmental health threats, such as from nuclear, oil, and chemical facilities.

Protect: The occupier must assess existing risks to the population by third parties, such as industry, and, as a minimum, create a risk management plan for all harmful substances in the occupied territory. When noxious sulphur dioxide gas from the Titan factory in Russian-occupied Crimea caused chemical burns and breathing problems, it apparently took two weeks for the authorities to release any information to the public and before the evacuation of children occurred.¹⁶⁶

¹⁶² *SERAC v. Nigeria*, *supra* note 91, para. 53; *Saramaka Case*, *supra* note 117, paras. 133-154; *Taskin v. Turkey*, *supra* note 100.

¹⁶³ See Department of Defense, Instruction, Number 4715.19, February 15, 2011, Incorporating Change 1, February 8, 2013, *Use of Open-Air Burn Pits in Contingency Operations*, para. 6 which reads "Generally, open-air burn pits should be a short-term solution during contingency operations where no other alternative is feasible." K. Donovan Kurera, 'Military Burn Pits in Iraq and Afghanistan: Considerations and Obstacles for Emerging Litigation' 28 *Pace Environmental Law Review* (2010-2011) 288.

¹⁶⁴ Note the rapid EIA procedure developed by the Joint UNEP/OCHA Environment Unit for fast-onset natural disasters, *The Flash Environmental Assessment Tool (FEAT): To Identify Acute Environmental Risks Immediately Following Disasters* (2009).

¹⁶⁵ Council Regulation 1907/2006, OJ 2006 L 396/1 (concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals).

¹⁶⁶ Statement of H.E. Mr. Petro Poroshenko, President, Ukraine to the UN General Assembly, *Climate Change, Economic Inequality, Systemic Bias among Issues Underlined by World Leaders as General Assembly Continues Debate*, GA/12064, 26 September 2018, available at <https://www.un.org/press/en/2018/ga12064.doc.htm> (last accessed 5 August 2019), "Russia's hostile attacks have also poisoned the Ukrainian soil and have caused an environmental disaster not only in the occupied Crimea, but in Donbas as well." 'Russia Evacuates Children as Crimea Town 'Coated in Rust'', BBC News, 6 September 2018, available at <https://www.bbc.co.uk/news/world-europe-45433463> (last accessed 3 August 2019).

Local residents complained that a “[...] greasy ‘rust’ had coated [...] apricot trees and vines[...]”, likening “[...] the rust to old engine oil [...]”.¹⁶⁷ Risk can also come from civilians themselves; for example, following the Soviet occupation of Afghanistan, uncontrolled cultivation and grazing, as well as hunting, water extraction, and deforestation caused large-scale damage to the environment, including the creation of risks to the survival needs of the population.¹⁶⁸

Furthermore, where the territory contains facilities and infrastructure that poses a high risk of failure, such as a dam or nuclear facility, the occupier will, by necessity, be subjected to higher levels of responsibility, including in ensuring the security and stability of the population. For example, in the non-government controlled territory of Donbas in eastern Ukraine, the discontinuation of coal mine maintenance has led to flooding of the mines, with the potential contamination of the water table with dangerous chemicals and heavy metals, including radiation from previous underground nuclear testing, as a consequence.¹⁶⁹ In the occupied Palestinian territories, there has been a lack of monitoring of a waste dump, with the consequence that toxic chemicals are finding their way into the underground water systems.¹⁷⁰ Potable water is especially important in water scarce regions, and ensuring the continued monitoring and maintenance of such facilities, therefore, will be paramount. Mosul dam, for example, is the largest dam in Iraq and requires constant injection of cement to fortify its foundations to avoid collapse. Rehabilitation work was temporarily halted in 2014, however, as the so-called Islamic State took control of the dam.¹⁷¹ While not a true case of *occupation*, this example undoubtedly evidences the particular problems and responsibilities for occupiers to institute and maintain repairs to facilities so as to avoid further risks to the population.

Similarly, linked to the looting of chemical facilities in Iraq, it transpired that residents were using empty chemical and radioactive drums for domestic water storage.¹⁷² Thus, surveying the occupied territory for harmful substances and securing these against damage, disposal, and looting will also help prevent

¹⁶⁷ BBC News, *ibid.*

¹⁶⁸ UNEP, *Afghanistan*, *supra* note 1, 14.

¹⁶⁹ OSCE, *Ukraine*, *supra* note 1.

¹⁷⁰ *Al-Haq Report*, *supra* note 140, 26.

¹⁷¹ T. von Lossow, ‘Water as Weapon: IS on the Euphrates and Tigris: The Systematic Instrumentalisation of Water Entails Conflicting IS Objectives’, (2016), available at https://www.swp-berlin.org/fileadmin/contents/products/comments/2016C03_lsw.pdf (last accessed 3 August 2019), 4.

¹⁷² See the sites at Al Qadissiya and Al Suwaira, *UNEP, Hot Spots in Iraq*, *supra* note 1, 62-83, and the Tuwaitha nuclear research facility, 36.

further risk of harm to the population and so, in turn, help protect against future health risks. Public education, warnings, and risk assessment actions would, therefore, be required to protect the population against such dangers and to help them avoid and reduce the resultant harm. Such information could, for example, advise the population, more specifically, on measures to take to avoid existing risks, when to seek medical advice, as well as indicate the location of suspected hazardous sites, such as from depleted uranium, cluster munitions, or even animal disease outbreaks. Risk management might also require the provision of information on how to deal with specific threats, such as oiled fishing resources or contaminated water sources. After all, what use is there in repairing water facilities without having previously warned users that the water was contaminated? Risk management would also necessitate specific instructions on how to avoid the dangers from explosive or toxic remnants of war (ERW/TRW), particularly relevant to the agricultural community.¹⁷³ As a practical measure, the occupier should ensure the use of recognized emblems or signage on buildings, which house dangerous chemicals, as well as cordons and regulations.

Fulfil: In order to fulfil the minimum obligations, the occupier should investigate significant harms caused to the environment in order to mitigate risk and, with sufficient resources, ensure actions are undertaken to remediate contaminated areas and secure dangerous facilities. Sufficient regulation of hazards and risks are paramount, gaining in importance as the level of risk increases. For example, the Ministry of Environment, created by the CPA in Iraq, was required to develop programs to cover areas such as the control of hazardous waste and to control toxic substances.¹⁷⁴

III. Conserving a Healthy Environment in the Broader, Ecological Sense

Respect: Recognizing that any limitation placed on the occupier to prevent pollution will aid the recovery and viability of the wider environment, the occupier must, therefore, refrain from undertaking activities that would risk causing significant pollution of, or damage to, the environment of the occupied territory,

¹⁷³ ERW is also subject to treaty obligations of surveying and clearance under Article 3 of *Protocol on Explosive Remnants of War 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)*, 2399 UNTS 126, 28 November 2003.

¹⁷⁴ Section 2(1), CPA, *Order Number 44*, *supra* note 152.

particularly conservation areas, ecological spaces, and environmentally-sensitive sites, including rivers, seas, forests, national parks, and reserves. Recognizing a broader, environmental conservation approach, during occupation such duties might also entail respecting existing conservation approaches and activities, and ensuring that conservation actors can continue their work, such as in the Virunga National Forest in the Democratic Republic of Congo.¹⁷⁵ Examples of such breaches would arguably include the suspension of the protected areas project in the occupied Palestinian territories,¹⁷⁶ the fragmentation of nature reserves by the construction of the Israeli wall,¹⁷⁷ and deforestation caused to make way for Israeli settlements.¹⁷⁸ Respect for the broader environment should also, undoubtedly, include the duty to refrain from the deliberate destruction of the environment during occupation, such as occurred in Russian-occupied areas of Georgia in 2008, where forests were deliberately destroyed by fire with consequent, large-scale impacts on wildlife,¹⁷⁹ and in occupied Azerbaijan where forests and national parks were destroyed.¹⁸⁰

For an occupier undertaking a lawful, usufructory exploitation of natural resources, such as a publicly-owned forest or agricultural areas,¹⁸¹ a focus on environmental human rights could create enhanced protection by imposing duties on the occupier as to *how* it exploits such resources, as well as to what extent.¹⁸² Arguably, the occupier should be required to undertake an environmental risk assessment to inform exploitation, by either the occupier or the occupied population, and possibly a sustainable exploitation plan.

Protect: Looting, as well as the illegal exploitation and destruction of forests, agricultural areas and valuable natural resources, such as diamonds and gold, have broader impacts on ecosystem function, biodiversity, and long-term conservation efforts. For example the unsustainable harvesting of sandalwood and the destruction of forest cover in occupied Timor-Leste caused degradation

¹⁷⁵ Sjöstedt, *supra* note 44.

¹⁷⁶ UNEP, *OPT*, *supra* note 1, 96.

¹⁷⁷ *Ibid.*, 98.

¹⁷⁸ *Ibid.*, 100.

¹⁷⁹ International Law and Policy Institute, *Protection of the Natural Environment in Armed Conflict: An Empirical Study* (2014), 28-30.

¹⁸⁰ Jha, *supra* note 142, 66-67.

¹⁸¹ Article 55, *1907 Hague Regulations*, *supra* note 15.

¹⁸² In the case law of the Inter-American and African systems (albeit not related to armed conflict or occupation) such a dimension is evident in the substantive environmental right to a healthy environment, see *Yakye Axa Case*, *supra* note 89, IACtHR; *Saramaka Case*, *supra* note 117.

of soil quality, leading to fertility declines of tree species and soil instability, potentially then leading to greater risk of landslides and soil compaction leading to loss of water retention capacity.¹⁸³ Similarly, the destruction of irrigation channels,¹⁸⁴ wide-scale uprooting of trees (such as olive trees in Palestine),¹⁸⁵ polluting wells, and redirecting watercourses all have broader conservation impacts and should be prohibited. Consequently, the occupier must take measures to protect against the broader impacts of environmental damage caused by third party actions, including requiring sustainable development of natural resources subject to existing licenses.

In relation to conservation areas, ecological spaces and environmentally sensitive sites, these must be protected, for example, by adequate signage and monitoring, against third party damage, such as looting or pollution of resources and unlawful exploitation. Creating a risk assessment system will be invaluable for the protection of conservation areas, ecological spaces, and environmentally sensitive sites.

Fulfil: Particularly as occupations become protracted, the occupier should ensure the sustainable utilization and management of all natural resources for the benefit of the local population,¹⁸⁶ while recognizing the limits of the concept of usufruct. Benvenisti suggests an obligation of the management of water resources, such as “[...] taking active measures to prevent pollution of the rivers.”¹⁸⁷ In locating the obligation, Benvenisti focuses on the human survival aspect of ensuring the supply of clean drinking water.¹⁸⁸ A broader, resource

¹⁸³ *The Final Report of the Timor-Leste Commission for Reception, Truth and Reconciliation* (January 2006), Part 7.9, Economic and Social Rights, paras. 47, 49.

¹⁸⁴ Jha, *supra* note 142, 66 for Azerbaijan.

¹⁸⁵ UNEP, *OPT*, *supra* note 1, 102.

¹⁸⁶ A. Cassese, ‘Powers and Duties of an Occupier in Relation to Land and Natural Resources’, in E. Playfair (ed), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (1992), 419, 422; Dinstein, *supra* note 16. Note the Security Council limits on oil exploitation in occupied Iraq, namely: pending the creation of “[...] an internationally recognized, representative government of Iraq [...]”, SC Res. 1483, UN Doc S/RES/1483, May 22, 2003, para. 20.

¹⁸⁷ Benvenisti, *Occupation*, *supra* note 16, 265; E. Benvenisti, ‘Water Conflicts During the Occupation of Iraq’ 97 *American Journal of International Law* (2003) 4, 860 [Benvenisti, Water Conflicts]. See also the “[...] need to consider measures for the impartial protection [...]” of water resources within the Palestinian Occupied Territories, SC Res. 465, UN Doc S/RES/465 (1980), 1 March 1980, Preamble.

¹⁸⁸ Benvenisti, *Occupation*, *ibid.*, 265.

management requirement could also be drawn from environmental human rights, and, as this section outlines, could be expanded further.

The occupier should create a plan to work towards instituting measures of clean-up and remediation in conservation areas, ecological spaces and environmentally sensitive sites. Again, such actions will become more important as the period of occupation lengthens. An example of remediation action is provided by the restoration of the Ramsar-listed wetlands of the Mesopotamian Marshes in southern Iraq.¹⁸⁹ Reliance upon environmental human rights could, therefore, provide greater environmental protection and something akin to an obligation of good environmental governance during occupation.¹⁹⁰ Creating or designating new protected environmental areas would, though, certainly require the participation and approval of the local population. For example, the Ministry of the Environment, created by the CPA in Iraq, was required to develop programs to cover water and air quality, and pollution, as well as natural resource protection, land management, and biodiversity.¹⁹¹ The Ministry was created with a broad mandate of responsibility for “[...] the protection and conservation of Iraq’s environment [...]”, and was required to ensure that environmental protection formed an “integral factor” when developing other related policies, such as those concerning natural resources, human health, economic growth, energy, transportation, agriculture, industry, and trade.¹⁹²

F. Conclusions

This contribution set out to analyze whether, by using environmental human rights, we could provide more depth to the guidance offered to States as regards their obligations during occupation. This contribution argues that, using evidence from State practice, international courts, and human rights jurisprudence and machinery, it is possible to identify some minimum core obligations of environmental human rights that would remain applicable in situations of occupation. Shifting the focus, from seeing environmental protection solely through the prism of other rights, such as the right to health

¹⁸⁹ Benvenisti, *Water Conflicts*, *supra* note 187; C.J. Richardson & N.A. Hussain, ‘Restoring the Garden of Eden: An Ecological Assessment of the Marshes of Iraq’, 56 *BioScience* (2006) 6, 477.

¹⁹⁰ Justice Shilo referred to *good governance* as a duty of the occupier in *Tabib et al v. Minister of Defense & Military Governor of Tulkarem*, Judgment of 3 December 1981, HCJ 202/81, para. 629.

¹⁹¹ Section 2(1), CPA, *Order Number 44*, *supra* note 152.

¹⁹² Section 2(1), CPA, *ibid.*

or water, this contribution has helped to capture the broader body of obligations encapsulated in *environmental human rights*. Arguably, therefore, the resulting guidance drawn from the environmental human rights analysis presented in the current contribution should contain fewer gaps than would an analysis which focused on each individual human right in turn. The guidance, presented above, is based on the notion of minimum core obligations as conceived by this author's analysis of the wealth of environmental human rights practice to date. Clearly, these findings are open to debate, welcomed by the author.

More broadly, the analysis does not start merely from the perspective of the three approaches traditionally used in environmental human rights law, namely the greening of rights, procedural rights, and the right to environment. Instead, the analysis sought to move past those *baskets* of obligations to distil from practice on a broader level. The three new approaches outlined in the contribution refer instead to a baseline level of environmental health, risk management, and conservation. It is submitted that, using these three approaches as the bases of the obligations, the formulation of concrete guidance for States is helped, as it presented a simplified set of core obligations focused on the most important but also the best evidenced aspects of the rights. Managing risk, particularly significant risk, for example, comes across much clearer in all human rights jurisprudence than the arguably more mechanical application of procedural rights. Furthermore, the guidance suggested recognizes that the scope of obligations may vary with the stability of the situation of occupation, the length of the occupation, as well as the conservationist principle within occupation law, by requiring minimum regulatory change.

Returning to the ILC Draft Principles on occupation, there is clearly much to applaud. The definitive statement regarding the protection of the environment in the Draft Principles concerning occupation is a very welcome development, and especially so since the law of occupation contains no explicit reference to the *environment*. The dual recognition that States must undertake *proactive measures* to address immediate environmental problems and possibly *active interference* in the laws and institutions of the occupied State adds strength to the Draft Principles. Arguably, the current analysis adds to that guidance with greater depth to those obligations and additional concrete examples. The resulting guidance, therefore, it is submitted, presents occupiers with a clearer, more detailed set of obligations, which should be both acceptable to States as well as achievable in practice and which appear to enhance the current level of protection of the environment in situations of occupation.

The Martens Clause and Environmental Protection in Relation to Armed Conflicts

Dieter Fleck*

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* Former Director International Agreements & Policy, Federal Ministry of Defence, Germany; Member of the Advisory Board of the Amsterdam Center for International Law (ACIL); Honorary President, International Society for Military Law and the Law of War.

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Abstract

The existing treaty law on the protection of the natural environment during armed conflicts is less than adequate. Treaty provisions relating to *international* armed conflicts are limited to the prohibition of damage of an extreme kind and scale that has not occurred so far and may hardly be expected from the conduct of hostilities unless nuclear weapons would be used. Even in such a scenario, States possessing nuclear weapons have explicitly objected to the applicability of that treaty law. For *internal* wars, no pertinent treaty provisions exist in the law of armed conflict. Yet multilateral environmental agreements concluded in peacetime stand as an alternative approach to enhance environmental protection during war. As a civilian object, the environment may not be targeted nor attacked in an armed conflict, but this does not exclude collateral damage, nor does this principle as such offer specific standards for proportionality in attacks.

In an effort to close these apparent gaps of treaty law, the present contribution looks into other sources of international law that could be used. In this context, the author revisits the role of the famous Martens Clause in the interplay of international humanitarian law, international environmental law, and human rights law. The role of the Clause in closing gaps caused by the indeterminacy of treaty law is reviewed and customary rules, general principles, and best practices are considered to this effect. For the protection of the natural environment during armed conflicts, the Martens Clause may, indeed, be used as a door opener to facilitate the creation and application of uncodified principles and rules. Particular standards for proportionality in attacks can be derived from the Martens Clause. Pertinent soft law instruments need to be developed in international practical cooperation and by academia. Yet it deserves further study to explore whether, and to what extent, the Martens Clause, which was adopted in the law of armed conflict, may also apply in post-conflict peacebuilding as a case of interaction between the *jus in bello* and the *jus post bellum*, at least as far as the protection of the natural environment is concerned.

A. Introduction

The applicable treaty law¹ relating to the protection of the natural environment during international armed conflicts is limited to the prohibition of damage of an extreme kind and scale that has not occurred so far² and may hardly be expected in the conduct of hostilities, unless nuclear weapons would be used.³ But for such case, nuclear-weapon States have explicitly objected to the applicability of that treaty law.⁴ Specific treaty law on the protection of the environment in non-international armed conflicts is altogether lacking. On the other hand, multilateral environmental agreements concluded in peacetime “[...] stand as an alternative approach [...]”⁵ to enhance environmental protection during all armed conflicts.

- ¹ *Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques*, 18 May 1977, Art. I (1), 1108 UNTS 151, 152 [ENMOD]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, Arts. 35 (3) and 55, 1125 UNTS 3, 21, 28 [AP I]; *Rome Statute of the International Criminal Court*, 17 July 1998, Art. 8 (2) (b) (iv), 2187 UNTS 3, 94 [ICC Statute].
- ² J.-M. Henckaerts & D. Constantin, ‘Protection of the Natural Environment’, in A. Clapham & P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (2014), 468, 470.
- ³ See the discussion by D. Fleck, ‘Legal Protection of the Environment: The Double Challenge of Non-International Armed Conflict and Post-Conflict Peacebuilding’, in C. Stahn *et al.* (eds), *Environmental Protection and Transitions From Conflict to Peace* (2017), 203, 203-204; by M. Gillett, ‘Eco-Struggles. Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict’, in C. Stahn *et al.* (eds), *Environmental Protection and Transitions from Conflict to Peace* (2017), 220, 228-231; and by M. Lawry-White, ‘Victims of Environmental Harm During Conflict. The Potential for “Justice”’, in C. Stahn *et al.* (eds), *Environmental Protection and Transitions from Conflict to Peace* (2017), 367, 372-375.
- ⁴ See the UK’s *nuclear weapons clause*, an interpretive statement that has never been contested by any other State, Great Britain, *The Manual of the Law of Armed Conflict*, (2004), para. 6.17. See also the letter from Department of State Legal Adviser, John B. Bellinger III, and Department of Defense General Counsel, William J. Haynes II, to the President of the International Committee of the Red Cross (ICRC) Dr. Jakob Kellenberger, J. B. Bellinger III & W. J. Haynes II, ‘A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law’, 89 *International Review of the Red Cross* (2007) 866, 443.
- ⁵ B. Sjöstedt, *Protecting the Environment in Relation to Armed Conflict. The Role of Multilateral Environmental Agreements* (2016), 309. This convincing approach is supported by specific treaty obligations for occupying powers, (*Convention (IV) Respecting the Laws and Customs of War on Land and its Annexes: Regulations Concerning the Laws and Customs of War on*

Persons participating in hostilities are subject to more than one branch of international law: international environmental law and human rights law are as relevant for the conduct of wartime military operations as international humanitarian law.⁶ The interaction among these different branches of international law becomes evident if one realizes, as the International Court of Justice (ICJ) has done in *Nuclear Weapons*, that human rights do not cease to apply in times of war and “[...] States must take environmental considerations into account when assessing what is necessary and proportionate in pursuit of legitimate military objectives”.⁷ While this underlines that the environment, as a civilian object, may not be targeted or attacked,⁸ it does not limit the collateral damage of the environment when attacks against military objectives are carried out. Customary rules, general principles of law, and *soft law* might pave the way

Land, 18 October 1907, TS 539, 1 Bevans 631, 36 Stat. 2277, Arts. 43 and 55 [The Hague Convention (IV)].

⁶ Henckaerts & Constantin, ‘Protection of the Natural Environment’, *supra* note 2, 482-484; D. Murray (ed.), *Practitioners’ Guide to Human Rights Law in Armed Conflict*, 2nd ed. (2016).

⁷ *Legality of the Use or Threat of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 240, paras. 25, 30 [Nuclear Weapons].

⁸ See Henckaerts & Constantin, ‘Protection of the Natural Environment’, *supra* note 2, 474. It is, indeed, to be considered that under Art. 52 (2) AP I, a provision that reaffirms existing customary law, “[...] military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”. The natural environment would barely meet this classical definition in any realistic scenario of professional warfighting.

for cooperative solutions,⁹ yet the relevant instruments that have been developed so far remain less than sufficient.¹⁰

In an effort to close the apparent gaps of pertinent treaty law, this contribution focuses on such uncodified sources of international law. Looking for a guide to using them the author revisits the role of the famous Martens Clause in this context, which – as highlighted in the Introductory Note to this *Special Issue* – will also be emphasized in the work of the International Law Commission (ILC) on protection of the environment in relation to armed conflicts.¹¹

After a brief overview on the origins of the Martens Clause and its revival in current treaties (Section B), the potential of the Clause for solving issues of indeterminacy of treaty law will be discussed (Section C). Where no solution can be found by treaty interpretation, uncodified principles and rules, i.e. customary law, general principles and *soft law*, including best practices, will become relevant, although the role of the Clause in this respect has often been unclear and disputed (Sections D-F). The author aims at enlarging consensus on these issues, considering their practical relevance for international cooperation to protect the environment in relation to armed conflicts. In this spirit, some practical consequences of the Martens Clause will be highlighted (Section G). Finally, proposals for international cooperation and further research will be

⁹ *Report of the United Nations Conference on the Human Environment, Declaration of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/REV.1, 5-16 June 1972 (Stockholm Declaration, 1972), Principle 21: “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” This Principle was confirmed *verbatim* in Principle 2 of the *Report of the United Nations Conference on Environment and Development, Rio Declaration on Environment and Development*, UN Doc A/CONF.151/26 (Vol. I), 3-14 June 1992. Furthermore, see Rio Declaration, Principle 24: “Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict, and cooperate in its further development, as necessary” and Principle 25: “Peace, development and environmental protection are interdependent and indivisible”.

¹⁰ See A. Kiss, ‘Perspectives on Compliance with Non-Binding Norms: Commentary and Conclusions’, in D. Shelton (ed.), *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System* (2000), 223.

¹¹ This issue, M. Jacobsson & M. Lehto, ‘Protection of the Environment in Relation to Armed Conflicts – An Overview of the International Law Commission’s Ongoing Work’, 10 *Goettingen Journal of International Law* (2020) 1, 32-45.

made (Section H). While focusing on environmental protection, the main issues and findings discussed here may affect the use of the Martens Clause in general and, thus, potentially also help to solve other cases of indeterminacy of the *jus in bello*.

B. The Martens Clause and its Revival in International Treaty Law

The Martens Clause was coined at the First Hague Peace Conference (1899), confirmed at the Second Peace Conference (1907),¹² reformed in the denunciation clauses of the four 1949 Geneva Conventions (I 63, II 62, III 142, IV 158),¹³ reaffirmed in a more general context both in Article 1 (2) AP I¹⁴ as

¹² For the original text of the Martens Clause, see the Preamble, para. 9 of the Hague Convention (II), *Convention (II) With Respect to the Laws and Customs of War on Land and its Annexes: Regulations Concerning the Laws and Customs of War on Land*, 29 July 1899, TS 403, 1 Bevans 241, 32 Stat. 1803 [The Hague Convention (II)] (which was only slightly adapted in the Preamble, para. 8, of the Hague Convention (IV), *supra* note 5, those adaptations are shown here in brackets): “Until [Pending the preparation of] a more complete code of the laws of war is issued, the High Contracting Parties think it right [deem it opportune] to declare [to state] that[,] in [the] cases not included [provided for] in the Regulations [rules] adopted by them, populations [the inhabitants] and [the] belligerents [shall] remain under the protection [of] and [subject to] empire of the principles of international law [the law of nations], as they result from [established by] the usages established between [prevailing among] civilized nations, from [by] the laws of humanity, and the requirements [by the demands] of the public conscience”, cf. D. Schindler, J. Toman & Henry-Dunant Institute, *The Laws of Armed Conflicts. A Collection of Conventions, Resolutions and Other Documents* (1973), 64.

¹³ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, Art. 63 (4), 75 UNTS 31, 68; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, Art. 62 (4), 75 UNTS 85, 120; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, Art. 142 (4), 75 UNTS 135, 242; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Art. 158 (4), 75 UNTS 287, 392: “The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.”

¹⁴ Art. 1(2) AP I: “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.”

well as in the Preamble (para. 4) of AP II,¹⁵ and again used in the Inhumane Weapons Convention (Preamble, para. 5),¹⁶ the Anti-personnel Land Mines Convention (Preamble, para. 8),¹⁷ and the Convention on Cluster Munitions (Preamble, para. 11).¹⁸ Elements of the Martens Clause can also be found in the Geneva Gas Protocol (Preamble, paras. 1-3),¹⁹ the Biological Weapons Convention (Preamble, para. 10),²⁰ and the ICC Statute (Preamble, para. 1).²¹ The ICJ has held that the Martens Clause itself, as reaffirmed in Article 1 (2) AP I, is now part of customary law.²²

These various treaty provisions seem to convey a general conviction that the Martens Clause provides residual protection in cases not covered by a specific treaty rule, yet experts are skeptical as to the meaning of the Clause and its practical consequences.²³ Fjodor F. Martens, Legal Advisor of the Russian

¹⁵ *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, Preamble, para. 4, 1125 UNTS 609, 611 [AP II]: “Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of public conscience”.

¹⁶ *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*, 10 October 1980, Preamble, para. 5, 1342 UNTS 137, 164 [Inhumane Weapons Convention].

¹⁷ *Ottawa Convention on the Prohibition of the Use, Stockpiling Production, and Transfer of Anti-personnel Mines and on Their Destruction*, 3 December 1997, Preamble, para. 8, 2056 UNTS 211, 241 [Anti-personnel Land Mines Convention].

¹⁸ *Convention on Cluster Munitions*, 30 May 2008, Preamble, para. 11, 2688 UNTS 39, 93.

¹⁹ *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*, 17 June 1925, Preamble, paras. 1-3, 25 American Journal of International Law (1931) 2, Supplement, 94, 94 [Geneva Gas Protocol].

²⁰ *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, 10 April 1972, Preamble, para. 10, 1015 UNTS 163, 166 [Biological Weapons Convention].

²¹ ICC Statute, *supra* note 1, Preamble, para. 1, 91.

²² ICJ, *Nuclear Weapons*, *supra* note 7, 259 para. 84.

²³ See *inter alia* J. von Bernstorff, ‘Martens Clause’ (2009), in *Max Planck Encyclopedia of Public International Law online*, available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e327> (last visited 23 February 2020), para. 4, argues that “[F]or Martens and his contemporaries the clause did not seem to have any significance beyond this diplomatic compromise in the context of international rules on belligerent occupation [...]”. R. Giladi ‘The Enactment of Irony: Reflections on the Origins of the Martens Clause’, 25 *European Journal of International Law* (2014) 3, 847, 868, even advocates for a “[...] departure from normative inquiries about the clause [...]”. Such critical comments, however, need to be reconsidered in the context of the relevant treaty, State practice, and jurisprudence, as will be shown below.

Ministry of Foreign Affairs and a prominent participant of the 1899 and 1907 Hague Peace Conferences who had developed the Clause in a successful diplomatic mediation 120 years ago, was discreet enough not to refer to it himself in any of his many writings. By letting States take the credit for developing it, Martens has in fact contributed to the acknowledgement of the principles of humanity and dictates of public conscience worldwide.

As shown above, in 1899 and 1907, the relevance of the Martens Clause for the development of international humanitarian law was explicitly related to Articles 1 and 2 of the Regulations annexed to the Hague Convention, i.e. to rights and duties of militia, volunteer groups, and the *levée en masse*, an issue that was contested among smaller and bigger powers at the Hague Peace Conferences. The 1949 Geneva Conventions refer to the Martens Clause in the specific context of denunciations (which never became operable and are rather unlikely to occur in future). It was not before the 1977 Additional Protocols that the Martens Clause was linked to the protection of victims of armed conflicts in general, following a proposal by government experts that had first been made at the Red Cross Conference in Teheran (1973).

For a convincing evaluation of the Martens Clause and the functions it serves or could serve in contemporary international law, one should consider that it has been codified in the law of armed conflict.²⁴ The Clause thus does not automatically extend to peacetime and post-conflict situations, whenever a need arises. The *principles of humanity* and *dictates of public conscience* have been invoked to remedy wartime atrocities; they cannot be taken as a convenient arbiter for solving any difficulty in the interpretation and application of international law. This should be acknowledged even though the ICJ has concluded that elementary considerations of humanity are “[...] more exacting in peace than in war [...]”.²⁵ The question whether and to what extent the dominating role of *opinio juris* may also apply in peacetime and in post-conflict situations, at least as far as the protection of the environment is concerned, would deserve a special study and cannot be assessed here in all its aspects.

Furthermore, the interplay between international humanitarian law, international environmental law, and human rights law in armed conflicts have to be taken into account. These three branches of international law, particularly

²⁴ T. Meron & The Hague Academy of International Law, *The Humanization of International Law* (2006), 9, appears to accept a wider influence of the Martens Clause on such other branches, in particular, human rights law. But it should be noted that the text of the Clause in the relevant treaties is more limited.

²⁵ *Corfu Channel Case (United Kingdom v. Albania)*, Judgment, ICJ Reports 1949, 4, 22.

the first one,²⁶ are important fields of application of rules not codified in treaty law, i.e. customary law, general principles, and even *soft law*. The Martens Clause has, indeed, repeatedly been referred to in the context of enhancing the protection of the environment in armed conflict,²⁷ although generally accepted understandings on the applicability, procedural requirements, and practical consequences of the Clause could not be developed so far. The protection of the natural environment during armed conflicts is clearly part of the goals of international humanitarian law.²⁸ A nexus between human rights and international humanitarian law has been recognized by States.²⁹ The terms “established custom” and “principles of humanity” used in Article 1 (2) AP I are too vague to be meaningful for reaching this goal; yet the “dictates of public conscience” are more to the point here, as they entail a responsibility for future generations that includes environmental concerns in armed conflicts.

Finally, the function of the Martens Clause needs to be explored. Is it simply a reminder of the continued validity of uncodified principles and rules beside treaty law? Or could it provide additional guidance for the interpretation of legal sources in cases of doubt? Does it, more specifically, have a role in

²⁶ See T. Meron, ‘The Martens Clause, Principles of Humanity, and Dictates of Public Conscience’, 94 *American Journal of International Law* (2000) 1, 78.

²⁷ M. Bothe *et al.*, ‘International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities’, 92 *International Review of the Red Cross* (2010) 879, 569, 588–589; C. Droegge & M. L. Tougas, ‘The Protection of the Natural Environment in Armed Conflict: Existing Rules and Need for Further Legal Protection’, 82 *Nordic Journal of International Law* (2013) 1, 21, 39–40; P. Sands *et al.*, *Principles of International Environmental Law*, 4th ed. (2018), 198; D. Shelton & A. Kiss, ‘Martens Clause for Environmental Protection’, 30 *Environmental Policy and Law* (2000) 6, 285, 286; see also *World Conservation Congress Resolution 2.97, A Martens Clause for Environmental Protection*, available at https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2000_REC_97_EN.pdf (last visited 24. April 2020): “A Martens Clause for environmental protection. Until a more complete international code of environmental protection has been adopted, in cases not covered by international agreements and regulations, the biosphere and all its constituent elements and processes remain under the protection and authority of the principles of international law derived from established custom, from dictates of the public conscience, and from the principles and fundamental values of humanity acting as steward for present and future generations.”.

²⁸ Like the Stockholm Declaration, *supra* note 9, this latter text does not specifically refer to armed conflict but may be meant to include it. ICJ, *Nuclear Weapons*, *supra* note 7, para. 33; E. B. Weiss, ‘Opening the Door to the Environment and to Future Generations’, in L. Boisson de Chazournes & P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (1999), 338, 344–349.

²⁹ *Final Act of the International Conference on Human Rights*, UN Doc A/Conf.32/41, 22 April – 23 May 1968, 18.

the creation of customary law, general principles of law or *soft law* and thus influence the contents of new rules? To explore these questions, one must try to understand what is meant by *cases not covered by* the various treaties.

C. Issues of Indeterminacy in the Law of Armed Conflict

In a recent scholarly contribution on problems of indeterminacy in the law of armed conflict, Adil Hamed Haque usefully distinguishes between various instances in which clear treaty regulation may be lacking, i.e. ambiguity, vagueness, incompleteness, and inconsistency:³⁰ *Ambiguous* treaty provisions may carry multiple meanings in ordinary language. Even when a provision has a single meaning, it may still be *vague* in that it admits borderline cases. In the event such cases are not explicitly referred to, the provision may still be *incomplete* from what it leaves unsaid. Theoretically, there may even be an *inconsistency* between applicable legal rules.

There are, indeed, important examples in international humanitarian law for indeterminacy: there is no treaty definition of the term *armed conflict*³¹ and there is *ambiguity* in the interaction between international humanitarian law and human rights law with primary and secondary frameworks to be balanced to rule out conflicting situations. To cite some examples, the important proportionality rule remains *vague* in that it does not strictly define what collateral civilian damage would be excessive, the prohibition of widespread, long-term, and severe damage to the natural environment is *incomplete* as it applies to damage that will hardly occur in an armed conflict and it is silent on the many other environmental devastations that, given the fragility of today's natural environment, are quite unacceptable in the conduct of military operations.

In all such cases, an existing gap in legal regulation may be difficult to close, irrespective of whether the negotiators of the pertinent treaty law have sleepwalked into it or even left it by intention. It is true that general rules of treaty interpretation³² may and should be used to rectify indeterminacies so that certain gaps in the text of a treaty provision can be closed within treaty law

³⁰ A. A. Haque, 'Indeterminacy in the Law of Armed Conflict', 95 *International Law Studies* (2019), 118, 120.

³¹ See discussion in ILC Committee on the Use of Force, Final Report on the Meaning of Armed Conflict in International Law (74th Conference, The Hague, 2010), 676; *ILC Draft Articles on Effects of Armed Conflicts on Treaties, with Commentaries, Yearbook of the International Law Commission* (2011), Vol. II, Part Two, 108, Art. 2 (b), 109.

³² See in particular Arts. 31-33 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, 332, 340 [VCLT].

itself. But this will not always help, and it definitively would not suffice to solve the problems of *ambiguity*, *vagueness*, and *incompleteness* in the aforementioned examples. Rather, progressively developing new, non-treaty law or best practice will be the option to pursue.

Haque concludes that the law governing the conduct of hostilities lacks “[...] a deliberate and well-defended interpretive theory”.³³ He mentions the Martens Clause in AP I and AP II,³⁴ but does not discuss the very practical question as to what specific purpose the Clause serves and how it should be implemented. Thus, his general proposition – that “[...] the law governing the conduct of hostilities cannot have an interpretive theory of its own but must share one with general international law, the law of inter-State force, and human rights law”³⁵ – regrettably ignores the specific role of the Martens Clause in international humanitarian law and the effect it may have for the interpretation and further development of its rules. The Clause, indeed, deserves to be reconsidered and used today, as it may help to find solutions in uncodified sources of that law for *cases not covered* by existing treaties. Such solutions will be discussed in the following three Sections.

D. Customary Law

The text of the Martens Clause in the various treaties cited previously³⁶ speaks for a certain relevance of the Clause for customary international humanitarian law and its progressive development. This goes beyond the customary status of the Clause as such, as it raises the question of its law-making effect for closing gaps of these various treaties. As the declared purpose of the Clause is to influence the behavior of States, the question is valid as to whether such behavior is then based on an evolving customary norm.

It may be noted that Article 38 (1) (b) of the ICJ Statute refers to “[...] international custom, as evidence of a general practice accepted as law [...]”. Practice is, indeed, essential, not only to confirm the existence of a rule as part of customary international law, but also to ensure compliance with and respect for applicable rules. The recent study on the *Identification of Customary International*

³³ Haque, ‘Indeterminacy in the Law of Armed Conflict’, *supra* note 30, 159, with reference to S. Watts, ‘Present and Further Conceptions of the Status of Government Forces in Non-International Armed Conflict’, 88 *International Law Studies* (2012), 145, 165.

³⁴ Haque, ‘Indeterminacy in the Law of Armed Conflict’, *supra* note 30, 148.

³⁵ *Ibid.*, 160.

³⁶ See *supra* notes 12-18.

Law undertaken by the ILC³⁷ considers general practice of States plus *opinio juris* as constituent elements, thus emphasizing a “two-elements approach” from which no exemption was accepted for identifying the customary nature of any rule of international law. It has already been criticized that no flexibility was allowed to accommodate the *speciality* of human rights and international humanitarian law in the creation of customary law.³⁸

While the ILC, as confirmed by its Special Rapporteur Sir Michael Wood, was fully aware of the role of customary law, in particular in relation to non-international armed conflicts,³⁹ the Martens Clause and the question of its particular impact on customary international humanitarian law was not discussed in the ILC Study. The Clause was briefly mentioned in the Special Rapporteur’s First Report as a provision confirming the prevailing importance of customary international law.⁴⁰ His Second Report raised the question whether “[...] in [...] human rights law, international humanitarian law and international criminal law, among others, one element may suffice in constituting customary international law, namely *opinio juris*” (as distinct from State practice), but stated, in a rather apodictic manner, that “[...] the better view is that this is not the case”.⁴¹ A firm position was taken by the ILC not to accept special rules for the identification of customary law in different branches of international law. In academic discussions, in turn, the argument was made that a more flexible approach in the ascertainment of customary law is used already, particularly in international humanitarian law,⁴² an issue to be discussed below.

It may appear understandable that the ILC, limiting itself to more technical issues of *identifying existing customary law*, did not go into details of *the process of its creation*. But the Martens Clause is relevant for both these

³⁷ ILC Draft Conclusions on Identification of Customary International Law, With Commentaries, *Yearbook of the International Law Commission* (2018), Vol. II, Part Two, 122.

³⁸ L. Chiussi, ‘Remarks on the ILC Work on the Identification of Customary Law and Human Rights: Curbing ‘Droit de l’Homme’?’, 27 *The Italian Yearbook of International Law* (2018) 1, 163.

³⁹ M. Wood, ‘The Evolution and Identification of the Customary International Law of Armed Conflict’, 51 *Vanderbilt Journal of Transnational Law* (2018), 727, 735.

⁴⁰ See M. Wood, *First Report on Formation and Evidence of Customary International Law*, UN Doc. A/CN.4/663, 17 May 2013, 15, para. 35, note 76: “The Martens clause was an early example of the continuing importance of customary international law, notwithstanding a treaty [...]”

⁴¹ See M. Wood, *Second Report on Identification of Customary International Law*, UN Doc. A/CN.4/672, 22 May 2014, para. 28, notes 49, 50.

⁴² M. La Manna, ‘The Standards for the Identification of Exceptions to Customary Law’, 27 *The Italian Yearbook of International Law* (2018) 1, 151, 151-154.

aspects. Its declared purpose is to influence the behavior of States in filling gaps of existing international law, thus influencing interpretation and also serving the progressive development of international law rather than merely identifying already existing rules. Moreover, it has been considered as a consequence of the Clause that, in international humanitarian law,

“[...] when it comes to proof of the emergence of a principle or general rule reflecting the laws of humanity (or the dictates of public conscience), as a result of the clause the requirement of *usus* (*les usages établis entre nations civilisées*) may be less stringent than in other cases where the principle or rule may have emerged instead as a result of economic, political, or military demands”.

Opinio juris sive necessitates may thus take on a special prominence in international humanitarian law, so that

“[...] the expression of legal views by a number of states and other international subjects concerning the binding value of a principle or a rule, or the social or moral need for its observance by states, may be held to be conducive to the formation of a principle or a customary rule, even when those legal views are not backed up by widespread and consistent state practice, or even by no practice at all”⁴³.

⁴³ A. Cassese, ‘The Martens Clause: Half a Loaf or Simply Pie in the Sky?’, 11 *European Journal of International Law* (2000) 1, 187, 193-202; A. Cassese, *International Law*, 2nd ed. (2005), 161. The underlying idea is supported by the ICJ in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, 14, 98, para. 186: “In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.” See also J. d’Aspremont, ‘An Autonomous Regime of Identification of Customary Humanitarian International Law: Do Not Say What You Do or Do Not Do What You Say?’, in R. van Steenberghe (ed.), *Droit International Humanitaire: un Régime Spécial de Droit International?* (2013), 67.

The late Antonio Cassese has developed this argument in due consideration of the impact of the laws of humanity and dictates of public conscience. He has done so rather tentatively, both in his article in the *European Journal of International Law* and later in his textbook, thus leaving room for second thoughts. His consideration has also turned out to be less than conclusive, as we now know from the ILC draft principles 6 (1) and 10 (2) that verbal practice of States could well represent *usus*, and acceptance as law (*opinio juris*) may be conveyed through public statements. Nevertheless, Cassese's idea does deserve to be explored further, the more so as, in the development of customary law, the two elements will not both be present from the outset and, in international humanitarian law, often omissions are at stake which are much more difficult to be identified as an expression of general practice of the State.

There is a body of national and international jurisprudence which is relevant in this context. In 1948, a United States Military Tribunal at Nuremberg referred to the Martens Clause in Hague Convention IV and stated as an *obiter dictum* that this Clause is “[...] much more than a pious declaration [...] [but] the legal yardstick to be applied if and when the specific provisions of the [...] Regulations [...] do not cover specific cases occurring in warfare, or concomitant to warfare”. The Tribunal then went on to declare that “[...] it will hardly be necessary to refer to these more general rules”.⁴⁴

The International Criminal Tribunal on the former Yugoslavia (ICTY), bound by its Statute to prosecute grave breaches of the Geneva Conventions and crimes against humanity (not, however, grave breaches of AP I),⁴⁵ has used the Martens Clause in *Martić* to support the customary status of the prohibition against attacking the civilian population as such, as well as individual civilians, and the general principle limiting the means and methods of warfare.⁴⁶ In

⁴⁴ United States Military Tribunal III, ‘United States of America v. Alfred Krupp von Bohlen und Halbach et al.’, in Nuernberg Military Tribunals, *Trials of War Criminals before the Nuernberg Military Tribunals* (1950), Vol. 9, 1341, erroneously referring to a “Mertens Clause” that had been formulated by a “Belgian” delegate at the Hague Peace Conferences. Incidentally, decades later, G. Best, ‘Peace Conferences and the Century of Total War’, 75 *International Affairs* (1999) 3, 619, 627, has also colportated that although the Clause is named after F. F. Martens, “[...] it was actually the bright idea of a Belgian [...]”.

⁴⁵ *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, 25 May 1993, Arts. 2 and 5, S/Res/1966 (2010) [ICTY Statute].

⁴⁶ *Prosecutor v. Martić*, Judgment, IT-95-11-XR61, 8 March 1996, 5, para. 11 (“There exists, at present, a corpus of customary international law applicable to all armed conflicts irrespective of their characterisation as international or non-international armed conflicts.

Kupreskić, the Tribunal had to decide whether the prohibition of reprisals against civilians in combat zones (prohibited by Art. 51, para. 6, AP I), assuming that it was not declaratory of customary international law, has subsequently been transformed into a general rule of international law.⁴⁷ The Tribunal confirmed that “[...] a customary rule of international law has emerged on the matter under discussion” and also stated that the Martens Clause, in light

“[...] of the way States and courts have implemented it, [...] clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law”.⁴⁸

The Constitutional Court of the Republic of Colombia has based the constitutionality of AP II on the Martens Clause, arguing that while AP II, like Common Article 3 of the Geneva Conventions, does not contain detailed provisions governing legitimate means of warfare and the conduct of hostilities, it is due to the Clause that AP II must not be interpreted in isolation but must be viewed at all times within the context of the entire body of humanitarian principles which are applicable to internal armed conflicts, so that the absence of specific rules in AP II relating to the protection of the civilian population and to the conduct of hostilities “[...] in no way signifies that the Protocol authorizes behavior contrary to those rules by the parties in conflict”.⁴⁹

This corpus includes general rules or principles designed to protect the civilian population as well as rules governing means and methods of warfare.”) and 6, para. 13 (“[...] the prohibition against attacking the civilian population as such, as well as individual civilians, and the general principle limiting the means and methods of warfare also derive from the ‘Martens clause’”).

⁴⁷ *Prosecutor v. Kupreskić*, Judgment, IT-95-16-T, 14 January 2000, 207, paras. 527-536.

⁴⁸ *Ibid.*, paras. 527 and 532. *Prosecutor v. Kupreskić*, Appeals Chamber Judgment, IT-95-16-A, 23 October 2001, 95, para. 245, decided that the Trial Chamber had erred in relying upon the evidence of Witness H, and concluded that a miscarriage of justice has occurred in the present case, but did not question the interpretation of legal rules by the Trial Chamber.

⁴⁹ Constitutional Court of the Republic of Colombia, Ruling No. C-225/95, Re: File No. L.A.T.-040, 18 May 1995; original in Spanish, unofficial translation, footnotes partially

The ICJ has emphasized the “[...] continuing existence and applicability [...]” of the Martens Clause “[...] as an effective means of addressing the rapid evolution of military technology” and “[...] an affirmation that the principles and rules of humanitarian law apply to nuclear weapons”.⁵⁰ This dictum clearly confirms that there are limits to the use of weapons in armed conflict, even if treaty law does not explicitly prohibit them. While two judges had criticized the Court, insofar acting in line with many other voices in international humanitarian law,⁵¹ for not deriving an explicit prohibition on nuclear weapons from the Martens Clause,⁵² it may at least be stated that the Advisory Opinion has “[...] facilitated an important debate on this significant and frequently overlooked clause of the laws of armed conflict”.⁵³

The 2005 ICRC Study on *Customary International Humanitarian Law* (CIHL) has mentioned the Martens Clause as a topic that “[...] could not be developed in sufficient detail for inclusion in this edition, but [...] might be included in a future update”.⁵⁴ Meanwhile, the database updates of the Study have referred to the Clause in Rules 18 (Assessment of the Effects of Attacks),

omitted available at https://casebook.icrc.org/case-study/colombia-constitutional-conformity-protocol-ii#para_22 (last visited 04 January 2020), para. 23.

⁵⁰ ICJ, *Nuclear Weapons*, *supra* note 7, 257 para. 78, 260, para. 87.

⁵¹ See Meron, *supra* note 24, 88: “Except in extreme cases, its references to the principles of humanity and dictates of public conscience cannot, alone, delegitimize weapons and methods of war [...]”; W. Boothby, *Weapons and the Law of Armed Conflict*, 2nd ed. (2016), 14; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd ed. (2016), 14: “General revulsion in the face of a particular conduct during hostilities (even if it goes beyond habitual fluctuations of public opinion) does not create ‘an independent legal criterion regulating weaponry’ or methods of warfare”.

⁵² Judge Weeramantry, in his Dissenting Opinion, concluded from the Martens Clause that nuclear weapons are illegal under general principles of customary law, arguing that whilst the Clause is “[...] sufficiently general to pose difficulties in certain cases [...]”, there is no such uncertainty in regard to the use or threat of use of nuclear weapons, Dissenting Opinion of Judge Weeramantry, *Legality of Use or Threat of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 429, 482-490. Judge Shahabuddeen, in his Dissenting Opinion, stated that the Martens Clause, which was intended to fill gaps left by conventional international law, could not be confined to principles waiting, uncertainly, to be born in future; based on the available material the Court would have been able to hold that the Clause operates to prohibit the use of nuclear weapons in all circumstances, Dissenting Opinion of Judge Shahabuddeen, *Legality of Use or Threat of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 375, 405-411.

⁵³ R. Ticehurst, ‘The Martens Clause and the Laws of Armed Conflict’, 37 *International Review of the Red Cross* (1997) 317, 125, 134.

⁵⁴ J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law* (2005), Vol. I, xxxvi. On the protection of the natural environment in armed conflict see Rules

19 (Control during the Execution of Attacks), 43 (Application of General Principles on the Conduct of Hostilities to the Natural Environment), and 149 (Responsibility for Violations of International Humanitarian Law),⁵⁵ without, however, making specific comments. The updated ICRC Commentaries on the 1949 Geneva Conventions provide a more comprehensive interpretation of the Martens Clause, explaining that, as a minimum, the Clause “[...] should [...] be regarded as expressly preventing the *argumentum e contrario* that what is not explicitly prohibited by treaty law is necessarily permitted” and

“[...] as underlining the dynamic factor of international humanitarian law, confirming the application of the principles and rules of humanitarian law to new situations or to developments in technology, also when those are not, or not specifically, addressed in treaty law”.⁵⁶

The new Oxford Commentary on the Geneva Conventions describes the Martens Clause as a “[...] (substantive) principle of interpretation of IHL” that may be dubbed as an “emergency exit from voluntarist positivism”.⁵⁷

While there is a certain reluctance among experts to fully accept Antonio Cassese’s view of the dominating role of *opinio juris* for identifying customary international humanitarian law,⁵⁸ this is what substantially happened in reality:

43-45. See also Henckaerts & Constantin, ‘Protection of the Natural Environment’, *supra* note 2, 469-491.

⁵⁵ CIHL, database update 2019, available at <https://ihl-databases.icrc.org/applic/ihl/ihl-search.nsf/results.xsp?lang=EN> (last visited 04 January 2020).

⁵⁶ S. Michel & C. Schenker, ‘Article 63: Denunciation’, in ICRC, *Commentary on the First Geneva Convention* (2016), 3297, 3298, with reference to ICJ, *Nuclear Weapons*, *supra* note 7, 260, para. 87: “Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons.”

⁵⁷ G. Distefano & E. Henry, in A. Clapham *et al.* (eds), *The 1949 Geneva Conventions. A Commentary* (2015), 179, 187-188.

⁵⁸ Yet there are less reluctant comments as well: C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course of Public International Law* (1999), 357, calls Cassese’s careful and critical assessment of the Clause as “[...] much too pessimistic”. In C. Tomuschat, *Human Rights Between Idealism and Realism*, 3rd ed. (2014), 42, Tomuschat convincingly explains that emphasis is to be placed on the question “to what extent states present their practices as fully corresponding to the international rule of law or whether they simply deny charges brought against them”, making the argument that “[e]ven massive abuses do not militate against assuming a customary rule as long as the responsible author State seeks to hide and conceal its objectionable conduct

the rules governing the conduct of hostilities in international armed conflict are generally applicable also in non-international armed conflict even in the absence of specific treaty law.⁵⁹ This derives from *opinio juris*, although it cannot be firmly based on the practice of States and armed opposition fighters.⁶⁰ Deviating practice is normally (and rightly so) taken as an example of breaches, but not considered relevant for limiting or denying the existence of a customary rule of international humanitarian law.

Likewise, in critical reviews of the ICRC Study on CIHL, all contributors have focused on the question whether and to what extent a certain rule is based on *opinio juris*, rather than trying to match the seminal work undertaken by the ICRC to collect and evaluate relevant practice.⁶¹ This clearly underlines the dominating role of *opinio juris*. At the same time, an examination of the Martens Clause as “[...] a dynamic element peculiar to the development of the law of armed conflict [...]” was specifically missed.⁶²

A realistic assessment thus supports Cassese’s arguments in that it leads to recognition of the decisive importance of *opinio juris* as opposed to State practice for the creation of customary international humanitarian law. This does not, of course, exclude States from the process of creating customary law. Rather, it challenges States to fully accept their obligations under Article 1 (2) AP I, a provision that has been accepted as customary law by the ICJ and also fully applies to the protection of the natural environment during armed conflict. States are the decisive actors in developing *opinio juris*. Their verbal acts, like physical acts, constitute practice that contributes to the creation of a customary norm. It remains their responsibility to implement the law in practice. It may be noted in this context that rules on the conduct of hostilities do not always entail

instead of justifying it by invoking legal reasons”. According to A. A. Cançado Trindade, *The Construction of a Humanized International Law. A Collection of Individual Opinions (1991-2013)* (2014), 1353, para. 137, the Martens Clause “[...] impedes the *non liquet* and exerts an important role in the hermeneutics and the application of humanitarian norms”.

⁵⁹ See D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed. (2013), 601, Section 1212, with further references.

⁶⁰ See also F. L. Kirgis, ‘Custom on a Sliding Scale’, 81 *American Journal of International Law* (1987) 1, 146, 149: “The more destabilizing or morally distasteful the activity – for example, the offensive use of force or the deprivation of fundamental human rights – the more readily international decision makers will substitute one element [State practice] for the other [*opinio juris*], provided that the asserted restrictive rule seems reasonable.”

⁶¹ See, e.g. E. Wilmschurst & S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007).

⁶² *Ibid.*, 19.

a criminalization of breaches, and that individual criminal responsibility is not necessarily the same in international and non-international armed conflicts, but as far as the protection of the natural environment is concerned, this issue can be neglected.⁶³

E. General Principles of Law

If the Martens Clause has significance for the creation of customary international law, this is all the more the case in respect of general principles of law, which are referred to in Article 38 (1) (c) of the ICJ Statute as “[...] recognized by civilized nations [...]”, acknowledged by States as applying to their international relations, and applied with this understanding in the jurisprudence of the ICJ.⁶⁴ The Martens Clause may gain particular relevance for understanding general principles of international humanitarian law, as humanity and dictates of public conscience are important for the implementation and further development of that law.

A general responsibility of States not to cause damage to the environment of other States was first stated in the 1972 Stockholm Declaration, Principle 21, and confirmed in the 1992 Rio Declaration on Environment and Development, Principle 2.⁶⁵ While both instruments, due to their affirmative character and global support, may be accepted as reflecting general principles of law, the content of the Stockholm Principle 21 is too vague for the present context in that its applicability in wartime is left unclear. This is not the case, however, for the Rio Principles 24 and 25, specifically addressing the need to protect the environment in times of armed conflict and emphasizing the interdependence between peace, development, and environmental protection. General as they

⁶³ Certain attacks against the natural environment are penalized under Art. 8 (2) (b) (iv) of the ICC Statute, a provision that applies to international armed conflicts. An extension to non-international armed conflicts, comparable to Art. 8 (2) (e) (xiii-xv) on poison or poisoned weapons; asphyxiating gases, liquids, materials or devices; and expanding bullets adopted at the 2010 Kampala Review Conference, would serve a symbolic function, but as long as penalization is limited to “[...] widespread, long-term and severe [...]” damage and the “[...] military advantage anticipated [...]” is to be assessed from the perspective of the perpetrator on the basis of information available at the time of launching the attack, this will hardly become practically relevant.

⁶⁴ See generally J. Crawford, *Brownlie's Principle of Public International Law*, 8th ed. (2012), 34; G. Gaja, ‘General Principles of Law’, in *Max Planck Encyclopedia of Public International Law*; B. Cheng, *General Principles of Law: As Applied by International Courts and Tribunals* (2006); J. Gardam, *Necessity, Proportionality and the Use of Force by States* (2011).

⁶⁵ See *supra* note 9.

are, these Rio Principles may clearly become relevant for the conduct of military operations in relation to armed conflicts, as they affect military planning and the use of weapons. The Martens Clause can be of help to ensure their application in line with requirements of humanity and dictates of public conscience.

It may be noted that there is a special relevance of the Martens Clause for taking measures of prevention and precaution that are particularly important for the protection of the environment in relation to armed conflicts.⁶⁶ This does not only apply to issues of proportionality in attacks, but also to necessary measures to be taken in planning and conducting military operations: damages to the natural environment must be minimized as long as the latter is a civilian object. The Martens Clause may and should be used to interpret and apply such principles. Proportionality standards are not clearly defined in treaty law and there may be a variety of precautions to be taken in an attack. The role of prevention and precaution will be better understood and hence it may be better applied if requirements of humanity and dictates of public conscience are duly considered. Military planners and commanders using the Martens Clause will thus be better prepared to take responsible action.

As previously explained (Section D), the *Kupreskić* judgment of the ICTY confirmed the prohibition of reprisals against civilians in combat zones as a rule of customary international law. Alexandre Skander Galand, in his critical assessment of this particular finding, convincingly argues that a recognition as a general principle of international law would have sufficed under the ICTY Statute, as general principles are also recognized to establish criminal responsibility.⁶⁷ This essentially underlines the role of the Martens Clause in the law of armed conflict, and it demonstrates that this role is not limited to the creation of a customary norm but likewise applies to the application of other sources of international law that are not codified as treaty law.

⁶⁶ See M. Bothe, 'Principle of Prevention in International Environmental Law and Principle of Precaution in the Law of Armed Conflict', in this *Special Issue*.

⁶⁷ A. S. Galand, 'Approaching Custom Identification as a Conflict Avoidance Technique: *Tadić* and *Kupreskić* Revisited', 31 *Leiden Journal of International Law* (2018) 2, 403,427, with reference to C. Bassiouni, *Crimes Against Humanity* (2011), 469. Indeed, Art. 15 (2) of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, 177, like Art. 7(2), of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, 230, both provide that the principle of *nulla poena sine lege* does not prejudice the "[...] trial and punishment of any act or omission which, at any time when it was committed was criminal according to the general principles of law recognized by the community of nations".

F. Soft Law and Best Practices

Whilst it remains important to draw a distinction between legally binding rules on the one hand and *soft law* on the other, and to clearly explain whether a certain rule *shall* or *should* be observed, the important practical role of *soft law* for the development of international humanitarian law and environmental law cannot be underestimated. Where binding legal rules are not at hand, *soft law* instruments may influence practice and policy alike. They may help to reaffirm and further develop existing principles and rules. They may also assist in better implementing existing law.

The current work of the ILC on Protection of the Environment in Relation to Armed Conflicts offers an excellent example for this. It includes a set of draft principles, provisionally adopted in 2019,⁶⁸ that are largely derived from general principles and provisions of international humanitarian law, environmental law, and human rights law as well as from important environmental aspects of the 1954 Hague Convention for the Protection of Cultural Property,⁶⁹ the 1968 Nuclear Non-Proliferation Treaty,⁷⁰ the 1972 Biological Weapons Convention, the 1993 Chemical Weapons Convention,⁷¹ the 1997 Anti-personnel Landmines Convention, and the 2008 Convention on Cluster Munitions. New, more innovative rules draw from *requirements of the public conscience* and articulate a specific responsibility to preserve the natural environment for future generations. Indeed, an *environmental Martens Clause* was added as Draft Principle 12⁷² with a commentary, after both Special Rapporteurs had addressed the issue

⁶⁸ See ILC, *Report of the International Law Commission on the Work of the Seventieth Session*, UN Doc. A/73/10, 30 April–1 June and 2 July–10 August 2018, 239, para. 165.

⁶⁹ *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Protocol (1)*, 14 May 1954, 249 UNTS 240, and Protocol (2), 26 May 1999, 38 ILM (1999), 769 [Convention for the Protection of Cultural Property].

⁷⁰ *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July 1968, 729 UNTS 161 [Nuclear Non-Proliferation Treaty].

⁷¹ See A.-M. Böhringer & T. Maruhn, 'Environmental Implications of Disarmament. The CWC Case', in C. Stahn *et al.* (eds), *Environmental Protection and Transitions from Conflict to Peace* (2017), 192.

⁷² ILC, *Report of the International Law Commission on the Work of the Seventy-First Session*, UN Doc. A/74/10, 20 August 2019, 247: "Part Three 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, the principles of humanity and the dictates of public conscience."

before.⁷³ The commentary explains that Draft Principle 12 applies during armed conflicts and in situations of occupation, and that “[t]he view was [...] expressed that the term ‘public conscience’ could be seen to encompass the notion of intergenerational equity as an important part of the ethical basis of international environmental law”.⁷⁴ As emphasized in the commentary, the ILC is not taking a position on the various possible interpretations regarding the legal consequences of the Martens Clause.

It may be hoped that this Draft Principle will revive discussions of the topic, encourage dynamic interpretations, and – most importantly – lead to appropriate action by States to overcome situations of indeterminacy in existing law.

G. Some Practical Consequences of the Martens Clause

A successful application of the Martens Clause will help close gaps of treaty law without, however, creating new treaty obligations. It should not be forgotten that military planners, commanders, and simple soldiers are all addressees of the Clause. It is for these individuals to omit, or to take adequate precautions to avoid, acts that would be against the principles of humanity and the dictates of public conscience. The omission or act so achieved will be in fulfilment of an uncodified obligation to honor these principles. The Martens Clause may be an expression of customary law, a general principle of law, or of *soft law*. Yet the source of law on which the act or omission is based will not be of primary importance here. Even the legally binding – or, in the case of *soft law*, politically binding – nature of the obligation is of lesser relevance, as it will be decisive to see a clear consequence of principles of humanity and/or dictates of public conscience in practice. Admittedly, uncodified principles and rules may sometimes suffer from an even higher degree of indeterminacy than treaty law, but there will be no way to escape this in situations where clear rules do not exist. The appropriate solution must be found under any circumstances, often under time pressure and with serious consequences.

Three practical examples may be highlighted in this context to illustrate the specific task of protecting the environment during armed conflict:

⁷³ *Second Report of the Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts* by M. G. Jacobsson, UN Doc. A/CN.4/685, 28 May 2015, 47, para. 146; *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts* by Marja Lehto, UN Doc. A/CN.4/728, 27 March 2019, 76, paras. 173-184.

⁷⁴ *Report of the International Law Commission on the Work of the Seventy-First Session*, *supra* note 72, 250, para. 8.

(1) Methods and means of combat must be employed with due regard to the protection and preservation of the natural environment.⁷⁵ What *due regard* exactly means here must be interpreted and implemented. This task may be facilitated by the Martens Clause with its emphasis on *the dictates of the public conscience*.

(2) In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment.⁷⁶ While this customary rule does not specify what is “[...] feasible [...] to avoid, and in any event to minimize [...]”⁷⁷ incidental environmental damage, the Martens Clause may help to develop appropriate standards in practice.

(3) Launching an attack against a military objective which may be expected to cause excessive damage in relation to the direct military advantage anticipated is prohibited.⁷⁸ An application of the Martens Clause in light of its relevance to strengthening the responsibility towards future generations may offer appropriate standards of behavior in such cases.

In each of these cases, specific military conduct will be required that goes beyond the more general principles of proportionality and avoidance of civilian collateral damage. The Martens Clause may facilitate appropriate planning and implementation. It should also be considered that, in case of doubt whether a legal obligation already exists, the application of the Clause may result in a voluntary practice to achieve such a goal.⁷⁹

H. Conclusions

The Martens Clause may and should be used to solve issues of indeterminacy in the law pertaining to military operations of States and non-State actors during armed conflicts. As reaffirmed in the 1977 Additional Protocols, the Clause is

⁷⁵ See Rule 44, 1st sentence, Henckaerts & Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 54, 147. As explained in the ICRC Study, the customary rule formulated here “[...] has been motivated by a recognition of the dangerous degradation of the natural environment caused by mankind”.

⁷⁶ See *ibid.*, Rule 44, 2nd sentence.

⁷⁷ See *ibid.*, 51.

⁷⁸ See *ibid.*, 143, Rule 43 (C). The 1st sentence of Rule 43 suggests that this customary rule derives from the general principles on the conduct of hostilities. Yet the implementation of this rule requires specific considerations that may even be different from those aiming at the avoidance of collateral damage of other civilian objects.

⁷⁹ See M. Bothe in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 4th rev. ed. (forthcoming in 2020), Chapter 10.

no longer confined, as in the 1907 Hague Convention IV, to issues related to the rights and duties of militia, volunteer groups, and the *levée en masse* but applies to all rights and obligations under international humanitarian law. The Martens Clause is also relevant for the interpretation and implementation of existing weapons prohibitions. It challenges all parties to an armed conflict to close gaps of the law resulting from the indeterminacy of applicable treaty law. This task not only requires reconsidering relevant treaty provisions and customary rules but also to look into general principles of law and develop best practices in military operations. The following conclusions may be drawn:

(1) The Martens Clause may assist in the implementation of existing principles and rules of, and the assessment of new developments in, international humanitarian law. It applies in all cases of ambiguity, vagueness, incompleteness, or inconsistency of existing treaty law in this field. The words *established custom*, *principles of humanity*, and *dictates of public conscience* should not be confined to customary law, but include general principles of law and even *soft law* and best practice.

(2) The Martens Clause is fully relevant for the respect for and protection of the environment during the conduct of hostilities.

(3) The law relating to the protection of the environment during armed conflict is not exclusively derived from international humanitarian law, but also from other branches of law. It is not so much based on treaty law but particularly – to use the language of Article 38 of the ICJ Statute – on international custom, general principles of law, and subsidiary means for the determination of rules of law.

(4) The Martens Clause helps to identify and further develop existing rules on the protection of the environment during armed conflict and support their implementation. Effective protection of the environment in light of the responsibility towards future generations is part of a modern understanding of the *dictates of public conscience*.

(5) The problem of collateral damage and particular standards for proportionality remain the focus of any rules on the protection of the environment during armed conflict.

(6) Pertinent *soft law* instruments should be developed in international academic and practical cooperation.

(7) It merits further study to explore the role of the Martens Clause as a case of interaction between the *jus in bello* and the *jus post bellum*, at least as far as the protection of the natural environment is concerned.

Precaution in International Environmental Law and Precautions in the Law of Armed Conflict

Michael Bothe^{*}

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^{*} Professor Emeritus of Public Law, J. W. Goethe University, Frankfurt/Main.

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Abstract

The protection of the environment in relation to armed conflict, in particular *during* armed conflict is a complex problem as it involves at least two different fields of international law, the law of armed conflict (international humanitarian law) and international environmental law. Their mutual relationship is a delicate issue. International humanitarian law is not necessarily *lex specialis*. Three principles deserve particular attention in this connection: as to general international environmental law, the principle of prevention and the precautionary principle, as to international humanitarian law the duty to take precautions. The terms *prevention* and *precaution* are used in different contexts in environmental law (both national and international) and in the law of armed conflict. The duty, imposed by international humanitarian law, to take precautions has much in common with, but must be distinguished from, the precautionary approach of general environmental law. This paper shows what these principles mean and how they relate to each other. It answers the question to what extent the rules based on these concepts are effective in restraining environmental damage being caused by military activities. The application of these principles in peace and war serves intergenerational equity and is thus an important element of sustainable development.

A. Introduction

The protection of the environment in relation to armed conflict, in particular *during* armed conflict, is a complex problem as it involves (at least) two different fields of international law: the law of armed conflict (international humanitarian law) and international environmental law. The division of a legal system into different areas or bodies of law is a phenomenon common to legal systems in general. It does not only exist in international law. Legal regulations evolve around particular problem situations as they are perceived by relevant actors at a particular time: for example, a matrimonial link is established by a contract, thus the general rules of contract law may apply. But that matrimonial relation is also regulated by family law, which is a distinct body of law. As for water resources, they may be subject to property law, but there may be distinct rules of water law. Thus, a particular situation is subject not only to one particular body of law, but it may come within the purview of several.

A legal system, as a rule, does not tolerate that the addressees of its norms receive incompatible or contradictory orders concerning one particular issue from different bodies of law belonging to the same legal system. Therefore, the relationship between those bodies of law has to be regulated as they apply to one particular situation. The *lex specialis* approach, i.e. that one body of law prevails and excludes the other, is one possible solution, but not the only one.¹ There are also possibilities of concurrent application with mutual adaptation or harmonization, in some contexts called mutual supportiveness. International environmental law and the international law of armed conflict (international humanitarian law) are such different bodies of law, which have evolved around completely different problem areas: on the one hand, the need, derived from

¹ The view that international humanitarian law is *lex specialis* in relation to human rights is based on some sentences in the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 66, 78, para. 25, and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinions, ICJ Reports 2002, 136, 178, para. 106. If *lex specialis* is understood in its usual meaning that it includes the application of other norms, the statement of the court is contradictory. It is therefore rightly criticized in legal doctrine, see *inter alia* M. Milanovic, 'The Lost Origins of Lex Specialis', in J.D. Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human and Human Rights* (2016) 78-117; R. Kolb, 'Human Rights and Humanitarian Law', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, available at www.mpepil.com (last visited 5 January 2020), in particular sec. 44. See also the relevant remark in this issue by M. Jacobsson & M. Lehto, 'Protection of the Environment in Relation to Armed Conflicts – An Overview of the International Law Commission's Ongoing Work', 10 *Goettingen Journal of International Law* (2020) 1, 31.

different reasons, to protect the natural environment and, on the other hand, the need to regulate the relationship between parties to an armed conflict, which involves a need to minimize damage for the sake of avoiding unnecessary losses and suffering, and the humanitarian need to protect victims.

A typical problem concerning the relationship between these two areas of international law is that damage which is considered acceptable under the law of armed conflict (at least according to a certain interpretation) would not be acceptable under environmental law. The major freedom to cause damage possibly granted by international humanitarian law is not the last word. International humanitarian law is not necessarily *lex specialis*,² at least not in the sense that, where causing damage would appear to be lawful under the law of armed conflict, international environmental law could not render it unlawful.

The validity of multilateral environmental agreements (MEAs), as well as the application of international customary environmental law, is thus not excluded by the mere fact that a State (a party to a MEA) is involved in an armed conflict. This is obvious in the relationship between a party to an international conflict and States not parties to that conflict, as their relationship is governed by the law of neutrality. One of the basic principles of the law of neutrality is that the relations between neutral States and States parties to an armed conflict are not affected or modified by the existence of that conflict,³ except for certain specific modification provided for by the law of neutrality, such as trade and maritime commerce. In this sense, the law applicable between neutral and belligerent States is that which governs normal peaceful relations.

The same reasoning applies in the relation between a State on whose territory a non-international armed conflict takes place and any other State. The internal situation of a State, including the existence of an armed conflict taking place on its territory, does not affect its relation with third States, subject to such exceptions as may be derived from a state of necessity.

But also between the parties to an armed conflict, the existence of this conflict neither excludes the continued applicability of environmental agreements

² M. Bothe *et al.*, 'International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities', 92 *International Review of the Red Cross* (2010) 879, 569, 579-581 [Bothe *et al.*, *International Law Protecting the Environment during Armed Conflict*]; see also J. Wyatt, 'Law-making in the Intersection of International Environmental Law, Humanitarian and Criminal Law: the Issue of Damage to the Environment in International Armed Conflict', 92 *International Review of the Red Cross* (2010) 879, 593, 636-639.

³ M. Bothe, 'The Law of Neutrality', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2013) 3rd., 549, 560.

nor that of general international environmental law. The International Law Commission (ILC) dealt with this problem in its Articles on the effects of armed conflicts on treaties.⁴ As a general principle, the Articles state (Art. 3):

“The existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties: as between the States parties to the conflict [...]”

Whether a treaty is terminated by the armed conflict is a matter of treaty interpretation (Art. 5). Certain factors indicate whether a treaty is susceptible to termination. They include (Art. 6[a]):

“[...]the nature of the treaty, in particular its subject-matter, its object and purpose, its content [...]”

Art. 7 adds an indicative list of subject-matters “[...]which involves an implication[...]” that the treaty continues in operation. This list (Annex) includes

“[...] (c) Multilateral law-making treaties; [...] (g) Treaties relating to the international protection of the environment; (h) Treaties relating to international watercourses [...]”.

The coexistence of the law of armed conflict and other fields of international law which continue to be applicable during an armed conflict was also recognized by the ILC at the very beginning of its current work on the subject.⁵ This is reflected in Principle 3 of the version of the Principles adopted by the ILC in 2019 (hereinafter ILC Principles).⁶

“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.”

This text presupposes the continued application of fields of international law other than the law of armed conflict during such conflicts.⁷

Thus, international environmental law matters during armed conflicts. International humanitarian law does not necessarily constitute *lex specialis* in

⁴ *Report of the International Law Commission on the Work of its Sixty-third Session*, UN Doc A/66/10, 26 April - 3 June and 4 July - 12 August 2011, 175-217.; see also C. Droege & M.-L. Tougas, ‘The Protection of the Natural Environment in Armed Conflict – Existing Rules and the Need for Further Legal Protection’, in R. Rayfuse (ed.), *War and the Environment. New Approaches to Protecting the Environment in Relation to Armed Conflict* (2014), 11, 37-42 [Droege & Tougas, *The Protection of the Natural Environment in Armed Conflict*].

⁵ This issue, M. Jacobsson & M. Lehto, ‘Protection of the Environment in Relation to Armed Conflicts – An Overview of the International Law Commission’s Ongoing Work’, 10 *Goettingen Journal of International Law* (2020) 1, 29.

⁶ *Report of the International Law Commission on the Work of its Seventy-first Session*, UN Doc. A/74/10, 29 April - 7 June and 8 July - 9 August 2019, 211-215.

⁷ *Ibid.*, 216.

the sense that it excludes the application of international environmental law.⁸ Details as to their exact relationship remain to be analyzed.

Three principles deserve particular attention in this connection: as to the principle of prevention and the precautionary principle in general international environmental law, and as to the principle of precaution in international humanitarian law. The distinction between these is somewhat blurred by the fact that the terms *prevention* and *precaution* are used in different contexts in environmental law (both national and international) and in the law of armed conflict. The duty, imposed by international humanitarian law, to take precautions has, as will be shown, much in common with, but must be distinguished from, the precautionary approach of general environmental law. This paper will show what the three principles mean and how they relate to each other. It endeavors to answer the question as to what extent the rules based on these concepts are effective in restraining environmental damage caused by military activities.

B. Environmental Law

In the context of environmental law, *prevention* means that measures must be taken to prevent environmental damage before it occurs, in contradistinction to repression or redress. States have a *duty of due diligence* to prevent environmental damages being caused outside their territory by activities taking place inside their territory.⁹ The principle is formulated in Principle 21 of the Stockholm Declaration on the Environment:

“States have [...] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”¹⁰

This principle involves three threshold questions: first, the level of damage to be expected and to be prevented and, second, the required probability of such damage. The third question, related to the first two, is what level of diligence is *due*. It is similar to the problem of degrees of culpability known from criminal or tort law.

The leading case stating the principle is the *Trail Smelter* Arbitral Award, which states that there is no

⁸ See the sources quoted *supra* note 1.

⁹ A. Proelß, ‘Prinzipien des Internationalen Umweltrechts’, in A. Proelß (ed.), *Internationales Umweltrecht* (2017) 69, 77-84 [Proelß, Prinzipien des internationalen Umweltrechts].

¹⁰ Declaration on the Environment, *Report on the United Nations Conference on the Human Environment*, 16 June 1972, U.N. Doc A/CONF.48/4, at 5 [Stockholm Declaration].

“[...] right to use or to permit the use of its territory in such a manner as to cause injury [...] when the case is of serious consequence and the injury is established by clear and convincing evidence”.¹¹

The damage to be expected must be serious (first threshold) and certain (second threshold, supported by “[...] clear and convincing evidence”). Taking into account modern standards of environmental law, this is less than satisfactory. However, in the *Pulp Mills* case between Argentina and Uruguay, the International Court of Justice (ICJ) essentially kept to this very standard, even if the first threshold was lowered to ‘significant’. The Court held that the effect of the mill on biodiversity and the effects of the air pollution caused by it on water quality were not proven,¹² and therefore there was¹³ “[...] no conclusive evidence [...] that Uruguay has not acted with the requisite degree of due diligence [...]”

The *precautionary principle* sets a more demanding standard for preventive measures to be taken, namely that measures have to be taken in case of a risk of damage which cannot (yet?) be predicted with certainty, in particular because of a lack of knowledge. The principle requires, in other words, environmental decision-makers to err on the side of caution. An additional reason for restraining or prohibiting certain activities, even if it cannot be predicted with certainty that they will cause significant environmental damage, is the need to leave room for future activities. This is an important element of the duty to protect the right of future generations.¹⁴ Thus, the precautionary principle is a crucial tool to implement sustainable development.

The principle has been included in a number of MEAs, yet in many different versions. They derive from, and develop, the traditional due diligence obligation formulated in the *Trail Smelter* award. An example of a somewhat cautious application of the new version of the principle by a court is the *Southern Bluefin Tuna* decision of the International Tribunal for the Law of the Sea relating to the sustainable exploitation of the Southern Bluefin Tuna stocks.¹⁵ The Tribunal addresses the problem of scientific uncertainty:

¹¹ *Trail Smelter Case (United States v. Canada)*, Award of Arbitral Tribunal, 11 March 1941, 3 Reports of International Arbitral Awards (2006), 1905, 1965.

¹² *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 28, 90, para. 262 [Pulp Mills Case].

¹³ *Ibid.*, para. 265.

¹⁴ M. Bothe, ‘Environment, Development, Resources’, 318 Recueil des Cours (2005), 333, 488.

¹⁵ *Southern Bluefin Tuna Cases (Australia v. Japan; New Zealand v. Japan)*, Judgment, 27 August 1999, ITLOS Case Nos. 3 & 4, paras 77 - 80, available at <https://www.itlos.org/>

“79. Considering that there is *scientific uncertainty* regarding measures to be taken to conserve the stock of southern bluefin tuna and that there is no agreement among the parties as to whether the conservation measures taken so far have led to the improvement in the stock of southern bluefin tuna;

80. Considering that, although the Tribunal cannot conclusively assess the scientific evidence [...] , it finds that measures should be taken as a matter of urgency ... to avert further deterioration of the southern bluefin tuna stock;”

This is the essence of the precautionary principle. Environmentally relevant decision-makers may err, but they may only err on the safe side. Scientific uncertainty is no excuse for disregarding the possibility of environmental damage.

By insisting on the requirement of “[...] conclusive evidence [...]” of damage, the ICJ, in its *Pulp Mills* decision, implicitly rejected the application of the precautionary principle and thus did nothing less than neglecting a fundamental value of current international law, namely the principle of sustainable development. For related reasons, the Court is rightly and heavily criticized by the Joint Dissenting Opinion of Judges Simma and Al Kwasaneh: the Court, as the two Judges claim, failed to adopt a forward-looking attitude where the scientific community is divided on the requirements of the precautionary principle.¹⁶

C. Law of Armed Conflict

The term *precautions* appears in two provisions of Protocol I Additional to the Geneva Conventions (AP I),¹⁷ namely Art. 57 (measures to be taken by an attacker) and 58 (measures to be taken by a State which may become the target of an attack).¹⁸

fileadmin/itlos/documents/cases/case_no_3_4/published/C34-O-27_aug_99.pdf (last visited 24 March 2020) (emphasis added).

¹⁶ *Pulp Mills Case*, *supra* note 12, Joint Dissenting Opinion of Judges Simma and Al Kwasaneh, 117-119, paras 18-25.

¹⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

¹⁸ See W. A. Solf, ‘Chapter IV: Precautionary Measures’, in M. Bothe, K.J. Partsch & W.A. Solf, *New Rules for Victims of Armed Conflicts*, 2nd ed. (2013), 400, 400-417; Droegge &

“Art. 57

Precautions in attack

(1) In the conduct of military operations, *constant care shall be taken* to spare the civilian population, civilians and civilian objects.

(2) With respect to attacks, the following *precautions* shall be taken:

(a) those who plan or decide upon an attack shall

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects [...]

(ii) take all feasible *precautions* in the choice of means and methods of attack with a view to avoiding, and in any case minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; [...]

Art. 58

Precautions against the effects of attacks

The Parties to the conflict shall, to the maximum extent feasible:

[...] endeavor to remove the civilian population ... from the vicinity of military objectives;

avoid locating military objectives within or near densely populated areas;

take the other necessary *precautions* to protect the civilian population [...] against the dangers resulting from military operations.”

The *precautions* to be taken by the attacker relate to both the principle of distinction (if an element of the environment is a civilian object) and to the principle of proportionality regarding collateral damage.¹⁹ They must be “[...] feasible [...]” or “[...] reasonable [...]” for the purpose of avoiding or minimizing expected civilian damage. In this sense, the duty resembles the *due diligence* principle. The attacking commander must evaluate the possibility of damage to civilians and civilian objects and must assess its degree and probability. The precautions to be taken, for the same purpose, by the target State “[...] to the maximum extent feasible [...]” are imposed upon that State in its own interest.

Tougas, *supra* note 4, 24-26 (emphasis added).

¹⁹ Droege & Tougas, *supra* note 4, 24; M. Bothe, ‘The Ethics, Principles and Objectives of Protection of the Environments in Times of Armed Conflict’, in R. Rayfuse (ed.), *War and the Environment. New Approaches to Protecting the Environment in Relation to Armed Conflict* (2014), 91, 98, 101 [Bothe, The Ethics, Principles and Objectives of Protection of the Environments in Times of Armed Conflict].

Both types of duties are obligations of conduct, not of result. They apply to environmental damage to the extent that elements of the environment constitute civilian objects. The duty to take precautions means that an expected, i.e. foreseeable civilian damage must be avoided. This implies threshold questions similar to those already discussed for peacetime environmental law, namely the degree of certainty of damage which would occur if the precautions were not taken, and the severity of the damage to be avoided.

Related to the precautions required by Art. 58 are rules which prohibit attacks on certain defined areas, namely “non-defended localities” (Art. 59 AP I) and “demilitarized zones” (Art. 60 AP I). Both can be characterized as measures to be taken by a possible target State to avoid damage to these areas or to persons who are in these areas. If certain requirements are met, the non-defended locality may not be attacked, and military operations may not be extended to demilitarized zones. A non-defended locality may be established pursuant to a unilateral declaration or by agreement between the parties, whereas the demilitarized zone may only be established by agreement between the parties. Similar concepts may be used to protect valuable elements of the environment.²⁰

The specific provision on environmental damage (Art. 55 AP I) does not use the term precaution, but prescribes that “[c]are shall be taken [...]”.²¹ Interpreted in the light of the second sentence of that article and Art. 35, the essential prescription of Art. 55 is a prohibition of the said damage. The term “care” is also used in Art. 57 para. 1. The “precautions” prescribed by Art. 57 para. 2 are thus a means to fulfill the duty to take care. The damage to be avoided according to Art. 55, i.e. the second threshold question just mentioned, is too restrictively defined: it is only prohibited if it is (cumulatively) “[...] widespread, long-term, and severe [...]”. There is general agreement that this is a far cry from an adequate standard of environmental protection.²²

The customary law of armed conflict has, however, added an additional principle to the rules on environmental protection, namely the *due regard* principle. Methods and means of warfare must be employed with due regard to

²⁰ See the statement of the President of the International Committee of the Red Cross, J. Kellenberger, ‘Strengthening Legal Protection for Victims of Armed Conflicts: The ICRC Study on the Current State of International Humanitarian Law’, 92 *International Review of the Red Cross* (2010) 879, 799, 803; see also Droege & Tougas, *supra* note 4, 34, 35.

²¹ See K. Hulme, ‘Taking Care to Protect the Environment Against Damage: A Meaningless Obligation?’, 92 *International Review of the Red Cross* (2010) 879, 675, 678-682, 688-690.

²² Bothe *et al.*, ‘International Law Protecting the Environment During Armed Conflict’, *supra* note 2, 576; Droege & Tougas, *supra* note 4, 225.

the protection and preservation of the natural environment. This was, for the first time, formulated as a rule of armed conflict law in the *San Remo Manual on the Law of Naval Warfare*,²³ inspired by the frequent use of the term in the 1982 Law of the Sea Convention,²⁴ and then recognized in the International Committee of the Red Cross (ICRC) Customary Humanitarian Law Study (rule 44),²⁵ later also in the *Air and Missile Warfare Manual*.²⁶ This principle implies a question of the standard similar to the due diligence principle, namely what degree of regard is due, or what exactly is the threshold of the due regard obligation. This is a question the answer to which remains to be concretized in practice.²⁷ This answer will determine what is the real difference between the treaty obligation to *take care* and the customary law obligation of *due regard*. State practice shows a certain inclination to accept the threshold contained in Arts. 35 and 55 AP I.²⁸

A particular field of the customary law of armed conflict is the law of occupation, which is only in part regulated by Geneva Convention IV but constitutes to a larger extent customary law formulated in the Hague Regulations.²⁹ Art. 55 of the Regulations as developed by State practice constitutes a crucial rule obliging the occupying power to respect the requirements of sustainable

²³ L. Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflict at Sea* (1995), 14, 15, paras 34, 35, 44.

²⁴ See, indicatively, *United Nations Convention on the Law of the Sea*, 10 December 1982, Arts. 56-60, 1833 UNTS 397, 418-420.

²⁵ J.-M. Henckaerts & L. Doswald-Beck, 'Due Regard for the Natural Environment in Military Operations (Practice Relating to Rule 44)', in J.-M. Henckaerts & L. Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol II. (2005), 860; available at <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-ii-icrc-eng.pdf> (last visited 20 January 2020).

²⁶ Program on Humanitarian Policy and Conflict Research at Harvard University (ed.), *Manual on International Law Applicable to Air and Missile Warfare* (2009), 32, Rule 89.

²⁷ See D. Fleck, 'The Protection of the Environment in Armed Conflict: Legal Obligations in the Absence of Specific Rules', 82 *Nordic Journal of International Law* (2013) 1, 7, 12-15; D. Fleck, 'The Protection of the Environment in Armed Conflict: Legal Obligations in the Absence of Specific Rules', in R. Rayfuse (ed.), *War and the Environment. New Approaches to Protecting the Environment in Relation to Armed Conflict* (2014), 45, 50; Bothe, 'The Ethics, Principles and Objectives of Protection of the Environments in Times of Armed Conflict', *supra* note 19, 105.

²⁸ Hulme, *supra* note 21, 684-687.

²⁹ H.-P. Gasser & K. Dörmann, 'The Protection of the Civilian Population', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* 3rd ed. (2013), 231, 264-307.

development.³⁰ This is recognized by Principle 21 of the ILC Principles³¹ relating to the sustainable use of natural resources in situations of occupation:

“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 purposes under the law of armed conflict, it shall do so in a way that *ensures their sustainable use and minimizes environmental harm.*”³²

D. Relationship Between the Principles of Peacetime Environmental Law and the Relevant Rules of the Law of Armed Conflict

On this basis, a few remarks on the relationship between the obligation of due diligence in general environmental law and the rules on protection in times of armed conflict are possible.

The duty of a potential target State to take precautions (Art. 58 AP I) amounts to the application of the *principle of prevention* in time of peace. It requires States which may become target States to take preventive measures designed to reduce the risk of environmental damage caused by war. The principle of prevention relates to all causes of environmental damage, be it caused by a relevant actor's own activities, a third party, or natural events not attributable to any actor.

First, planning decisions must therefore be taken in a way which enables the State to fulfill the duties to take precautions in time of armed conflict. Important military installations may not be placed close to valuable or especially vulnerable civilian objects. Second, the regime of environmentally sensitive areas (protected areas) must be shaped in a way which would allow for establishing them as non-defended areas or demilitarized zones in times of armed conflict. This would keep the deleterious effects of hostilities away from environmentally sensitive areas. It is postulated as a development of international humanitarian law that procedures are created to establish environmentally vulnerable areas as

³⁰ M. Bothe, ‘The Administration of Occupied Territory’, in A. Clapham, P. Gaeta & M. Sassòli (eds), *The 1949 Geneva Conventions* (2015), 1455, 1477.

³¹ See *Report of the International Law Commission on the Work of its Seventy-First session*, *supra* note 6.

³² (Emphasis added).

specially protected zones in times of armed conflict.³³ This has been recognized by the ILC Principles:³⁴

“Principle 4, Designation of protected zones:
States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.”

“Principle 17, 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.”

Another question is the interpretation of the *due regard principle* in the law of armed conflict. What is the level and probability of damage to which due regard must be paid? It is submitted that this principle must be interpreted in the light of the *precautionary principle* of peacetime environmental law. Due regard requires the military decision-maker to take into account future environmental damage which may be caused but is not certain. The ICRC Customary Law Study suggests that this is a rule of customary law. To quote the commentary to rule 44, already mentioned:³⁵

“There is practice to the effect that lack of scientific certainty as to the effects on the environment of certain military operations does not absolve parties to a conflict from taking proper precautionary measures to prevent undue damage. As the potential effect on the environment will need to be assessed during the planning of an attack, the fact that there is bound to be some uncertainty as to its full impact on the environment means that the *precautionary principle* is of particular relevance to such an attack. The precautionary principle in environmental law has been gaining increasing recognition. There is, furthermore, practice to the effect that this environmental law principle applies to armed conflict.”

³³ See the statement of the President of the International Committee of the Red Cross, J. Kellenberger, *supra* note 20, 803.

³⁴ See *Report of the International Law Commission on the Work of its Seventy-First session*, *supra* note 6.

³⁵ Henckaerts & Doswald-Beck, ‘Due Regard for the Natural Environment in Military Operations’, *supra* note 25 (Emphasis added).

It has previously been stated here that it is one of the functions of the precautionary principle to avoid a situation where there is no room for future use of the environment, where the latter, either as a resource or as a basis for the carrying capacity of the Earth, is exhausted. Thus, the precautionary principle is a decisive tool for preserving the rights of future generations and to heed the requirements of sustainable development. Military activities are not exempt from the ensuing duties. This is a constitutional principle of current international law.

E. Conclusion

The problem discussed in this paper is an example of a general structural problem of current international law. The international legal system is, on the one hand, characterized by fragmentation,³⁶ and on the other hand by an adherence to overarching values. Different areas of the law – humanitarian law, environmental law, trade law, and even particular treaties – live a life of their own. This not only characterizes the law-making fora; these *regimes* entertain specific and specialized epistemic communities of their own which accompany and determine their functioning. This phenomenon is a necessary condition of the functioning of international law. The ensuing specialization creates a commonality of interests between relevant actors, which most often is the driving force of legal development and proper application of the law.

The fragmentation is, on the other hand, mitigated or counterbalanced by the existence of overarching values. The interdependence between the fragmented parts or areas of international law cannot be denied. A comprehensive look at the problems raised within the international community is necessary. This is why a trend towards avoiding conflicts, towards mutual recognition or tolerance, towards rapprochement between different areas of international law or between different regimes, can be observed.³⁷ As the European Court of Human Rights put it, there is a “[...] spirit of systemic harmonization [...]”.³⁸ This is based on the fact that the international community is characterized by an adherence to common values, a trend for which the

³⁶ J. Pauwelyn, ‘Fragmentation of International Law’, in Wolfrum (ed.), *supra* note 1; A. Peters, ‘The Refinement of International Law: From Fragmentation to Regime Interaction and Politization’, 15 *International Journal of Constitutional Law* (2017) 3, 671, 672-682.

³⁷ Peters, *supra* note 36, 685-687.

³⁸ *Al-Dulimi & Montana Management Inc. v. Switzerland*, ECtHR Application No. 5809/082016, Judgment of 21 June 2016, 67, para. 140.

term *constitutionalization* has been coined.³⁹ By this term, the structure of the international system is compared to the structure of national legal systems, which are governed by a *constitution*. The constitution determines the functioning of the State and prevails over rules of an inferior rank. Although this comparison may appear somewhat audacious, it nevertheless reflects the reality of current international discourses. Sustainable development and intergenerational equity are relevant for human activities in all areas. They apply in peace and war. They constitute most prominent constitutional and overarching values of the international order.⁴⁰ They must also determine the behavior of parties to an armed conflict where the protection of the environment is at stake.

³⁹ T. Klein, *Die Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente Einer Idealistischen Völkerrechtslehre* (2012), on the possible transfer of the notion of *constitution* to the international legal order at 117-119 (English summary at 707), on international law as an order of values 18-27 (English summary at 705); See also M. Hakimi, 'Constructing an International Community', 111 *American Journal of International Law* (2017) 2, 317, 333-356.

⁴⁰ Proelß, *supra* note 9, 97-102.

The Protection of the Environment: A Gendered Analysis

Keina Yoshida*

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Abstract

This article addresses the International Law Commission's *Draft Principles on the Protection of the Environment in Relation to Armed Conflicts*. The main argument presented is that any principles on the protection of the environment – pre-conflict, during conflict, and post-conflict – should be complementary to and inclusive of both the Women, Peace and Security agenda and Convention on the Elimination of All Forms of Discrimination Against Women as part of a holistic and integrated approach to environmental protection. The erasure of the specific women's human rights instruments, including Convention on the Elimination of All Forms of Discrimination Against Women, cannot be legitimized on the basis that mentioning gender equality or the right to non-discrimination is redundant given that other more general instruments have been cited or that considering them is too controversial. Their inclusion as part of the underlying international human rights framework is vital.

A. Introduction

In 2015, the United Nations Security Council (UNSC) adopted Resolution 2242, as part of its Women, Peace and Security (WPS) framework.¹ This framework is one of the ways in which women's groups have advocated for the inclusion of gender equality and women's participation in conflict and post-conflict settings. Resolution 2242 broke new ground by recognizing climate change as a threat to international peace and security. The more recent Resolution 2467 (2019) included the threat of the illicit trade in natural resources with respect to "conflict minerals".² While Resolution 2467 does not develop its analysis on illicit trade more broadly to consider the linkages between extractive industries, sexual violence, trafficking, and environmental degradation, the inclusion of both climate change and conflict minerals within the WPS framework recognizes how issues of climate insecurity, as well as environmental degradation and protection, interrelate and affect women in conflict and post-conflict settings.

Within the human rights framework, the Beijing Declaration and Platform for Action, approaching its 25th anniversary, famously stated that "[w]omen's experiences and contributions to an ecologically sound environment [are] [...] central to the agenda for the twenty-first century".³ In reality, issues relating to women in conflict and post-conflict settings and conflict prevention are presented as distinct from those of environmental protection, including its gendered nature. I have recently drawn attention to how the WPS framework and the literature and practice of environmental peacebuilding fail to adequately take one another into account.⁴ This leads to a number of practical problems

¹ SC Res. 2242, UN Doc S/RES/2242 (2015), 13 October 2015.

² SC Res. 2467, UN Doc S/RES/2467 (2019), 23 April 2019. See also Draft Principles 18 and 21 on the sustainable use of natural resources in *Text and Titles of the Draft Principles Provisionally Adopted by the Drafting Committee of the International Law Commission on First Reading on the Seventy-First Session, Protection of the Environment in Relation to Armed Conflicts*, UN Doc A/CN.4/L.937, 6 June 2019, 3-4 [Text and Titles, Protection of the Environment in Armed Conflict].

³ United Nations, *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20/Rev.1, 15 September 1995, 104 - 105, para. 251.

⁴ K. Yoshida, 'The Nature of Women, Peace and Security: Where is the Environment in WPS and Where is WPS in Environmental Peacebuilding', LSE Centre for Women, Peace and Security Working Paper, 22/2019. See also A. Kronsell, 'WPS and Climate Change', in S. E. Davies & J. True (eds), *The Oxford Handbook of Women, Peace and Security* (2018), 726; R. Balakrishnan & K. Dharmaraj, 'WPS and Sustainable Development Goals', in S. E. Davies & J. True (eds), *The Oxford Handbook of Women, Peace and Security* (2018); For

concerning the failure to ensure women's participation in environmental peacebuilding issues, which result in a narrowed approach that is focused on inclusion of women in the management of natural resources rather than considering broader conceptions of environmental protection.⁵ Foundationally, this means that the gendered risks and gendered consequences of environmental degradation, and its links to conflict, are not adequately addressed.

This bifurcation can also be seen in relation to the International Law Commission's (ILC) Draft Principles on the protection of the environment in armed conflict.⁶ The principles on the Protection of the Environment in Relation to Armed Conflict provide a much needed update to the issue of environmental protection in the context of growing attention to the ways in which the environment intersects with, contributes to, sustains, or fuels conflict. The ILC has adopted a number of Draft Principles discussed in the articles in this special edition following its examination of environmental law, human rights law, and international criminal law. The Draft Principles make clear that "[...] the natural environment shall be respected and protected in accordance with applicable international law, and in particular, the law of armed conflict."⁷

The Draft Principles and the reports which accompany them consider the international law framework in order to enhance the protection of the environment in relation to armed conflict including through reminding States of their obligation to take "[...] preventative measures for minimising damage to the environment during armed conflict [...]" (Draft Principle 2). Notably, however, neither the Draft Principles nor the reports mention women's human rights instruments, such as the Convention on the Elimination of All Forms

an overview and classification of the literature on environmental peacebuilding see, T. Ide 'The Dark Side of Environmental Peacebuilding', 127 *World Development* (2020) 1.

⁵ For example, the Harmony with Nature framework before the General Assembly. See also D. Boyd, *The Rights of Nature: A Legal Revolution that Could Save the World* (2017); V. Shiva & M. Mies, *Ecofeminism* (2014). Generally, on environmental peacebuilding see: C. Bruch *et al.*, 'Post-Conflict Peace Building and Natural Resources', 19 *Yearbook of International Environmental Law* (2008) 1, 58; C. Bruch *et al.*, 'International Law, Natural Resources and Post-Conflict Peacebuilding: From Rio to Rio+20 and Beyond', 21 *Review of European, Comparative & International Environmental Law* (2012) 1, 44 [Bruch *et al.*, Rio to Rio+20 and Beyond].

⁶ For an overview of the Draft Principles see this issue, M. Jacobsson & M. Lehto, 'Protection of the Environment in Relation to Armed Conflicts – An Overview of the International Law Commission's Ongoing Work', 10 *Goettingen Journal of International Law* (2020) 1, 32.

⁷ *Text and Titles, Protection of the Environment in Relation to Armed Conflicts*, *supra* note 2, Draft Principle 13.1.

of Discrimination against Women (CEDAW). Looking beyond the Draft Principles of the ILC, the main argument is that any principles on the protection of the environment – pre-conflict, during conflict, and post-conflict – should be complementary to and inclusive of both the WPS agenda and CEDAW as part of a holistic and integrated approach to environmental protection.

This article therefore introduces audiences to the work of the CEDAW Committee through their most pertinent general recommendations on this issue: general recommendations 30 and 37. In the second section, it outlines how gender equality and women's rights are obfuscated in the ILC's work and, finally, it concludes that the promotion of progressive development in relation to the protection of the environment in armed conflict must acknowledge the intersections between women's rights and the protection of the environment, given the lived realities of many women who are engaged in environmental protection.

B. Where are the Women?

The failure to expressly include gender equality and non-discrimination within the ILC's consideration of the most significant instruments illustrates how women's rights are often at the periphery of the international legal ecosystem.⁸ As Hilary Charlesworth has lamented, despite claims of feminist governance in international law “[...] feminist concerns have been translated in a very limited way[.]” and scholarship is often consigned to a footnote.⁹ The protection of the environment and its intersection with women's rights has been a longstanding concern for many women, particularly from Indigenous communities and the global South more broadly. Indigenous ecofeminists such as Vandana Shiva have drawn attention to the impacts of environmental degradation on human health, including women's reproductive health, and their livelihoods through food and water insecurity.¹⁰ Adverse impact on biodiversity, ecosystems, and the land, as both a material and non-material source of sustenance, has been experienced by

⁸ H. Charlesworth, 'Talking to Ourselves? Feminist Scholarship in International Law', in S. Kuovo & Z. Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (2011), 17.

⁹ *Ibid.*, 23.

¹⁰ V. Shiva, 'Staying Alive: Women, Ecology and Development' (1988). See also M. Viezzer, 'Si me Permiten Hablar: Testimonio de Domitila, una Mujer de las Minas de Bolivia', in Y. Espinosa Miñoso, D. Gómez Correal & K. Ochoa Muñoz – Popayán (eds), *Tejiendo de Otro Modo: Feminismo, Epistemología y Apuestas Decoloniales en Abya Yala* (2014), 391. This interview records Domitilia's experience of attending the World Conference for

some Indigenous communities fighting to guard the rights of nature as a form of ecological and/or spiritual violence.¹¹ The right to non-discrimination is thus a particularly important one in the context of the *greening of human rights*.¹² As the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment has explained: “The degradation and loss of biodiversity often result from and reinforce existing patterns of discrimination. Although everyone depends on ecosystem services, some people depend on them more closely than others”.¹³ The Special Rapporteur notes that the loss of biodiversity dependent ecosystem services also has disproportionate effects on people who are vulnerable for other reasons, including gender, age, disability, or minority status. This means that being attentive to non-discrimination and the differential impacts on environmental degradation is fundamental in thinking about whose voices and experiences are considered.

The decision not to expressly include mention of non-discrimination, or CEDAW’s work on the environment or conflict, is striking given the temporal complementarity inbuilt between the approach of the ILC,¹⁴ and the WPS framework and CEDAW General Recommendation No. 30.¹⁵ General Recommendation No. 30 provides guidance to States on the application of CEDAW to conflict prevention, international and non-international armed conflicts, situations of foreign occupation, and post-conflict situations. It is

Women in Mexico 1975 and the marginalization of women’s narratives from the global south by Western women and women from the bourgeoisie classes.

¹¹ Draft recommendation no 13.3 (*Text and Titles, Protection of the Environment in Relation to Armed Conflicts, supra* note 2) would be unacceptable applying the rights of nature frameworks. It states that “No part of the natural environment may be attacked, unless it has become a military objective”. For an excellent overview on the rights of nature and the law see, D. R. Boyd, *The Rights of Nature: A Legal Revolution that Could Save the World* (2017).

¹² Human Rights Council, UN Doc A/HRC/RES/38/4. 16 July 2018.

¹³ Human Rights Council, UN Doc A/HRC/34/49, 19 January 2017.

¹⁴ The standards of soft law on women’s rights are instead implicitly included in the Draft Principles through the provision which provides that “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”, *Text and Titles, Protection of the Environment in Relation to Armed Conflicts, supra* note 2, Draft Principle 3. The standards arguably therefore must be read together with all State obligations, including in relation to women’s rights, more generally.

¹⁵ C. O’Rourke & A. Swaine, ‘CEDAW and the Security Council: Enhancing Women’s Rights in Conflict’, 67 *International and Comparative Law Quarterly* (2018) 1, 167-199 [O’Rourke & Swaine, CEDAW and the Security Council].

structured with a focus on the conflict cycle but the Committee “[...] notes that the transition from conflict to post-conflict is often not linear and can involve cessations of conflict and then slippages back into conflict – a cycle that can continue for long periods of time”.¹⁶ The long-lasting effects of conflict on the environment are also recognized within the ILC reports. The ILC has acknowledged the severe environmental impacts of conflict which are long lasting. As the Special Rapporteur of the ILC notes, “[n]ot all resources are renewable, reforestation can take decades and may not produce expected results, restoring areas affected by erosion or desertification is difficult, forms of land use may change permanently, and species may be lost”.¹⁷ To this end, the ILC’s work relates to the temporal phases of preventative measures, conduct of hostilities, and reparative measures. The acknowledgement by the ILC and CEDAW regarding the need to adopt principles and standards which apply throughout a non-linear conflict cycle echoes the work of feminist scholars who have long argued that strict temporal framings, often present in international law, fail to reflect the realities of conflict and peace.¹⁸

The purpose of this section is to provide a brief overview of the WPS framework and the work of the CEDAW Committee.¹⁹ It is beyond the scope of this short paper to give a comprehensive account of the gender architecture at the UN or to set out all of the laws and standards which apply to women’s human rights.²⁰ This section does not provide an overview of all of these instruments. Instead, it focuses on two frameworks, and within these the focus is on the right to participation or the participation pillar of the WPS agenda.

¹⁶ Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), *General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations*, UN Doc CEDAW/C/GC/30, 18 October 2013, para. 4 [CEDAW, General Recommendation No. 30].

¹⁷ *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto*, UN Doc A/CN.4/728, 27 March 2019, 11, para. 19.

¹⁸ A. R. Roberts, ‘Women and the Political Economy of War’, in C. Cohn (ed), *Women and War* (2013), 40.

¹⁹ M. Freeman, C. Chinkin & B. Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (2012).

²⁰ On the gender architecture of the UN see, H. Charlesworth & C. Chinkin, ‘The New United Nations ‘Gender Architecture’: A Room with a Review?’, 17 *Max Planck Yearbook of United Nations Law* (2013).

I. The UN's Women, Peace, and Security Agenda

In October 2000, the UNSC adopted its first resolution on WPS. Resolution 1325 became the first of a series of resolutions focusing on women's rights and gender equality in the context of the Security Council's peace and security agenda.²¹ Participation is a core pillar in the WPS framework, which addresses the issue of gender balance in peace negotiations and also in new institutional and legal frameworks constructed through the political transition processes.²² Resolution 1325 stresses the importance of women's "[...] equal participation and full involvement in all efforts for the maintenance and promotion of peace and security [...]" and also recognizes the urgent need to mainstream a gender perspective into peacekeeping operations. The nine resolutions which now make up the agenda are conceptualized as falling under four pillars: conflict prevention, women's participation, protection, and relief and recovery.²³ The resolutions have developed to ensure that women's participation is meaningful and effective in that it should also include a gendered understanding of the structures in place, ensuring that women can have influence and effectively participate in different spheres and stages of the conflict cycle.²⁴ Significantly, this means including women in peace processes and ensuring that they are consulted and included in all decisions, including on matters relating to the natural environment.

²¹ K. Barnes & F. Olonisakin, 'Introduction', in F. Olonisakin *et al.* (eds), *Women, Peace and Security* (2010), 3. The WPS framework includes the following core resolutions: SC Res. 1325, UN Doc S/RES/1325 (2000), 31 October 2000; SC Res. 1820, UN Doc S/RES/1820 (2008), 19 June 2008; SC Res. 1888, UN Doc S/RES/1888 (2009), 30 September 2009; SC Res. 1889, UN Doc S/RES/1889 (2009), 5 October 2009; SC Res. 1960, UN Doc S/RES/1960 (2010), 16 December 2010; SC Res. 2106, UN Doc S/RES/2106 (2013), 24 June 2013; SC Res. 2122, UN Doc S/RES/2122 (2013), 18 October 2013 and SC Res. 2242, UN Doc S/RES/2242 (2015), 13 October 2015. UN Woman, 'Global Study on Preventing Conflict, Transforming Justice, Securing Peace: A Global Study on the Implementation of United Nations Security Council resolution 1325' (2015), available at [https://www.peacewomen.org/sites/default/files/UNW-GLOBAL-STUDY-1325-2015%20\(1\).pdf](https://www.peacewomen.org/sites/default/files/UNW-GLOBAL-STUDY-1325-2015%20(1).pdf) (last visited 24 March 2020).

²² C. Chinkin, *Peace Agreements as a Means for Promoting Gender Equality and Securing the Participation of Women*, UN Doc EGM/PEACE/2003/BP.1, 31 October 2003; C. Bell & C. O'Rourke, 'Peace Agreements or Pieces of Paper? Impact of UNSC Resolution 1325 on Peace Processes and Their Agreements', 4 *International and Comparative Law Quarterly* (2010) 1, 59.

²³ P. Kirby & L. Shepherd, 'Reintroducing Women, Peace, and Security', 92 *International Affairs* (2016) 2, 249 (original emphasis).

²⁴ T. Paffenholz, 'What Works in Participation', in S. E. Davies & J. True (eds), *The Oxford Handbook of Women, Peace and Security* (2019).

Beyond women's participation, the WPS resolutions are relevant to the work of the ILC given its recent recognition that environmental factors affect international efforts to build and maintain peace. In 2015, the Security Council enacted Resolution 2242, which made an important step towards expanding WPS by recognizing that climate change interconnects with the WPS framework. The Preamble to Resolution 2242 (2015) notes the

“[...] changing global context of peace and security [including] the impacts of climate change...and in this regard reiterating its intention to increase attention to women, peace and security as a cross-cutting subject in all relevant thematic areas of work on its agenda, including threats to international peace and security caused by terrorist acts [...]”.²⁵

As set out in the introduction, the most recent resolution importantly addresses the issue of small arms, the need to prevent sexual violence in conflict, and the illicit trade in natural resources. Although Resolution 2467 does not develop its analysis on conflict minerals with respect to the environment, the Resolution does speak to a growing awareness present elsewhere on the linkages between extractive industries, sexual violence, and trafficking in human beings.²⁶ As the Special Rapporteur on Trafficking has stated in her most recent report:

“Conflict-related violence is also used to strip natural resources, forcibly seize land and displace populations, often leading to the trafficking of women and girls who are recruited for the purpose of sexual exploitation and forced labour in illegal mining areas and

²⁵ Significantly, in 2018 the CEDAW Committee published General Recommendation No. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change. The Recommendation follows earlier work and statements of the Committee on natural disasters: CEDAW, *General Recommendation No. 37 on Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change*, UN Doc CEDAW/IC/GC/37, 7 February 2019 [CEDAW, General Recommendation No. 37].

²⁶ C. Chinkin & G. Fernandez, ‘Women, Peace and Security: The Sound of Silence’, in S. Basu, P. C. Kirby & L. J. Shepherd, *New Directions in Women, Peace and Security* (2020). See also P. Simons, ‘Unsustainable International Law: Transnational Resource Extraction and Violence Against Women’, 27 *Transnational Law and Contemporary Problems* (2017) 2, 416.

other extraction zones controlled by non-State actors, such as armed groups or private security services”.²⁷

The report underscores the political economy of violence, including competition for the control of natural resources and mining, drawing attention to evidence from the Democratic Republic of Congo and Colombia. The Special Rapporteur’s reports extensively consider the issue of the illegal exploitation of natural resources, noting “[...] the severe environmental impacts of illegal resource extraction”.²⁸ The reports considered a number of intersecting and fragmented legal norms, including the prohibition of pillage under international humanitarian law, the principle of permanent sovereignty over natural resources, international environmental law protections of watercourses, lakes, and wetlands, and the designation of protected zones in areas of major ecological importance. It draws particular importance to the protection of the traditional lifestyles of Indigenous Peoples in accordance with the Convention on Biological Diversity, which links to the Special Rapporteur’s observations above on the disproportionate impact of environmental degradation on the lives of forest dwellers, Indigenous Peoples, fishers, and others who live in close connection with forests, rivers, lakes, and oceans.²⁹

The connection between the legal protection of natural resources and the environment relates to all temporal areas of the Commission’s work, including in relation to peace agreements. The reports do not, however, consider the links between trafficking, sexual violence, and the illegal exploitation of natural resources within their consideration of organized crime (para. 29).³⁰ They omit any mention of standards which relate to women’s rights, the prohibition of sex trafficking, and gender-based violence within international criminal law, or women’s participation more generally during the different temporal stages of the conflict.

At the same time, the WPS framework can be criticized for its failure to develop its understanding of how environmental protection is integral to obtaining international peace and security. Importantly, the Draft Principles

²⁷ Special Rapporteur on Trafficking, *Report Presented to the General Assembly on Trafficking in Persons, Especially Women and Children*, UN Doc A/73/171, 11 July 2018, 7-8, para. 22.

²⁸ *Ibid.*, para. 19.

²⁹ *Second Report of the Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts* by M. G. Jacobsson, UN Doc. A/ CN.4/685, 28 May 2015, para. 15.

³⁰ CEDAW, *General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19*, UN Doc CEDAW/C/GC/35 (2015) [CEDAW, General Recommendation No. 35].

also recognize the environmental impact of peace operations. Draft Principle 7 states:

“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”.³¹

The impact of peace operations on women’s rights has been a topic of central interest to those working in the field of WPS, particularly in relation to responsibility over sexual violence. The wider ecological and gendered impact of peace operations remains an area for scholarly attention in the WPS field. Another aspect which both the WPS agenda and the ILC could and should have paid more attention to is the protection of human rights defenders who protect the environment throughout the conflict cycle and particularly in post-conflict settings. Resolution 2467 does not make any direct reference to human rights defenders, though the Security Council states that it remains “[...] deeply concerned about threats, attacks and restrictions on the work of civil society organizations that inhibit their ability to contribute to international peace and security”.³² The ILC does, conversely, include two significant Draft Principles in this regard. Draft Principle 10 on corporate due diligence and Draft Principle 11 on corporate liability both recognize that States should take appropriate measures to ensure that corporations and other business enterprises can be held liable for harm caused by them to the environment, including in relation to human health, encompassing post-conflict situations. These Draft Principles echo the work of the CEDAW Committee, which has also reminded States of the need to take appropriate measures to ensure corporations are held accountable for sexual and gender-based violence against women.³³

³¹ *Text and Titles, Protection of the Environment in Relation to Armed Conflicts*, *supra* note 2, 2.

³² C. Chinkin & M. Rees, ‘Commentary on Security Council Resolution 2467: Continued State Obligation and Civil Society Action on Sexual Violence in Conflict’ (2019), available at https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/09/report/commentary-on-security-council-resolution-2467/19_0496_WPS_Commentary_Report_online.pdf (last visited 21 February 2020).

³³ CEDAW, *General Recommendation No. 35*, *supra* note 30.

II. The Women's Convention and the CEDAW Committee

The WPS agenda, which sits at the level of the Security Council, falls within the international human rights framework, via the CEDAW Committee. The enactment by the Committee of General Recommendation No. 30 (2015) on women in conflict prevention, conflict, and post-conflict situations presented a further important step with regard to the normative status of the WPS agenda.³⁴ General Recommendation No. 30 cements synergies between the international human rights framework on women's rights and the Security Council agenda, and it ensures that States parties to the Convention report to the Committee about its compliance with the WPS framework.³⁵ States parties now report to the CEDAW Committee during the periodic reporting procedure on their compliance with the agenda.

The recommendation provides authoritative guidance to States on their obligations in relation to women and girls in conflict and post-conflict situations and importantly emphasizes the need for a human rights perspective.³⁶ CEDAW's General Recommendation No. 30 makes it clear that conflict exacerbates gender inequalities and that, in post-conflict environments, the violence does not stop but rather often increases.³⁷ General Recommendation No. 30 warns that, at the official cessation of hostilities, the promotion of gender

³⁴ CEDAW, *General Recommendation No. 30*, *supra* note 16. The Recommendation covers the application of the Convention in situations of international and non-international armed conflicts, situations of foreign occupation, as well as other forms of occupation, and post-conflict transition (see para. 4) and “[...] internal disturbances, protracted and low-intensity civil strife, political strife, ethnic and communal violence, states of emergency, and suppression of mass uprisings, war against terrorism and organised crime [...]” and other situations which result in serious violations of women's rights. The Recommendation refers to the WPS agenda as a “political framework” raising questions as to the exact normative status of the WPS agenda. This questions forms part of the research of the Feminist International Law of Peace and Security project currently under investigation at the Centre for Women, Peace and Security at the LSE.

³⁵ *Ibid.*, 1. The “[...] primary aim and purpose of the general recommendation is to provide authoritative guidance to States parties on legislative, policy and other appropriate measures to ensure full compliance with their obligations under the Convention to protect, respect and fulfil women's human rights”. Notably, the environment and climate change are barely mentioned in *General Recommendation No. 30*. On CEDAW and WPS see, O'Rourke & Swaine, *CEDAW and the Security Council*, *supra* note 15. See also SC Res. 1457, UN Doc S/RES/1457 (2003), 24 January 2003, para. 3.

³⁶ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, ICJ Reports 2010, 639, para. 66.

³⁷ CEDAW, *General Recommendation No. 30*, *supra* note 16, para. 35.

equality and women's participation in decision-making processes is often not seen as a priority and may even be side-lined as incompatible with stabilization goals. Together with the WPS framework, it reminds States that women's rights cannot be traded for peace. In other words, gender-blind conflict prevention measures cannot adequately predict and prevent conflict. It is only by including female stakeholders and using a gendered analysis of conflict that States parties can design appropriate responses.

Significantly, General Recommendation No. 30 also highlights how the immediate aftermath of conflict can provide a strategic opportunity to adopt legislative and policy measures to eliminate discrimination against women and have equal opportunities to participate in the new, post-conflict structures of governance. This requires the full participation and involvement of women in formal peacemaking, post-conflict reconstruction, and socio-economic development. The Committee reminds the State parties that, under the Convention, the obligation to ensure women's equal representation also requires temporary special measures to ensure that special and multiple barriers to women's equal participation are addressed. The General Recommendation also notes that rural women are often disproportionately affected by the inequitable access to land and natural resources.

In addition to the guidance specifically on women's rights in the conflict continuum, the CEDAW Committee's recent work has focused on the intersection between gender equality and the protection of the environment.³⁸ Much like the significant standards developed by the Committee on gender-based violence through its jurisprudence and general recommendations,³⁹

³⁸ See also Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 'Women's Human Rights and the Right to a Clean, Safe and Healthy, and Sustainable Environment: Reference Manual for Judges 2019', available at <https://www.icj.org/wp-content/uploads/2019/12/Women%E2%80%99s-Human-RigHts-and-tHe-RigHt-to-a-Clean-safe-HealtHy-and-sustainable-enviRonment-Reference-Manual-for-Judges-2019.pdf> (last accessed 21 February 2020). M. Robison, *Climate Justice: Hope, Resilience and the Fight for a Sustainable Future* (2018).

³⁹ H. Monansky, 'What's Law Got to Do With It?: An Overview of CEDAW's Treatment of Violence Against Women and Girls Through Case Studies', *Michigan State Law Review* (2014) 2, 327. All following cases are CEDAW cases: *A. T. v. Hungary*, Communication No. 2/2003, UN Doc CEDAW/C/32/D/2/2003, 26 January 2005; *Fatma Yildirim v. Austria*, Communication No. 6/2005, UN Doc CEDAW/C/39/D/6/2005, 6 August 2007; *Sahide Goekce v. Austria*, Communication No. 5/2005, UN Doc CEDAW/C/39/D/5/2005, 6 August 2007; *Karen Vertido v. the Philippines*, Communication No. 18/2008, UN Doc CEDAW/C/46/D/18/2008, 16 July 2010; *V.K. v. Bulgaria*, Communication No. 20/2008, UN Doc CEDAW/C/49/D/20/2008, 17 September 2011; *Inga Abramova v. Belarus*,

CEDAW developed and read the right to a healthy environment into the Convention.⁴⁰ In 2012, the former UN Special Rapporteur on Human Rights

Communication No. 23/2009, UN Doc CEDAW/C/49/D/23/2009, 27 September 2011; *S. V. P. v. Bulgaria*, Communication No. 31/2011, UN Doc CEDAW/C/53/D/31/2011, 27 November 2011; *Isatou Jallow v. Bulgaria*, Communication No. 32/2011, UN Doc CEDAW/C/52/D/32/2011, 28 August 2012; *R. P. B. v. the Philippines*, Communication No. 34/2011, UN Doc CEDAW/C/57/D/34/2011, 12 March 2014; *Angela González Carreño v. Spain*, Communication No. 47/2012, UN Doc CEDAW/C/58/D/47/2012, 15 August 2014; *X. and Y. v. Georgia*, Communication No. 24/2009, UN Doc CEDAW/C/61/D/24/2009, 25 August 2015; *Belouosova v. Kazakhstan*, Communication No. 45/2012, UN Doc CEDAW/C/61/D/45/2012, 25 August 2015; *A. S. v. Hungary*, Communication No. 4/2004, UN Doc CEDAW/C/36/D/4/2004, 29 August 2006; *Kell v. Canada*, Communication No. 19/2008, UN Doc CEDAW/C/51/D/19/2008, 27 April 2012; *M. W. v. Denmark*, Communication No. 46/2012, UN Doc CEDAW/C/63/D/46/2012, 21 March 2016; *L. R. v. Republic of Moldova*, Communication No. 58/2013, UN Doc CEDAW/C/66/D/58/2013, 21 March 2017; S. Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006), 21; See also by way of background C. Chinkin, 'Violence Against Women', in Freeman, Chinkin & Rudolf (eds), *supra* note 19, 443; C. Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights', 12 *Human Rights Quarterly* (1990) 4, 486; Y. Erturk, *Violence Without Borders: the Paradigm, Policy and Practical Aspects of Violence Against Women* (2016).

⁴⁰ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, states in Article 18 that women have "[...] the right to live in a healthy and sustainable environment". The African Charter on Human and Peoples' Rights of 1981 provides in Article 24 that "[a]ll peoples shall have the right to a general satisfactory environment favorable to their development". See the *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217 [Banjul Charter]. The Protocol of San Salvador provides in Article 11(1) that "[e]veryone shall have the right to live in a healthy environment [...]". See the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, 17 November 1988, OAS A-52 [Protocol of San Salvador]. The Arab Charter on Human Rights 2004 includes a right to a healthy environment as part of the right to an adequate and decent standard of living in Article 38. See the *Arab Charter on Human Rights*, 22 May 2004, 12 *International Human Rights Report* (2005) 893. More recently, the Inter-American Court of Human Rights has confirmed in its advisory opinion 23/17 that there is a stand-alone right to a healthy environment and the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazu Agreement) has been opened to States for ratification. See the Official Summary Issued by the Inter-American Court, 'Advisory Opinion of OC-23/17', 15 November 2017, available at www.corteidh.or.cr/docs/opinion/resumen_serica_23_eng.pdf (last visited 21 February 2020).

and the Environment⁴¹ found, in relation to CEDAW, that, while the text of the Convention neither explicitly describes a human right to a healthy environment, “[...] the relationship between environmental harms and human rights protections has been recognized and integrated into the understanding of ‘traditional’ human rights by the Committee”.⁴² The Mapping Report found that the CEDAW Committee had a long history of recognizing the right to a healthy environment through its concluding observations, which have held that environmental degradation threatens the enjoyment of many human rights *inter alia* the right to the highest attainable standard of physical and mental health, the right to an adequate standard of living including the rights to adequate housing, food, and safe and clean drinking water, and sanitation, but also the right to land and the right to freedom of movement. This was further cemented in 2019 with the Committee’s enactment of a specific general recommendation on climate change, making it the first treaty body to address this issue through a general comment.

Beyond participation and the need to integrate women’s traditional and local knowledge, the CEDAW Committee’s recent work highlights the economic and social impact of environmental degradation on women’s lives and livelihoods. The Committee has set out the ways in which negative gender stereotyping and the limited control women have over decisions governing their lives make them more vulnerable to climate change and the impacts on environmental degradation. The Committee explains how gendered social, cultural, and

⁴¹ Special Rapporteur on the Environment and Human Rights, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, John H. Knox, UN Doc A/HRC/22/43, 24 December 2012. John Knox, the UN Rapporteur on the Environment and Human Rights, stated that his first priority would be to provide greater conceptual clarity to the application of human rights obligations related to the environment by taking an evidence-based approach to determining the nature, scope and content of the obligations. He complied legal experts to prepare a number of reports, in a mapping exercise. This included a specific mapping document on *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Development. Individual Report on the United Nations Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc A/HRC/25/53, December 2013.

⁴² Individual Report on the United Nations Convention on the Elimination of All Forms of Discrimination against Women, *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Development. Individual Report on the United Nations Convention on the Elimination of All Forms of Discrimination against Women*, *supra* note 41, para. 15; the right to a healthy environment generally see, Human Rights Council Resolution 16/11, UN Doc A/HRC/RES/16/11, 12 April 2011.

economic structures mean that women and girls are disproportionately impacted by the effects of climate change and disasters. Women's limited access to education and reproductive health services are further restricted in times of crisis, resulting in human rights violations. Climate change and disasters thus result in differential impacts on women and girls.⁴³

The CEDAW Committee makes it clear that women and girls in conflict situations are particularly exposed to the risks associated with disasters and climate change, which includes higher levels of mortality and morbidity. As the literature on environmental peacebuilding also makes clear, environmental degradation is entangled with conflict in a myriad of complex ways. The impacts of climate change are exacerbating food and water insecurity, resulting in a loss of livelihood and, by extension, increased climate migration.⁴⁴ This has a gendered component as those who are most vulnerable are often those who are least likely to be able to flee when there is a substantial risk to their life. Women and girls also face a heightened risk of gender-based violence, with recent evidence suggesting that the impacts of climate change are increasing the levels of child marriage.

The State obligations in the human rights framework in relation to women and girls intersect with environmental protection in important ways. Women's rights of access to land, their right to participate and be actors in peace processes, and the inclusion of their knowledge on environmental protection are all important dimensions of environmental management. The interlinking nature of each of these issues is addressed by the CEDAW Committee in their most recent general recommendation. On 7 February 2018, the CEDAW Committee published General Recommendation No. 37 on gender-related dimensions of disaster risk reduction in the context of climate change.⁴⁵ The objective of the

⁴³ See, M. Tanyag & J. True, 'Gender Responsive Alternatives to Climate Change' (2019), available at <https://actionaid.org.au/wp-content/uploads/2019/11/Monash-GRACC-Report-Global-.pdf> (last visited 25 March 2020).

⁴⁴ See for example, *Ioane Teitiota v. New Zealand*, UN Doc CCPR/C/127/D/2728/2016, 7 January 2020.

⁴⁵ CEDAW, *General Recommendation No. 37*, *supra* note 25. Other UN treaty bodies refer to general recommendations as general comments. See also Economic and Social Council, *Mainstreaming Gender Equality and Empowerment of Women in Climate Change Policies and Strategies*, UN Doc E/CN.6/2011/L.1, 1 March 2011. Climate change is defined in the *United Nations Framework Convention on Climate Change* in Article 1 as "[...] a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods", *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107 [UNFCCC]. The UNFCCC is a *lex*

general recommendation is to underscore the urgency of mitigating climate change to highlight the steps that need to be taken to achieve gender equality as a factor that will reinforce the resilience of individuals and communities globally in the context of climate change and disasters. The Committee has previously highlighted the linkages between environmental degradation and violations of women's human rights, including the right to live a life free from violence.

General Recommendation No. 37 reinforces non-discrimination obligations and the obligation to ensure that prevention or mitigation efforts do not reinforce gender inequality. The General Recommendation makes it clear that any measures to combat climate change or to protect the environment should comply with human rights (para. 14).

Significantly, the General Recommendation has a separate section on participation and empowerment, which creates State obligations to promote the participation of women and girls in the creation, development, implementation, and monitoring of policies and plans on climate change (para. 32). It underlines the importance of local and traditional knowledge held by rural women and underlines how Articles 7 and 8 of CEDAW provide that women should have equality in political and private life at the local, national, and international levels. This recalls General Recommendation No. 30, which affirms that "[...] the inclusion of a critical mass of women in international negotiations, peacekeeping activities, all levels of preventative diplomacy, mediation [...]"⁴⁶

At its very core, the WPS agenda and CEDAW remind States of the need to adopt a gendered approach to issues of peace and security. They create obligations on States to ensure that women are included in all stages of the conflict cycle. Women cannot continue to be excluded from these discussions or silenced by policies, as is so often the case. Women must be listened to, included, and have their right to effectively participate respected. They must be recognized as actors with vital knowledge for transitions to peace and for social change.⁴⁷ The standards place obligations on States to ensure that all policies, legislation, plans, programs, budgets, and other activities related to environmental protection, climate change, disaster risk reduction, and post-

specialis. Its relationship to human rights is comprehensively explored in M. Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights Under International Law* (2018).

⁴⁶ CEDAW, *General Recommendation No. 30*, *supra* note 16, para. 42.

⁴⁷ *General Recommendation No. 37* also makes specific and repeated mention of local knowledge, including of indigenous knowledge in relation to climate change mitigation and protection of the environment. See CEDAW, *General Recommendation No. 37*, *supra* note 25.

conflict situations are gender responsive and grounded in human rights based principles including gender equality and non-discrimination.⁴⁸

While it is fair to say that CEDAW General Recommendation No. 30 does not address environmental peacebuilding directly, the obligation on States to ensure that the protection of the environment is carried out with the participation of women and in a way which does not reinforce gender inequality, or which positively promotes gender equality, can be gleaned through numerous human rights instruments that emphasize women's rights to participation set out above. This is a fundamental human right which also forms a core pillar of the WPS framework, recognizing the need to include women in peace negotiations and conflict prevention strategies as a key component of ensuring a sustainable peace.

C. A Missing Piece of the Story

On 16 December 2013, the General Assembly adopted Resolution 68/112 which emphasized the “[...] importance of furthering the progressive development and codification of international law”.⁴⁹ The resolution took note of the decision of the ILC to include the topics “Protection of the environment in relation to armed conflicts” and “Protection of atmosphere” in its program of work. The work of the ILC thus aims to enhance protection for what has been described as “[...] the silent victim of warfare”.⁵⁰ All over the world, there is growing momentum for change, in order to protect the environment given the climate emergency in which we live. Further, the protection of the environment has increasingly been recognized as a core component of creating the conditions

⁴⁸ CEDAW, *General Recommendation No. 30*, *supra* note 16, para. 31.

⁴⁹ *Report of the International Law Commission on the Work of its Sixty-Fifth Session*, 68/112, UN Doc A/RES/68/112, 18 December 2013.

⁵⁰ G. Bartolini & M. Pertile, ‘The Work of the ILC on the Environment and Armed Conflicts: Enhancing Protection for the Silent Victim of Warfare?’, 34 *Questions of International Law* (2016), 1; R. Rayfuse, ‘Rethinking International Law and the Protection of the Environment’, in R. Rayfuse (ed), *War and the Environment – New Approaches to Protecting the Environment in Relation to Armed Conflict* (2014), 1.

for sustainable peace.⁵¹ As the Rio Declaration of 1992 states, “[...] [p]eace, development and environmental protection are interdependent and indivisible”.⁵²

The ILC’s reports developed through the work carried out by the Commission between 2007 and 2016 draw attention to numerous ways in which the environment is harmed due to conflict, including through toxic hazards from the bombardment of industrial sites, weapons, landmines, depleted uranium, and direct targeting of natural resources through scorched earth tactics.⁵³ It also draws on the work of the United Nations Environment Programme (UNEP) and the World Bank, which identifies the use of extractive industries to fuel conflict and the issue of human displacement as well as how these relate to the depletion of natural resources.⁵⁴ The reports importantly address certain questions relating to State responsibility, non-State actors, and multinational enterprises present in conflict zones. The reports highlight the ecological destruction engendered by conflict through logging, mining, deforestation, and extractive industries, and also address the emerging concept of environmental reparations.

Through a number of reports drafted by the two Special Rapporteurs, the Commission has taken on the immense task of examining the applicable international law in relation to the protection of the environment in armed conflict.⁵⁵ The first Special Rapporteur’s initial report notes that environmental

⁵¹ GA Res. 70/262, UN Doc A/70/262, 12 May 2016 and GA Res. S/2882 (XXVI), UN Doc A/RES/2882, 21 December 1971. C. Voigt, ‘Environmentally Sustainable Development and Peace: The Role of International Law’, in C. Marcela Bailliet & K. Mujeznovic Larsen (eds), *Promoting Peace Through International Law* (2015) [Voigt, Environmentally Sustainable Development and Peace].

⁵² Bruch *et al.*, ‘Rio to Rio+20 and Beyond’, *supra* note 5, 44.

⁵³ *Second Report of the Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts by Marja Lehto*, UN Doc A/CN.4/728, 27 March 2019.

⁵⁴ See also M. Choudhury & L. Arimatsu, ‘Reclaiming the WPS Agenda: it’s Time to Talk About the Elephant in the Room’ (2019), available at <https://blogs.lse.ac.uk/wps/2019/09/27/reclaiming-the-wps-agenda-its-time-to-talk-about-the-elephant-in-the-room/> (last visited 25 March 2020).

⁵⁵ See reports *Preliminary Report of the Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts*, UN Doc A/CN.4/674, 30 May 2014, 16, para. 56 [Preliminary Report]; *Preliminary Report of the Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts, Corrigendum*, UN Doc A/CN.4/674/Corr.1, 11 August 2014; *Second Report of the Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts by M. G. Jacobsson*, *supra* note 29; *Third Report of the Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts by M. G. Jacobsson*, UN Doc A/CN.4/700, 3 June 2016; *First Report of the Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts by Marja Lehto*, UN Doc A/CN.4/720, 30 April 2018.

protection has primarily been viewed through the lens of the law of armed conflict but that other areas of international law may be applicable.⁵⁶ These areas include international human rights law and international environmental law. The 61-page report is a significant legal document, which identifies and extrapolates “[...] the most important principles, concepts and obligations [...]” in relation to environmental protection. It does not endeavour “[...] to chart every single international or bilateral agreement that regulates the protection of the environment or human rights”.⁵⁷ This is “[...] for obvious reasons [...]” given that it would be unmanageable to list all of the treaties and instruments.⁵⁸ The first Special Rapporteur’s report thus recalls the work of Christina Voigt, who has argued from a critical perspective that:

“The sheer number of existing laws, principles, case law, regulations, standards and so on that address environmental protection already constitute a vast and complicated apparatus of international legal norms. Yet, environmental degradation and with it political stress and conflict continue to rise despite such norm density”.⁵⁹

One of the normative areas addressed by the first Special Rapporteur in her report is the area of human rights and the environment. The report includes an overview of significant jurisprudence in this area, which clarifies State obligations to take reasonable measures to prevent environmental harm and the individual right to a healthy environment.⁶⁰ While the report cites instruments, including the African Charter on Human and Peoples’ Rights and the additional protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador), there is no mention at any point of the instruments, cases, or normative developments on women’s rights which intersect with environmental protection and human rights. For example, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol), which recognizes women’s rights to a healthy and sustainable environment (Article 18), is not mentioned where other instruments are cited.⁶¹ In this way, women’s human rights and its contribution

⁵⁶ *Preliminary Report*, *supra* note 55, 2, para. 2.

⁵⁷ *Ibid.*, 16, para. 56.

⁵⁸ *Ibid.*, 32, para. 120.

⁵⁹ Voigt, ‘Environmentally Sustainable Development and Peace’, *supra* note 51, 169.

⁶⁰ *Preliminary Report*, *supra* note 55, para. 162.

⁶¹ In the case of the African Court a petition can be brought solely on the basis of violations of the Maputo Protocol. It is not dependent on pleading violations of the Charter. See for

to the development of a right to a healthy environment is erased from the human rights and environment story.⁶²

Although the report specifically states that it cannot consider all the norms and laws relating to human rights and the environment, the exclusion of the Maputo Protocol is a troubling omission. This is because its omission is an obfuscation of norm development from the global South. As Fareda Banda has argued, there is a need to actively take part and acknowledge progressive developments of the law from the African continent in order to decolonize knowledge production.⁶³ The erasure of the specific women's human rights instruments, including CEDAW, cannot be legitimized on the basis that mentioning gender equality or the right to non-discrimination is redundant given that other more general instruments have been cited or that considering them is too controversial.

It is also troubling since instruments, such as the Maputo Protocol and CEDAW, provide States with important guidance as to their obligations throughout the conflict cycle. The Maputo Protocol, for example, has a specific right to peace under Article 10 which provides that women have "[...] the right to participate in the promotion and maintenance of peace".⁶⁴ Significantly, Article 10.3 provides that "States Parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular".⁶⁵ Although, on the face of it, this Article does not relate to the protection of the environment in armed conflict, the reduction of military spending is relevant to the issue of environmental protection, given the devastating consequences of war and conflict on the environment.⁶⁶ Given that the Draft Principles apply to the protection

example, *Association Pour le Progress et la Defense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Mali*, Application No. 046/2016, Judgment, 11 May 2018.

⁶² H. Charlesworth, 'Talking to ourselves? Feminist Scholarship on International Law', in S. Kouvo & Z. Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (2014), 17, 32.

⁶³ S. Labenski & K. Yoshida, 'Where Would Women be Without CEDAW' (2019), available at <https://blogs.lse.ac.uk/wps/2019/09/04/where-would-women-be-without-cedaw/> (last visited 21 February 2020).

⁶⁴ *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 11 July 2003, Registration Number A-26363 [Maputo Protocol].

⁶⁵ *Ibid.*

⁶⁶ J. Seager, 'Patriarchal Vandalism: Militaries and the Environment', in J. M. Silliman & Y. King (eds), *Dangerous Intersections: Feminist Perspectives on Population, Environment, and Development* (1999), 163.

of the environment before, during, or after an armed conflict, human rights principles on decreasing military spending or calling for complete and universal disarmament form part of the important obligations under international law which enhance the protection of the environment.

The Draft Principles of the ILC also do not acknowledge the need for a critical mass of women to be involved in the peace agreements or highlight the importance of women's participation in the principles which are applicable after armed conflict. Rather than harmonize the principles set out in the WPS framework and in CEDAW, the ILC remains silent on the issue of non-discrimination and participation. A gendered approach could have been included within Draft Principle 5 or at least the analysis of the international frameworks in the reports concerning the protection of the environment of Indigenous Peoples. At the very least, the human rights obligations on non-discrimination in relation to armed conflict should have been mentioned as a recommendation. This approach was adopted in relation to corporate due diligence and corporate liability. As Marie Jacobsson and Marja Lehto explain, while the principles “[...] do not reflect generally binding legal obligations, they have been phased as recommendations”.⁶⁷ On the other hand, the principle of non-discrimination is a legally binding obligation and could have been included as such.

D. Conclusion

The progressive development and clarification of the standards by the ILC on the protection of the environment is an important step toward reminding States that the environment can also be a victim of conflict and that corporations, non-State actors, and States can be held liable for damaging the environment. A significant amount of work has been done to clarify the standards which are fragmented and refracted throughout the legal ecosystem. It is in this spirit that this article has argued that the failure to include women's human rights as a recognized aspect of international law is problematic. Further, as set out above, States should be reminded that all measures must be inclusive of women's rights. For example, according to UN Women:

“Largely overlooked in gender-related peacebuilding programming to date, interventions around natural resources, environment and

⁶⁷ This issue, M. Jacobsson & M. Lehto, ‘Protection of the Environment in Relation to Armed Conflicts – An Overview of the International Law Commission’s Ongoing Work’, 10 *Goettingen Journal of International Law* (2020) 1, 32.

climate change provide significant opportunities to empower women politically and economically, and to strengthen their contributions to peace”.⁶⁸

Participation, non-discrimination, and empowerment of women and girls is an important aspect which links together with environmental peacebuilding. In the progressive development of international law, the principles as they are present a missed opportunity to reinforce the standards and obligations which exist and contribute to a vision of sustainable peace that is gender inclusive.

⁶⁸ UN EP, *Women, Natural Resources and Peace* (2018), available at https://postconflict.unep.ch/publications/Women_NR_Peace_2pager_2018.pdf (last visited 21 February 2020).

Preventing a Warming War: Protection of the Environment and Reducing Climate Conflict Risk as a Challenge of International Law

Kirsten Davies^{*}, Thomas Riddell^{**} and Jürgen Scheffran^{***}

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* Macquarie Law School, Macquarie University, Australia, Email: Kirsty.davies@mq.edu.au.

** Macquarie Law School, Macquarie University, Australia, Email: Thomas.riddell@hdr.mq.edu.au.

*** Research Group Climate Change and Security (CLISEC), Institute of Geography, CLICCS/CEN, University of Hamburg, Germany; Email: Juergen.scheffran@uni-hamburg.de. This article contributes to the Cluster of Excellence 'Climate, Climatic Change and Society' (CLICCS), funded by the Deutsche Forschungsgemeinschaft (DFG).

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Abstract

Global warming poses serious risks to the environment, communities, and international peace and security. Significant concerns have been raised that, in the case of climate policy failures, the world may enter a *Warming War*, threatening the future viability of the planet and its life-sustaining ecosystems. While the regime of treaties and agreements governing climate change acknowledges the science and threats posed by global warming, it is not well positioned to constrain the securitization of climate change. A function of international law is to prevent armed conflict by resolving disputes through the judicial application of principles and norms governing relations between States. However, to date, it has been ineffective in addressing the impacts of climate change on armed conflict, because the treaties applicable to climate change fail to provide preventative, enforcement, and dispute resolution mechanisms. It is time for international law to establish judicial bodies with jurisdiction for conflict resolution and response capacities in the pre-phase to a *Warming War*. The challenge is to develop soft security measures to avoid climate conflict risks turning violent and becoming a hard security issue, attracting the use of force by the United Nations Security Council (UNSC). The establishment of an International Court for the Environment (ICE) is proposed as an entity that could enforce legally binding norms and resolve climate-induced disputes, opening an avenue for stakeholders to bring climate loss and damage cases to court. Aside from the reduction of greenhouse gases (GHG) to limit global warming, and the establishment of new legal regimes, alternative actions can be undertaken to protect the environment and communities, by mitigating climate-related risks. There is growing discourse surrounding climate change as a *threat multiplier*, exacerbating existing vulnerabilities. In the pre-phase to conflict, there is an urgent need to identify these vulnerabilities and their levels of influence on the compound effects of climate and conflict risks.

A. Introduction

Climate change caused by the release of GHG has serious effects on water, forests, farmland, and biodiversity, as well as on oceans, coasts, polar regions, and other eco-zones.¹ Increasing uncertainties and risks arise from storms, droughts, and other weather extremes that are manifested as natural disasters.² Through its multiple effects, climate change is threatening human livelihoods and life on earth, exacerbating vulnerabilities and increasing the risk of insecurity and violent conflict, especially in developing States.³ These impacts of climate change confront the planet with the possibility of a *Warming War*.⁴ On this basis, both international law and the UNSC need to interpret climate change as an issue of international peace and security.⁵ Doing so may contribute to preventing conflict that is aggravated by the issues presented by climate change, such as the competition for natural resources and migration due to the forced displacement of individuals affected by environmental degradation. This paper considers how climate change is presenting risks to international peace and security and the current capability of international law and the UNSC to address this. It then explores how existing law and policy mechanisms can be improved as well as novel approaches that can address climate change's security risks at an international level.

It is outside the scope of this article to discuss the efforts that can be undertaken in the domestic sphere through law and policy to prevent climate-induced conflict. Instead, it discusses the mechanisms available through

¹ Intergovernmental Panel on Climate Change (IPCC) – Working Group II, 'AR 5 Climate Change 2014 – Impacts, Adaptation, and Vulnerability' (2014), available at <https://www.ipcc.ch/report/ar5/wg2/> (last visited 5 February 2020) [IPCC – Working Group II, AR5 Climate Change 2014].

² IPCC, 'Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation' (2012), available at https://www.ipcc.ch/site/assets/uploads/2018/03/SREX_Full_Report-1.pdf (last visited 5 February 2020).

³ German Advisory Council on Global Change (WBGU), 'World in Transition: Climate Change as a Security Risk' (2007), available at https://www.wbgu.de/fileadmin/user_upload/wbgu/publikationen/hauptgutachten/hg2007/pdf/wbgu_hg2007_engl.pdf (last visited 5 February 2020).

⁴ See generally, K. Davies & T. Riddell, 'The Warming War: How Climate Change is Creating Threats to International Peace and Security', 30 *Georgetown Environmental Law Review* (2017) 1, 47.

⁵ *Climate Change and its Possible Security Implications: Report of the Secretary-General*, UN Doc A/64/350, 11 September 2009; see Art. 39 of the *Charter of the United Nations*, 26 June 1945, 1 UNTS XVI [UN-Charter], noting that the use of *international peace and security* is intended to fall within the scope of this article.

international law and the UNSC that can be utilized to resolve climate-induced conflict. In this regard, deterrents, such as the implementation of sanctions and trade embargoes, are outside the scope of this paper. For the purpose of this paper, we follow the UN International Law Commission's (ILC) definition of armed conflict developed as a result of its analytical work on the effects of armed conflict on treaties, being "[...] a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups".⁶ The International Law Association has elaborated on this definition by introducing two qualifying factors for armed conflict, being "[t]he existence of [...] armed groups" that are "[e]ngag[ing] in fighting of some intensity".⁷ Further, the first definition of environmentally-displaced people refers to persons

"[...] who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life".⁸

To outline how the international legal system can respond in the pre-phase and other phases of imminent armed conflict (which are interconnected as conflict-affected States are more inclined to relapse in conflict), this paper firstly gives insight into the climate-conflict nexus by demonstrating to what degree climate change is becoming a driver of conflict to threaten international peace and security, potentially leading to a *Warming War*.⁹ Secondly, the paper discusses the role of international law in preventing armed conflict, and gives a brief background of the treaties and agreements governing climate change and existing enforcement mechanisms.

⁶ *Report of the International Law Commission to the Sixty-Third Session*, UN Doc A/66/10, 26 April - 3 June and 4 July - 12 August 2011, 175, para. 100, Art. 2 (b); for commentary on the definition's genesis, see *ILC Report of the Commission to the General Assembly to the Sixtieth Session, Yearbook of the International Law Commission* (2008), Vol. II, Part Two, 47; see further *Prosecutor v. Duško Tadić aka "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para. 70.

⁷ International Law Association, 'Final Report on the Meaning of Armed Conflict in International Law' (2010), available at www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf (last visited 5 February 2020).

⁸ E. El-Hinnawi, *Environmental Refugees* (1985), UNEP, 4.

⁹ See generally, Davies & Riddell, *supra* note 4, 47.

After concluding that the existing instruments of international law cannot effectively deal with climate change as a threat to international security, the paper provides recommendations to strengthen existing legal and policy mechanisms as well as for the creation of novel mechanisms to prevent the occurrence of climate-induced armed conflict, and thus protect the environment from its damages. It recommends that the UNSC formally recognizes climate change as a threat to international peace and security to provide stronger mechanisms that mitigate climate induced or exacerbated conflict.¹⁰ Further, it suggests that the UNSC uses its Chapter VII powers to influence the enforcement of environmental obligations where their breach may induce conflict. With a view towards the peaceful settlement of disputes,¹¹ this paper suggests the creation of an International Court for the Environment (ICE) as a forum for States to resolve climate-related disputes. Overall, the paper recommends that both the international legal system and the UNSC take greater action to recognize climate change as a security threat and ensure that there are adequate mechanisms in place to diffuse climate-induced disputes before they escalate into armed conflict.

The International Law Commission has a mandate to codify and progressively develop international law, e.g. with the aim of Protection of the Environment in relation to Armed Conflict (PErAC). The role of the ILC is to develop international law through topical studies. This paper's recommendations are designed to complement its work in relation to the protection of the environment in the context of armed conflict. Its work has involved reviewing applicable laws protecting the environment in the lead up to, during, and the aftermath of armed conflict and the formulation of draft principles to clarify and fill lacunas in the law.¹²

¹⁰ UN-Charter, *supra* note 5, Art. 39.

¹¹ *Ibid.*, Art. 1.

¹² See for example, *Report of the Drafting Committee of the International Law Commission to the Sixty-Sixth Session, Protection of the Environment in Relation to Armed Conflict: Text of the Draft Introductory Provisions and Draft Principles Provisionally Adopted so far by the Drafting Committee*, UN Doc. A/CN.4/L.870, 22 July 2015; *Report of the Drafting Committee of the International Law Commission to the Sixty-Eight Session, Protection of the Environment in Relation to Armed Conflicts: Text of the Draft Principles Provisionally Adopted During the Present Session by the Drafting Committee*, UN Doc. A/CN.4/L.876, 3 August 2016. On the Effects of Armed Conflicts on Treaties, GA Res. 66/99, UN Doc. A/RES/66/99, 9 December 2011.

B. Climate Change as a Driver of Conflict

I. Climate Change as a Risk Multiplier

Climate change is characterized as a risk multiplier, connected with other risk factors through multiple linkages from local to global levels. It imposes stress on natural resources such as water, food, and energy, and threatens the functioning of critical infrastructures and supply networks, provoking production losses, price increases, and financial crises. In the most affected regional hot spots, climate change and local environmental degradation can contribute to poverty and hunger while undermining human security, social living conditions, and political stability. It can aggravate migration movements and conflict situations.¹³

Numerous studies have examined empirical relationships between climate change and conflict.¹⁴ Some have found significant climate-conflict linkages,¹⁵ while others describe weak and ambiguous links.¹⁶ Particularly critical is the situation in fragile and failing States with social fragmentation and inadequate governance. Climate change can exacerbate pre-existing vulnerabilities experienced by individuals and communities. It can increase competition for food and water security, threaten human health and well-being, and increase the likelihood of extreme weather events and disasters.¹⁷

¹³ J. Scheffran & A. Battaglini, 'Climate and Conflicts – The Security Risks of Global Warming', 11 *Regional Environmental Change* (2011) 1 Supplement, 27.

¹⁴ J. Scheffran *et al.*, 'Climate Change and Violent Conflict', 336 *Science* (2012) 6083, 869; S. M. Hsiang, M. Burke & E. Miguel, 'Quantifying the Influence of Climate on Human Conflict', 341 *Science* (2013) 6151, 1212; N. von Uexkull *et al.* (eds), 'Civil Conflict Sensitivity to Growing-Season Drought', 113 *Proceedings of the National Academy of Sciences of the United States of America* (2016) 44, 12391; C. Adams *et al.* (eds), 'Sampling Bias in Climate-Conflict Research', 8 *Nature Climate Change* (2018) 3, 200; K. J. Mach *et al.* (eds), 'Climate as a Risk Factor for Armed Conflict', 571 *Nature* (2019) 7764, 193.

¹⁵ See for example, M. B. Burke *et al.* (eds), 'Warming Increases the Risk of Civil War in Africa', 106 *Proceedings of the National Academy of Sciences of the United States of America* (2009) 49, 20670; J.F. Maystadt, & O. Ecker, 'Extreme Weather and Civil War: Does Drought Fuel Conflict in Somalia through Livestock Price Shocks?' 96 *American Journal of Agricultural Economics* (2014) 4, 1157.

¹⁶ E.g. H. Buhaug, 'Climate not to Blame for African Civil Wars', 107 *Proceedings of the National Academy of Sciences of the United States of America* (2011) 38, 16477; M. Couttenier & R. Soubeyran, 'Drought and Civil War In Sub-Saharan Africa', 124 *The Economic Journal* (2014) 575, 201.

¹⁷ Davies & Riddell, *supra* note 4, 47.

The environmental and security scholar Thomas Homer-Dixon has described the competition for resources and the mass migration that can occur as a result of climate change as drivers of conflict; for instance, if resource abundant territory becomes sparse, and stable governments deteriorate under increasing domestic pressures.¹⁸ Scheffran *et al.* found that “[...] countries with low human development are particularly vulnerable to the coupling of natural disasters and armed conflict [...]”, and argue that effective institutions and governance mechanisms are important to prevent climate-induced conflicts.¹⁹

“[S]ince 2008, an average of 26.4 million persons [per year, globally,] [...] have been forcibly displaced by floods, windstorms, earthquakes or droughts.”²⁰ As the territorial integrity of some States is threatened (e.g. due to rising sea levels),²¹ increasing migration levels, competition for available resources, and ethnic tensions are occurring and predicted to escalate.²² The additional competition, pressure, and value placed on accessing shared resources can affect the ability of States and create new challenges for the international system to address the climate-conflict nexus.²³ In this way, climate change can be seen as a threat multiplier, driving the likelihood of conflict, including violent conflict.²⁴

A synopsis of empirical studies found that there are violent conflicts associated with climate change, especially in regions with large population growth, low levels of development, low economic growth, a moderate level

¹⁸ T. F. Homer-Dixon, ‘Terror in the Weather Forecast’ (2007), available at <http://www.nytimes.com/2007/04/24/opinion/24homer-dixon.html> (last visited 05 February 2020).

¹⁹ J. Scheffran *et al.* (eds), ‘Disentangling the Climate-conflict Nexus: Empirical and Theoretical Assessment of Vulnerabilities and Pathways’, 4 *Review of European Studies* (2012) 5, 1.

²⁰ European Parliamentary Research Service, ‘The Concept of ‘Climate Refugee’: Towards a Possible Definition’ (2018), 1, available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI\(2018\)621893_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI(2018)621893_EN.pdf) (last visited 12 March 2020).

²¹ At its 71st session, in 2019, the ILC included the topic ‘Sea-Level Rise in Relation to International Law’ in its programme of work, ILC, *Annual Report of the International Law Commission to the Seventy-First Session, Sea-level Rise in Relation to International Law*, UN Doc. A/74/10, 29 April - 7 June and 8 July - 9 August 2019, 329 - 339, paras. 202 - 262.

²² V. Koubi, ‘Exploring the Relationship Between Climate Change and Violent Conflict’, 16 *Chinese Journal of Population Resources and Environment* (2018) 3, 197, 198.

²³ *Climate Change and its Possible Security Implications: Report of the Secretary-General*, *supra* note 5.

²⁴ P. Huntjens & K. Nachbar, ‘Climate Change as a Threat Multiplier for Human Disaster and Conflict: Policy and Governance Recommendations for Advancing Climate Security’, The Hague Institute for Global Justice, Working Paper 9, May 2015, 1; T. F. Homer-Dixon, *Environment, Scarcity and Violence* (1999).

of democracy, political instability, and pre-existing tensions in the immediate vicinity.²⁵ Whether climate change induces or exacerbates violent conflicts depends on the political and socio-economic conditions.

II. Identifying and Addressing Vulnerabilities

The relationship between climatic change and conflict dynamics is complex and connected through multiple linkages and pathways.²⁶ While legal mechanisms are important in addressing armed conflict, the best way to prevent climate-conflict linkages is to mitigate climate change in the first instance. Decoupling armed conflict from climatic effects depends on both vulnerability to climate change and vulnerability to conflict. Vulnerability can be broken down into three factors: exposure and sensitivity to climate-related events and adaptive capacity.²⁷ Using vulnerability indicators provides a geographical representation of countries that are facing the vulnerability to either, or both, climate change and violent conflict, specific to each region.²⁸ The question is whether the combined vulnerability to disaster and conflict exceeds adaptive and coping capacity.

“A comparison of the number of deaths from natural disasters, and battle-related deaths [per capita in the past,] [...] reveals that both are highest in countries with a low human development index [...].”²⁹ Many of these countries are home to the world’s poorest people, who already experience increased threats to their lives and health that undermine human development. “If climate change adds to these risks and vulnerabilities, it can increase humanitarian crises and aggravate

²⁵ Scheffran *et al.* (eds), ‘Disentangling the Climate-Conflict Nexus: Empirical and Theoretical Assessment of Vulnerabilities and Pathways’, *supra* note 19; T. Ide *et al.* (eds), ‘The Climate-Conflict Nexus: Pathways, Regional Links, and Case Studies’, in H. G. Brauch *et al.* (eds), *Handbook on Sustainability Transition and Sustainable Peace* (2016), 285; A. Detges, ‘Climate and Conflict: Reviewing the Statistical Evidence: A Summary for Policymakers’ (2017), available at <https://www.adelphi.de/en/publication/climate-and-conflict-reviewing-statistical-evidence> (last visited 5 February 2020).

²⁶ Scheffran *et al.* (eds), ‘Disentangling the Climate-Conflict Nexus: Empirical and Theoretical Assessment of Vulnerabilities and Pathways’, *supra* note 19, 8.

²⁷ IPCC – Working Group II, ‘AR4 Climate Change 2007 – Impacts, Adaptation, and Vulnerability’ (2007), available at https://www.ipcc.ch/site/assets/uploads/2018/03/ar4_wg2_full_report.pdf (last visited 5 February 2020).

²⁸ IPCC – Working Group II, ‘AR5 Climate Change 2014’, *supra* note 1.

²⁹ Scheffran *et al.* (eds), ‘Disentangling the Climate-Conflict Nexus: Empirical and Theoretical Assessment of Vulnerabilities and Pathways’, *supra* note 19, 8.

existing conflicts without directly causing them.”³⁰ The double vulnerability to violence and environmental hazard is leading to compound effects where “[...] environmental change [...] can [...] make societies more vulnerable to [...] violence [which] [...] in turn can make societies more vulnerable to environmental change, leading to a trap from which escape is difficult”.³¹ In the most affected regions, compounding risks affect the erosion of social order and State failure, aggravate violent conflicts, and lead to a “[...] spiral of violence that further dissolves societal structures.”³²

The possible linkages between climate variability and climate change on the one hand, and the risk of violent conflict on the other, are studied in a large body of literature. These studies are diverse, often adopting different research designs, datasets, and methods, resulting in divergent findings.³³ As agreed in an expert assessment,³⁴ climate has historically affected armed conflict. Climate change will increase the future risks of conflict, but with large uncertainties and low ranking of climate as an influential conflict driver due to many possible causal mechanisms.³⁵ While climate variability and change are estimated to have substantially increased risk across five percent of conflicts to date, this estimate is predicted to increase to an average probability across experts of 13 percent for a two degree Celsius warming, and to 26 percent average increase under a scenario of four degrees warming.³⁶ Four drivers were ranked as particularly influential for conflict risk to date. These are: low socio-economic development, low capabilities of the State, intergroup inequality (for example, ethnic differences across groups), and recent history of violent conflict. The causal factor identified as most sensitive to the risk of conflict was economic shocks. Long-term economic development and stability is often dependent on the provision of natural resources. These, in turn, are affected by climate-related hazards such as floods, droughts, heat waves, or cyclones and their impact on

³⁰ *Ibid.*

³¹ J. Scheffran, T. Ide & J. Schilling, ‘Violent Climate or Climate of Violence? Concepts and Relations With Focus on Kenya and Sudan’, 18 *The International Journal of Human Rights* (2014) 3, 369, 375.

³² *Ibid.*, 369.

³³ H. Buhaug, ‘Climate-Conflict Research: Some Reflections on the Way Forward’, 6 *Wiley Interdisciplinary Reviews Climate Change* (2015) 3, 269; Mach *et al.* (eds), *supra* note 14, 193.

³⁴ Mach *et al.* (eds), *supra* note 14, 193.

³⁵ *Ibid.*

³⁶ *Ibid.*, 194.

agricultural productivity including food prices.³⁷ The consequences of climate-related economic shocks, which could heighten conflict risks, are highly variable and depend on affected areas and timing, affected sectors and groups, and political will and response capacity.

It is estimated that climate-related conflict risk can be reduced with a 67 percent average probability across experts through investments addressing known drivers, which drops to 57 percent for a four degree Celsius warming scenario with its more severe climate change effects.³⁸ Common factors determine both climate and armed conflict vulnerability. Approaches to addressing these vulnerabilities can also be similar. In the case of climate change these approaches are referred to as *adaptation* and in the case of armed conflict, *conflict risk reduction*. The advancement of human security and sustainable development will progress when interlinked and supported by governance. Adaptation options can support key aspects of livelihood security for nations and communities, such as food and economic security. Therefore climate adaptation should be recognised and integrated into measures designed to maintain peace and security, for example, mediation to prevent conflict, peacekeeping activities, aid delivered post-conflict, and reconstruction post conflict.³⁹

Exposure and sensitivity to climate extremes present risks to human life. These include risks to income, well-being, health, infrastructure, migration, and security. These all affect social stability and conflict. Sensitivity depends on factors such as agriculture and land degradation, low income and development, low education levels and health problems, the concentration of poverty and communities in areas at risk.⁴⁰ To reduce vulnerability and increase survival rates, it is important to limit adverse social consequences and encourage all modes of cooperation. For example, this can be accomplished through approaches such as disaster risk reduction, sustainable development, and strengthening resilience, and institutional and governance capacities. Conflict-sensitive adaptation and peacebuilding are essential to achieve conflict risk reduction in fragile contexts.⁴¹

³⁷ *Ibid.*, 195.

³⁸ *Ibid.*, 196.

³⁹ *Ibid.*, 196.

⁴⁰ J.W. Busby, T.G. Smith & N. Krishnan, 'Climate Security Vulnerability in Africa Mapping 3.0', 43 *Political Geography* (2014), 51.

⁴¹ S. Mitra, J. Vivekananda, 'Compounding Risk - Disasters, Fragility and Conflict' (2015), available at https://www.international-alert.org/sites/default/files/ClimateChange_DisastersFragilityConflict_EN_2015.pdf (last visited 5 February 2020).

III. Case Studies of Climate Change as a Driver of Conflict

Several case studies have suggested climate change as a driver of conflict; in particular, the events during the Arab Spring and the Civil War in Syria. Droughts and heatwaves in different parts of the world have resulted in the loss of wheat harvests, causing wheat prices to inflate. In Egypt, the government did not continue to subsidize the price of wheat, thus the price of bread tripled and widespread protests ensued.⁴² The droughts in Syria exacerbated the vulnerabilities of the local population and placed increasing political pressure on a system with poor institutional capacity and governance. The increased competition for water and agriculture increased economic losses in rural areas and resulted in large-scale migration to semi-urban areas.⁴³ The drought could have been one of several contributing factors to migration and violence but does not explain why neighboring countries, such as Jordan, did not experience civil war. It is more likely that the policies of the Assad government were highly influential in the escalation of the conflict in Syria. This demonstrates how important the role of good, or poor, governance is to determine whether climate change causes conflict, or rather, contributes to it. Ultimately, the combination of all factors resulted in the civil war.⁴⁴

The African continent is particularly vulnerable to both conflict and climate change. It is strongly affected by environmental problems (lack of water, soil erosion, desertification, deforestation of rainforests), exacerbated by climate change. Millions of people are moving to cities and neighboring countries, resulting in social problems and conflicts.⁴⁵ In the Horn of Africa, a combination of factors (war, oppression, hunger, drought) have destabilized the political situation, leading to forced displacement, violent conflict, and external intervention. This became evident in the Darfur conflict, which was called the 'first climate war'. This is because nomadic and peasant peoples were under pressure from the expansion of arid zones, even though the failed policies of the Sudanese government and the exploitation of oil resources had a direct

⁴² T. Sternberg, 'Chinese Drought, Bread and the Arab Spring', 34 *Applied Geography* (2012), 519, 520.

⁴³ *Ibid.*

⁴⁴ On the controversial discussion see: C.P. Kelley *et al.* (eds), 'Climate Change in the Fertile Crescent and Implications of the Recent Syrian Drought' 112 *Proceedings of the National Academy of Sciences of the United States of America* (2015) 11, 3241; J. Selby *et al.* (eds), 'Climate Change and the Syrian Civil War Revisited', 60 *Political Geography* (2017), 232.

⁴⁵ D. Ionesco, D. Mokhnacheva & F. Gemenne, *The Atlas of Environmental Migration* (2017).

bearing on the escalation of that conflict.⁴⁶ In 2017, the UNSC specifically recognized climate change as a contributing factor to the instability in the Lake Chad region.⁴⁷ The G7 identified the climate-induced conflict in Lake Chad to be potentially linked with a threat to international peace and security, given the connections between the drought, food insecurity, and the ability of Boko Haram to utilize these vulnerabilities to recruit local members.⁴⁸

Another vulnerable region is South Asia, with its high population density and exposure to extreme climatic events and the impacts of rising sea level. For example, Bangladesh is extremely vulnerable to flood risks in river and coastal zones. With rising sea levels and an increase in hurricanes and floods as a result of global warming, millions of people are at risk.⁴⁹ Related social and economic upheavals, along with compound threats to human security, can trigger or exacerbate conflicts. These include conflicts within neighboring nations, such as India, where millions of people have migrated from Bangladesh.

The above case studies are indicative of the role of climate change as a driver of conflict and as a threat to international peace and security. They demonstrate that assumptions about simple causal relations cannot be justified. Rather, a complex climate-conflict nexus, affected by multiple stressors, is more likely to be the case. The following section describes recent progress recognizing the correlation between climate and conflict.

IV. Addressing and Recognizing the Security Risks of Climate Change

The international community has widely recognized climate change as a driver of conflict and security risks. Former UN Secretary General Ban Ki-moon stated, in 2007, that “[...] [the] scarcity of food and water [will be] transforming

⁴⁶ Scheffran, Ide & Schilling, ‘Violent Climate or Climate of Violence? Concepts and Relations With Focus on Kenya and Sudan’, *supra* note 31.

⁴⁷ SC Res. 2349, UN Doc S/RES/2349 (2017), 31 March 2017.

⁴⁸ *Ibid.*; see the G7 commissioned report, C. Nagarajan *et al.* (eds), ‘Climate-Fragility Profile: Lake Chad Basin’ (2018), available at https://www.adelphi.de/en/system/files/mediathek/bilder/Lake%20Chad%20Climate-Fragility%20Profile%20-%20adelphi_0.pdf (last visited 5 February 2020).

⁴⁹ Bangladesh Institute of International and Strategic Studies and Saferworld, ‘Climate Change and Security in Bangladesh — A Case Study’ (2009), available at <https://www.saferworld.org.uk/resources/publications/404-climate-change-and-security-in-bangladesh> (last visited 5 February 2020); R. Brouwer *et al.* (eds), ‘Socioeconomic Vulnerability and Adaptation to Environmental Risk: A Case Study of Climate Change and Flooding in Bangladesh’, 27 *Risk Analysis* (2007) 2, 313.

peaceful competition into violence and [...] droughts [will be] sparking massive human migrations, polarizing societies and weakening the ability of countries to resolve conflicts peacefully.”⁵⁰ In 2018, the UN Deputy Secretary General Amina Mohammed implored the UNSC to recognize climate change as a threat to international peace and security. She stated that:

“[t]he impacts of climate change go well beyond the strictly environmental. Climate change is inextricably linked to some of the most pressing security challenges of our time. It is no coincidence that the countries most vulnerable to climate change are often those most vulnerable to conflict and fragility.”⁵¹

Several States have made submissions to the UNSC that support this view. For instance, Samoa has argued that climate change is “[...] a threat to territorial integrity, security and sovereignty.”⁵² Malaysia has asserted that “[...] if left unchecked, climate change could [...] be the greatest threat multiplier endangering global security.”⁵³

The US Department of Defense recognized climate change as a threat to national security, stating, in 2014, that:

“[...] it can significantly add to the challenges of global instability, hunger, poverty and conflict. Food and water shortages, pandemic disease, disputes over refugees and resources, more severe natural disasters – all place additional burdens on economies, societies, and institutions around the world.”⁵⁴

⁵⁰ United Nations, ‘Security Council Holds First-Ever Debate on Impact of Climate Change on Peace, Security, Hearing over 50 Speakers’ (2007), available at <https://www.un.org/press/en/2007/sc9000.doc.htm> (last visited 5 February 2020).

⁵¹ United Nations, ‘Impacts of Climate Change Go Well Beyond ‘the Strictly Environmental’, Deputy Secretary-General Tells Security Council Debate’ (2018), available at <https://www.un.org/press/en/2018/dsgsm1195.doc.htm> (last visited 5 February 2020).

⁵² UNSC, *Maintenance of International Peace and Security*, UN Doc S/PV.7499, 30 July 2015, 5.

⁵³ *Ibid.*, 18.

⁵⁴ United States Department of Defense, ‘2014 Climate Change Adaptation Roadmap’ (2014), available at https://www.acq.osd.mil/eie/Downloads/CCARprint_wForward_e.pdf (last visited 5 February 2020).

This includes possible effects on the military, which is involved in humanitarian operations, disaster and coastal protection, and is required to adapt to new tasks, changes in operational practices, and supply problems. A number of measures for reducing climate security risks were suggested in the 2015 G7 report, *A New Climate for Peace*.⁵⁵ Commenting on this report, former US Secretary of State John Kerry described climate change as “[...] a serious threat to global security” and welcomed its recommendations.⁵⁶ According to a 2019 US Department of Defense report, more than two-thirds of the military’s operationally critical installations are threatened by climate change.⁵⁷

A new level of integrated climate security assessments and strategies on high level international diplomatic and security policy agendas has been established with the Planetary Security Initiative (PSI), launched by the Dutch Ministry of Foreign Affairs in 2015. To catalyze action in affected contexts, the PSI “[...] sets out best practice, strategic entry points and new approaches to reducing climate-related risks to conflict and stability, thus promoting sustainable peace in a changing climate.”⁵⁸ Major objectives to enhance political awareness of, and involvement in, the climate-security nexus are: building an inclusive community that is multi-lateral, multi-sectoral, and multi-disciplinary, and creating a regular structural platform for global cooperation.⁵⁹

Some examples of European progress in the governance of the climate-conflict nexus include:

- At the 3rd PSI conference, held on December 12-13, 2017, the *Hague Declaration on Planetary Security*⁶⁰ was agreed, with the aim of creating

⁵⁵ L. Rüttinger *et al.* (eds), ‘A New Climate for Peace: Taking Action on Climate and Fragility Risks’ (2015), available at <https://www.adelphi.de/en/publication/new-climate-peace---taking-action-climate-and-fragility-risks> (last visited 5 February 2020).

⁵⁶ J. Kerry, Press Statement on ‘G-7 Commissioned Report on Climate and Fragility Risks’ (2015), available at <https://2009-2017.state.gov/secretary/remarks/2015/06/244105.htm> (last visited 5 February 2020).

⁵⁷ Office of the Under Secretary of Defense for Acquisition and Sustainment, ‘Report on Effects of a Changing Climate to the Department of Defense’ (2019), available at <https://media.defense.gov/2019/Jan/29/2002084200/-1/-1/1/CLIMATE-CHANGE-REPORT-2019.PDF> (last visited 5 February 2020).

⁵⁸ For this and the following entries see Planetary Security Initiative, available at <https://www.planetarysecurityinitiative.org> (last visited 5 February 2020).

⁵⁹ *Ibid.*

⁶⁰ See Planetary Security Initiative, ‘The Hague Declaration on Planetary Security’ (2017), available at <https://www.planetarysecurityinitiative.org/signees> (last visited 5 February 2020).

an institutional home for climate security and coordinating migration and climate change responses, strengthening urban resilience, and conducting risk assessments. Additionally, developing sustainable and conflict-sensitive strategies in hot spots, such as Lake Chad, Mali, and Iraq, was identified as a priority.

- On February 26, 2018, the EU Foreign Affairs Council aimed for mainstreaming the climate-security nexus in policy dialogue, conflict prevention, development and humanitarian action, and disaster risk strategies, including frameworks of the G7 and the UNSC to develop effective responses across policy areas.⁶¹ It was identified that climate projects in developing countries need to become more conflict sensitive.
- On June 22, 2018, the EU High Representative for Foreign and Security Policy, Federica Mogherini, initiated a high-level event. She proposed further action to elevate the climate-security nexus to the highest political level in national, regional, and multilateral fora, maximizing political and diplomatic efforts to support the Paris Agreements' implementation, and improving reporting and early warning systems in the most exposed countries and regions.⁶² She highlighted the need for particular foci being placed on prevention for resilience building, women as agents of change, and action on the ground.
- Also in June 2018, the report *Europe's responsibility to prepare*, developed by the Center for Climate and Security (Washington, DC) and the Clingendael Institute (The Hague), suggested scaling responses to the climate threat across EU bodies. The report highlighted the need to

⁶¹ See Planetary Security Initiative, 'EU Takes the Lead in Climate Security' (2018), available at <https://www.planetarysecurityinitiative.org/news/eu-takes-lead-climate-security> (last visited 5 February 2020).

⁶² European Union External Action Service, 'Mogherini at the High-Level Event "Climate, Peace and Security: Time for Action"' (2018), available at https://eeas.europa.eu/topics/climate-environment-energy/47168/mogherini-high-level-event-climate-peace-and-security-time-action_en (last visited 5 February 2020).

routinely and rapidly incorporate these threats into EU institutions at senior levels alongside *traditional* security issues.⁶³

- In early 2019, the EU Foreign/Defense Ministers identified climate change as a global threat and threat multiplier. They called for action on early warning and geopolitical analysis, capabilities to respond to weather-related disasters, situational risks assessments, and the identification of resource and carbon footprints of military activities.⁶⁴
- On May 16, 2019, the EU Foreign Affairs Council addressed climate-security issues in highly vulnerable areas in the Sahel (e.g. in Mali and Lake Chad). Defense Ministers in the Council discussed joining forces on a European defense policy strategy on climate security and related issues, such as resource stress and disputes, population growth, humanitarian disasters, and migration. Specific measures could include intelligence on conflict risks and root causes, the protection of key infrastructure, border protection and disaster relief, as well as innovation of technology and materials.⁶⁵
- A culmination of activities was the *Berlin Climate and Security Conference* on June 4, 2019 in the German Foreign Ministry, which called for climate prevention and adaptation as an issue for the UNSC. A Call for Action suggested more risk-informed planning based on a Global Risk and Foresight Assessment, enhanced capacity for action, and improved operational responses on climate and security aligned with sustainable development, security, and peacebuilding in all UN programs.⁶⁶

⁶³ S. Fetzek & L. van Scheik, 'Europe's Responsibility to Prepare: Managing Climate Security Risks in a Changing World' (2018), available at <https://climateandsecurity.org/euresponsibilitytoprepare> (last visited 5 February 2020).

⁶⁴ European Union External Action Service, 'EU's Call to Raise Global Ambition on Climate Change' (2019), available at https://eeas.europa.eu/diplomatic-network/foreign-affairs-council/58210/eus-call-raise-global-ambition-climate-change_en (last visited 5 February 2020).

⁶⁵ Planetary Security Initiative, 'EU Security Community Considers Climate Security' (2019), available at <https://www.planetarysecurityinitiative.org/news/eu-security-community-considers-climate-security> (last visited 5 February 2020).

⁶⁶ Berlin Climate and Security Conference, 'Berlin Call for Action' (2019), available at <https://berlin-climate-security-conference.de/callforaction> (last visited 5 February 2020).

The above examples describe the recent momentum recognizing the climate-conflict nexus. The following section investigates one aspect of addressing the nexus, centered on legal approaches through international law.

C. The Function of Law to Prevent Conflicts

The previous sections of this paper have presented the links between climate change and conflict, building the evidence that, as temperatures rise, the likelihood of global conflicts will increase. Given that numerous States and the respective military organs already accept the climate-security nexus, the remainder of this paper will investigate if international law is *fit for purpose* to manage the threats of global warming while maintaining peace and security, and what are some of the legal options worthy of consideration moving forward. It will consider the strengthening of a range of existing legal and policy mechanisms, along with the establishment of a new dispute resolution mechanism that specializes in disputes linked to environmental laws.

The international legal system strives to maintain international peace and security by bringing about the settlement of international disputes by peaceful means.⁶⁷ As such, the international legal system has a number of fora in which States can resolve disputes diplomatically and without resorting to armed conflict. For example, States can make declarations to the International Court of Justice (ICJ) to resolve disputes.⁶⁸ Many multilateral treaties also provide a dispute settlement mechanism for States to seek remedies in cases of breaches of international legal obligations.⁶⁹ Further, in becoming a party to the UN, States agree to accept and enforce decisions made by the UNSC,⁷⁰ which has the power to settle disputes through a range of peaceful means,⁷¹ as well as the power to resolve threats to international peace and security through coercive, and non-coercive, measures.⁷²

While the ICJ and UNSC possess the ability to resolve disputes through legal and political means respectively, their powers have limited applicability

⁶⁷ UN-Charter, *supra* note 5, Art. 1.

⁶⁸ *Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 993, Art. 36.

⁶⁹ See for example *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 397 Part XV; *Marrakesh Agreement Establishing the World Trade Organisation*, 15 April 1994, 1869 UNTS 3, Annex II.

⁷⁰ UN-Charter, *supra* note 5, Art. 25.

⁷¹ *Ibid.*, Art. 33.

⁷² *Ibid.*, Art. 39; for instance, by utilising its powers in Articles 41 and 42 of the UN Charter.

to climate change. Importantly, they do not extend to enforcing the body of legal principles and norms governing climate change, as encapsulated in the *United Nations Framework Convention on Climate Change* (UNFCCC) and subsequent decisions of its Conference of the Parties (termed the International Climate Change Regime in this paper). The ICJ does not have jurisdiction to resolve disputes arising under the International Climate Change Regime, nor has the UNSC exercised its powers under article 39 of the UN Charter to recognize climate change as a threat to international peace and security. This is problematic because the International Climate Change Regime is lacking an effective dispute resolution mechanism,⁷³ and its principles and norms do not extend to climate change's adverse effects on international peace and security. How can the gap between conflict and dispute resolution, in the sphere of international peace and security on the one hand, and climate change's role in inducing and exacerbating conflict on the other hand, be bridged? This is an important consideration for international law to effectively address, with the objective of preventing climate-induced conflict.

I. The International Climate Change Regime

The *UNFCCC* was the first international treaty that realized the essential need for climate change mitigation through the reduction of GHG emissions.⁷⁴ The *UNFCCC* introduced general principles to guide the development of the International Climate Change Regime. Amongst these general principles is the precautionary principle that reasons against a lack of scientific certainty preventing action in the face of irreversible damage.⁷⁵ A further general principle is the principle of common but differentiated responsibilities and respective capabilities which acknowledges the disparity between developed States who have enjoyed the process of industrialization and developing States for their respective contributions of GHG emissions and economic capacities to respond

⁷³ Only three States, the Netherlands, the Solomon Islands and Tuvalu have accepted the ICJ's compulsory jurisdiction pursuant to Art. 14 of the UNFCCC; see United Nations Treaty Collection, *Status of the United Nations Framework Convention on Climate Change*, available at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en (last visited 5 February 2020).

⁷⁴ *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107.

⁷⁵ *Ibid.*, 170, Art 3.3.

to climate change.⁷⁶ These principles, along with the *Kyoto Protocol*,⁷⁷ have created objectives for States to reduce their GHG emissions over a number of years. The various commitments made in the subsequent *Copenhagen Accord*⁷⁸ have enabled climate finance to flow from international mechanisms down to developing States to mitigate GHG's and adapt to rising temperatures. These agreements are narrow in scope, focusing on capacity building, technology transfer, and finance for mitigation and adaptation measures, and do not deal directly with climate change as a threat to international peace and security.⁷⁹

In 2015, the *Paris Agreement* was signed by 195 of the 197 State Parties to the *UNFCCC*,⁸⁰ and by 2019, 185 States have become party to it.⁸¹ The *Agreement* aims to strengthen efforts to mitigate GHG emissions and increase adaptation measures by scaling up finance, technology transfer and capacity building.⁸² Notably, the *Paris Agreement* takes a bigger step than previous environmental instruments by explicitly recognizing that climate change is associated with “[...] loss and damage [...]”. Article 8 acknowledges “[...] the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change [...]”.⁸³ However, it further goes on

⁷⁶ *Ibid.*, 170, Art 4; for for a detailed analysis of this principle, see L.Rajamani, ‘Ambition and Differentiation in the 2015 Paris Agreement: Interpretive Possibilities and Underlying Politics’, 65 *International and Comparative Law Quarterly* (2016) 2, 493 and L. Rajamani, ‘The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime’, 9 *Review of European Community and International Environmental Law* (2002) 2, 120.

⁷⁷ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 162.

⁷⁸ UNFCCC, Conference of the Parties, *Report of the Conference of the Parties on its Fifteenth Session, Held in Copenhagen From 7 to 19 December 2009 – Addendum – Part Two: Action Taken by the Conference of the Parties at its Fifteenth Session*, UN Doc FCCC/CP/2009/11/Add.1, 30 March 2010, 4.

⁷⁹ Davies & Riddell, *supra* note 4, 58.

⁸⁰ UNFCCC, Conference of the Parties, *Report of the Conference of the Parties on its Twenty-First Session, Held in Paris from 30 November to 13 December 2015 – Addendum – Part Two: Action Taken by the Conference of the Parties at its Twenty-First Session*, UN Doc FCCC/CP/2015/10/Add.1, 29 January 2016, 2 [UNFCCC, Conference of the Parties, Report of the Conference of the Parties on its Twenty-First Session].

⁸¹ United Nations Treaty Collection, ‘Status of the Paris Agreement’, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (last visited 5 February 2020); noting the United States of America’s withdrawal in 2017.

⁸² See for example, *Paris Agreement*, 12 December 2015, Art. 4, Art. 7, UNTS 54113.

⁸³ *Ibid.*, Art. 8.

to state that the *Paris Agreement* “[...] does not involve or provide a basis for any liability or compensation.”⁸⁴ This means that the *Agreement* cannot assist in establishing legal causation in legal action concerning climate change, nor does it provide any mechanism or remedy for States to resolve disputes if affected by another State’s breach of obligations. An additional limitation is the legally non-binding nature of the *Paris Agreement*, making it politically vulnerable, as can be evidenced by the US government’s withdrawal from the Agreement and its previous commitments to reducing GHG emissions.⁸⁵

Both the *UNFCCC* and the *Paris Agreement* were drafted as texts that do not include provisions related to armed conflict. While these texts do not contain procedural provisions that suspend or uphold their obligations during armed conflict, given that they aim to protect a common good, it could be assumed that they apply during and after armed conflict. This view would be in line with the ILC’s *Draft Articles on the Effects of Armed Conflict on Treaties* (as discussed in section C. III. 1).⁸⁶

Although the International Climate Change Regime has expanded in recent years, two important gaps have emerged. First, it has yet to adopt an effective dispute resolution mechanism. Without jurisdiction to redress breaches of international law obligations relating to climate change, there is no concrete way to resolve transboundary conflicts where the underlying driver is climate change. Second, despite its major aim of preventing “dangerous anthropogenic interference”⁸⁷ with the climate system, the word *dangerous* does not address international peace and security considerations in its interpretation, rather its focus is on the science. Broadening the scope of what constitutes a threat to international peace and security and mainstreaming climate change into conflict prevention is necessary to allow the law to be responsive to emerging climate

⁸⁴ UNFCCC, Conference of the Parties, *Report of the Conference of the Parties on its Twenty-First Session*, *supra* note 80, 8, para 51.

⁸⁵ See United Nations Secretary-General, ‘Statement Attributable to the Spokesman for the Secretary-General on the US Decision to Withdraw from the Paris Agreement’ (2017), available at <https://www.un.org/sg/en/content/sg/statement/2017-06-01/statement-attributable-spokesman-secretary-general-us-decision> (last visited 5 February 2020).

⁸⁶ ‘ILC Draft Articles on the Effects of Armed Conflicts on Treaties’, *Yearbook of the International Law Commission* (2011), Vol. II, Part Two, 107-108; GA Res. 66/99, *supra* note 12; S. Voeneky, ‘A New Shield for the Environment: Peacetime Treaties as Legal Restraints of Wartime Damage’, 9 *Review of European Community and International Environmental Law* (2000) 1, 20.

⁸⁷ J. Scheffran, Preventing Dangerous Climate Change — Adaptive Decision-Making and Cooperative Management in Long-Term Climate Policy, in V. I. Grover (ed.), *Global Warming and Climate Change — Ten Years after Kyoto and Still Counting* (2008), 449-482.

induced security threats. This can either be achieved by options such as the application of existing international environmental obligations, political action through the UNSC, and/or the creation of a specialized dispute settlement body.

II. The ICJ and Existing International Environmental Obligations

The ICJ is the judicial organ of the UN and the primary mechanism to settle international disputes and resolve the interpretation of international law.⁸⁸ Every UN member State is a party to the ICJ Statute, enabling them to consent to its jurisdiction to resolve disputes.⁸⁹ The ICJ's jurisdiction is limited as States must express their consent to its jurisdiction and can declare that certain subject matter claims cannot be heard by the Court.⁹⁰ As the Court's jurisdiction requires the consent of both parties to the dispute, the ICJ does not have absolute compulsory jurisdiction.⁹¹ In addition, consent can be obtained through *forum prorogatum*, in which a State invites another State to accept the jurisdiction of the Court for the purpose of the dispute.⁹² Thus, States in disagreement over the interpretation or application of the International Climate Change Regime could seek the consent of another State to use *forum prorogatum* as a means of eliciting the ICJ's jurisdiction. This could assist in resolving conflicts through peaceful and judicial means and also be a means of preventing armed conflict.⁹³ However, in the context of climate change, the difficulties in commencing contentious proceedings would likely include finding a State willing to accept an invitation to consent to the ICJ's jurisdiction, identifying a substantive obligation to litigate, and leading convincing evidence to satisfy tests of causation and attribution.⁹⁴

If the ICJ has jurisdiction to adjudicate contentious legal questions, it can produce a binding order or judgment with *inter partes* effect. In circumstances where a State commits an internationally wrongful act, being a breach of a

⁸⁸ *Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 993, Art 1.

⁸⁹ UN-Charter, *supra* note 5, Art. 93.

⁹⁰ *Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 993, Art. 36.

⁹¹ *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States)*, Judgment, ICJ Reports 1954, 19, 32; *Case Concerning East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 87, 101, para. 26.

⁹² *Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 993, Art. 36(2).

⁹³ See for example the resolution of border conflict arising from the ICJ's decision in *Temple of Preah Vihear (Cambodia v Thailand)*, Judgment, ICJ Reports 1962, 6, 160.

⁹⁴ See Wewrinke-Singh, M. & Salili, D. H., 'Between Negotiations and Litigation: Vanuatu's Perspective on Loss and Damage From Climate Change' *Climate Policy* (2019) [Forthcoming Special Issue: Loss and Damage After the Paris Agreement], 6-7.

substantive obligation under international law, and that breach results in damage to another State, the offending State will generally be held liable where certain legal tests are satisfied. Relevantly, there must be a breach of an international obligation, termed *a wrongful act*, that is attributable to the offending State,⁹⁵ and a causal link must be established between the wrongful act and the damage suffered.⁹⁶ While these legal tests present barriers to climate litigation before the ICJ, they can potentially be addressed. It is useful to illustrate, by way of a hypothetical, how States may be held responsible for breaching international obligations pertaining to climate change.

In such a hypothetical, it is assumed that States accept the ICJ's jurisdiction to hear disputes arising from the interpretation or application of the *UNFCCC*. A developing State could then commence proceedings against an Annex II State for breaching articles in the *UNFCCC* that are arguably obligatory in nature. Examples of such articles include, article 3(1) which states “[t]he Parties *should* protect the climate system [...] Accordingly the developed country Parties *should* take the lead in combating climate change [...]” (emphasis added).⁹⁷ In terms of attribution, norms of State responsibility hold that, where multiple States act in breach of a norm or principle to the detriment of another State, they are *co-authors* of that internationally wrongful act.⁹⁸ Accordingly, a failure by Annex II Parties to mitigate GHG emissions in line with the *Paris Agreement* could be argued as a breach of the *UNFCCC*'s mandatory obligation in article 3(1) to protect the climate system and take the lead in combatting climate change.

⁹⁵ *Report of the International Law Commission to the Fifty-Third Session, Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/56/10, 23 April-1 June and 2 July-10 August 2001, 26, Art. 2.

⁹⁶ *Ibid* Art. 31, Art 34, Art 36(1).

⁹⁷ For further discussion, see A. L. Stauss, ‘Climate Change Litigation: Opening the Door to the International Court of Justice’, in W. C. G. Burns & H. M. Osofsky (eds), *Adjudicating Climate Change: State, National and International Approaches* (2009), 334, 353.

⁹⁸ See *Legality of the Use of Force, (Yugoslavia v. Belgium)* Provisional Measures, Order of 2 June 1999, ICJ Reports 1999, 124; *Ibid. (Yugoslavia v. Canada)* 259; *Ibid. (Yugoslavia v. France)*, 363; *Ibid. (Yugoslavia v. Germany)*, 422; *Ibid. (Yugoslavia v. Italy)*, 481; *Ibid. (Yugoslavia v. the Netherlands)*, 542; *Ibid. (Yugoslavia v. Portugal)*, 656; *Ibid. (Yugoslavia v. Spain)*, 761; *Ibid. (Yugoslavia v. United Kingdom)*, 826; *Ibid. (Yugoslavia v. United States)*, 916; see further *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Judgement, ICJ Reports 1992, 240; for a discussion on joint attribution, see C. Dominicé, ‘Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State’, in J. Crawford, A. Pellet & S. Olleson (eds), *The Law of International Responsibility* (2010), 281.

Assuming loss and damage caused by climate change is considered transboundary environmental harm, it must be established that significant damage has been suffered so that damages are not considered nominal.⁹⁹

Further, importing legal concepts from domestic law, such as joint and several liability or proportionate liability, into causal analysis can account for the lack of individual State responsibility for loss and damage. Generally, joint and several liability applies in circumstances where the acts of two or more parties combine to produce the one loss or damage.¹⁰⁰ Each wrongdoer will be considered entirely liable for that loss or damage and a plaintiff may choose the party to commence proceedings against.¹⁰¹ Proportionate liability differs from joint and several liability in that each wrongdoer will be liable for their proportionate share of a plaintiff's loss.¹⁰² Applying these concepts when determining causation for climate-induced loss or damage (i.e. damage caused by GHG emissions) could both avoid the need to establish individual liability and establish a framework for allocating or apportioning liability on the basis of a State's proportion of GHG emissions.¹⁰³ Where these tests are satisfied, the responsible Annex II Parties must then provide reparations for the damage caused by a wrongful act.¹⁰⁴

While there is potential for the ICJ to decide on issues of climate change obligations and produce binding decisions, it is unlikely that this will occur in the present framework. Currently, only three States have explicitly accepted the ICJ's jurisdiction to resolve disputes arising from the *UNFCCC*.¹⁰⁵ It is unlikely that

⁹⁹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, 56, para. 101; *Report of the International Law Commission to the Fifty-Third Session, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, UN Doc A/56/10, 23 April-1 June and 2 July-10 August 2001, 151-153, Art. 2.

¹⁰⁰ See generally *Thompson v. Australian Capital Television Pty Ltd* (1996), 186 CLR 574 for a common law conception of joint and several liability.

¹⁰¹ See *Bell v. Thompson* (1934), 34 SR (NSW) 431 at 435.

¹⁰² See generally *Hunt Lawyers v. Mitchell Morgan Nominees Pty Ltd* (2013), 247 CLR 613.

¹⁰³ See M. Faure & P. A. Nollkaemper, 'International Liability as an Instrument to Prevent and Compensate for Climate Change', 43 *A Stanford Journal of International Law* (2007), 123 and P. Cullet, 'Liability and Redress for Human-Induced Global Warming: Towards an International Regime', 43 *A Stanford Journal of International Law* (2007), 99 for an in depth analysis of causal frameworks for climate-induced loss and damage.

¹⁰⁴ *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, 78, para. 140.

¹⁰⁵ Only the Netherlands, the Solomon Islands and Tuvalu have accepted the ICJ's compulsory jurisdiction pursuant to art. 14 of the *UNFCCC*; see United Nations Climate Change, *Declarations Status of Ratification of the Convention*, available at <https://unfccc.int/process/the-convention/status-of-ratification> (last visited 21 February 2020).

States will voluntarily accept the ICJ's jurisdiction to resolve disputes premised on substantive obligations in the *UNFCCC*, especially in the current political climate where some developed States have either withdrawn their support¹⁰⁶ and/or will not achieve their target regarding the reduction of emissions.¹⁰⁷ Further, this claim is supported by the fact that the ICJ's special chamber for environmental disputes has not been used in its 13 years of operation. This paper argues that the current framework is inadequate to deal with the threats that climate change pose to international peace and security. States require a dispute resolution mechanism to turn to in cases of climate-induced conflict to resolve conflicts through peaceful and judicial means, to ultimately mitigate the likelihood of climate-induced armed conflict.

III. Legal and Political Options in the Pre-Phase to Conflict

As has been discussed, climate change exacerbates existing vulnerabilities and is a threat to international peace and security as it increases the risk of armed conflict. This section discusses the legal capabilities of the international legal system that are specifically related to environmental protection and whether these are applicable during the pre-phase to armed conflict. The paper then suggests alternative legal and political approaches that can be used to prevent armed conflict, namely using the UNSC's article 41 and 42 powers, enforcement mechanisms in human rights treaties, and the establishment of an ICE.

1. Legal Protections of the Environment in the Pre-Phase to Armed Conflict

Whether international environmental law continues to apply before, during, and after armed conflict has been the subject of both judicial and juridical consideration. In *The Legality of the Threat or Use of Nuclear Weapons*¹⁰⁸, the ICJ refrained from answering this question. Instead, the Court considered whether obligations stemming from international environmental treaties "[...] were intended to be obligations of total restraint during military conflict". The Court opined that, while international environmental treaties cannot prevent a

¹⁰⁶ ICJ, Chambers and Committees, available at <https://www.icj-cij.org/en/chambers-and-committees> (last visited 21 February 2020).

¹⁰⁷ As demonstrated, for example, by the United States' withdrawal from the *Paris Agreement* announced on 1 June 2017 and the critical rhetoric of Brazil's president, Jair Bolsonaro, towards the Agreement and climate change in general.

¹⁰⁸ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226.

State from exercising self-defense, a State doing so must “[...] take environmental considerations into account when assessing what is necessary and proportionate [...]”. Decades later, in the *Decision on Armed Activities on the Territory of the Congo*, the ICJ held that States have a duty of vigilance to prevent acts of looting, plundering, and the exploitation of another State’s natural resources.¹⁰⁹ Notably, these judicial opinions do not touch upon whether obligations contained in specific environmental treaties, for instance the *UNFCCC* or the *Paris Agreement*, continue to have force in times of conflict.

Guidance is provided by the ILC’s *Draft Articles on the Effects of Armed Conflict on Treaties*.¹¹⁰ The articles provide a tiered test for determining whether obligations contained in a treaty apply during times of conflict. First, an overarching principle is set out whereby the existence of armed conflict does not in itself terminate or suspend treaty obligations.¹¹¹ Second, if a treaty contains procedural provisions as to whether obligations apply in circumstances of armed conflict, those provisions apply.¹¹² Third, if the given treaty is silent on whether armed conflict suspends or terminates its obligations, then the determination is made by reference to the rules of treaty interpretation, the subject matter of the given treaty, and to the *Draft Articles’* annex.¹¹³

The effect of the *Draft Articles* has been subject to much juridical debate.¹¹⁴ While this debate is outside the scope of this paper, much force can be seen in the argument that its application means that environmental treaties protecting common goods, such as the *UNFCCC* does in relation to the planetary climate,¹¹⁵ remain in force during armed conflict because they contain obligations owed to

¹⁰⁹ *Decision on Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168, 252, para. 246.

¹¹⁰ GA Res. 66/99, UN Doc. A/RES/66/99, 9 December 2011.

¹¹¹ *Ibid* Art. 3.

¹¹² *Ibid* Art. 4.

¹¹³ *Ibid* Art. 5, Art. 6 and Art. 7; Annex; the reference to the rules of treaty interpretation in this article is inferred to be a reference to the *Vienna Convention on the Laws of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980); the annex sets out a list of treaties that are assumed to have force in circumstances of armed conflict. Notably, it includes “[t]reaties relating to the international protection of the environment”.

¹¹⁴ A. Loets, ‘An Old Debate Revisited: Applicability of Environmental Treaties in Times of International Armed Conflict Pursuant to the International Law Commission’s ‘Draft Articles on the Effects of Armed Conflict on Treaties’, 21 *Review of European Community & International Environmental Law* (2012) 2, 127.

¹¹⁵ The common good in this instance being the Earth’s climate.

the international community as a whole, not just between conflicting States.¹¹⁶ In any event, judicial consideration is desirable, perhaps just as much as the development of customary international law on this issue.

There are existing international environmental norms and principles that could guide the ICJ in opining on the issue of what obligations that protect the environment ought to apply in times of armed conflict. Environmental impact assessments (EIA), as set out in *Pulp Mills Case*,¹¹⁷ could limit the impact armed conflict has on the environment and would be in line with the ICJ's opinion in *The Legality of the Threat or Use of Nuclear Weapons*. However, while an EIA should be conducted prior to the relevant activity, given the unpredictability of armed conflict, it would likely be conducted after conflict has commenced. In other words, it would not be a preventative mechanism to protect the environment in the pre-phase of conflict, but rather a tool of mitigating environmental damage during conflict.

Two further principles that could guide the application of international environmental law during armed conflict are the precautionary principle and the principle of prevention. The precautionary principle, as encapsulated in the *Rio Declaration*, declares that, notwithstanding scientific uncertainty, actions that have the potential to cause significant harm to the environment must be abstained from.¹¹⁸ The principle is included in most international environmental treaties.¹¹⁹ The principle can work ancillary to the principle of prevention, which is applicable in circumstances of transboundary harm. The ICJ in the *Pulp Mills Case* discussed the principle of prevention at length, confirming its status as a principle of customary international law in tracing its origins back to the no harm principle and the obligation of due diligence. The ICJ opined that States are obliged “[...] to use all the means at its disposal in order to avoid activities

¹¹⁶ See S. Voeneky, ‘A New Shield for the Environment: Peacetime Treaties as Legal Restraints of Wartime Damage’, 9 *Review of European Community & International Environmental Law* (2000) 1, 20.

¹¹⁷ *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol. I), 14 June 1992, principle 17; see also *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010.

¹¹⁸ K. Stefanik, ‘The Environment and Armed Conflict: Employing General Principles to Protect the Environment’, in C. Stahn, J. Iverson & J. S. Easterday (eds), *Environmental Protection and Transitions from Peace: Clarifying Norms, Principles and Practices* (2017), 93, 106.

¹¹⁹ *Vienna Convention for the Protection of the Ozone Layer*, 22 March 1985, preamble, 1513 UNTS 293; UNFCCC, *supra* note 74, Art. 3(3); A. Trouwborst, ‘Evolution and Status of the Precautionary Principle in International Law’, 96 *The American Journal of International Law* (2002) 4, 1016.

which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.”¹²⁰ Others have observed that its application may involve orders for provisional measures¹²¹ limiting or prohibiting certain activities from being carried out.¹²² Yet the principle can be employed by States prior to disputes arising, such as by ensuring activities avoid environmental harm in the first place.

Given that armed conflict can cause serious and irreparable environmental damage, both the precautionary principle and the principle of prevention ought to apply in the pre-phase to armed conflict to enable preventative measures to be put in place to protect the environment.¹²³ In the context of climate change, these principles could be invoked before the ICJ to either limit or mandate State actions to avoid serious and irreparable environmental damage. These principles could guide the formulation of provisional measures to limit GHG emissions and/or support the direction of resources for adaptation measures to decrease vulnerability to environmental stressors that may lead to conflict. An example of the latter could be a provisional measure mandating developed States to channel resources to drought-stricken areas to mitigate the role climate exacerbated water scarcity plays in driving conflict. As noted by Trouwborst, “[t]he *more* significant or the *more* serious the expected environmental impact, the more rigorous preventive or abatement measures may, respectively must be.”¹²⁴ While Trouwborst refers to the principle of prevention, where its application is informed by the precautionary principle, the two principles can create an important source of legal protection that guides action in the pre-phase to armed conflict to protect the environment from serious or irreparable harm.

Ultimately, the lack of an effective enforcement mechanism within the International Climate Change Regime,¹²⁵ combined with uncertainty surrounding the application of international environmental law in the pre-phase

¹²⁰ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, 56, para. 101.

¹²¹ Separate Opinion of Judge Treves, *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Order of 27 August 1999, ITLOS Reports 1999, 318, para. 9.

¹²² *Fisheries Jurisdiction (Germany v. Iceland)*, Judgment, ICJ Reports 1973, 49; *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Judgment, ICJ Reports 1973, 3, where limitations were placed on parties by way of prescribed amounts of annual fishing catches.

¹²³ Stefanik, *supra* note 118, 117-118.

¹²⁴ A. Trouwborst, *Precautionary Rights and Duties of States* (2006), 150.

¹²⁵ Only three States, the Netherlands, the Solomon Islands and Tuvalu have accepted the ICJ's compulsory jurisdiction pursuant to art. 14 of the UNFCCC; see United Nations Climate Change, *Declarations Status of Ratification of the Convention*, available at <https://unfccc.int/process/the-convention/status-of-ratification> (last visited 21.02.2020).

to armed conflict, creates a gap in the ability for the international community to effectively deal with climate change as a driver of conflict. We argue in this paper that alternative legal and political mechanisms are required to effectively address climate change's threats to international peace and security and outline below a range of potential means to do so.

2. The UNSC and Climate Change as a Threat to International Peace and Security

Given that the UNSC is the body tasked with maintaining international peace and security,¹²⁶ it is arguably the most appropriate institution to address the security implications of climate change. While the UNSC has extensive powers under chapter VII of the *UN Charter*¹²⁷ to achieve its functions, it may only exercise these powers if it determines that a threat to international peace and security exists.¹²⁸ The effect of article 39 of the *UN Charter* is that the UNSC has the discretion to decide what constitutes a threat to peace and security. It has the discretion to then use its powers under article 41, being measures that do not use armed force, and article 42, being measures using armed force, to resolve that threat. In practice, the procedure of the UNSC is to pass a resolution that (i) determines a given situation to be a threat to peace and security; (ii) recognizes the steps required to remedy the situation, and; (iii) authorizes the use of article 41 and/or article 42 powers to achieve those steps.¹²⁹ This procedure can arguably be applied to address climate change as a security threat.

The absence of a definition of a *threat to peace* in the *UN Charter* means that the UNSC has broad discretion in determining what constitutes a threat to international peace and security for the purposes of article 39. Both juridical arguments and UNSC practice support an interpretation of a threat to peace to include any situation that may, in the short- or medium-term, provoke armed conflict between States.¹³⁰ Notably, in 2005, the UNSC acknowledged food insecurity as a threat to international peace and security.¹³¹ Further, in 2014, the UNSC passed a resolution affirming the Ebola crisis as an international peace

¹²⁶ UN Charter, *supra* note 70, Art. 24.

¹²⁷ *Ibid*, specifically, pursuant to Arts. 40-42.

¹²⁸ *Ibid*, Art. 39.

¹²⁹ See for example SC Res. 841, UN Doc S/RES/841 (1993), 16 June 1993.

¹³⁰ E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004), 138, 149-174.

¹³¹ UN SCOR, UN Doc S/PV.5220 (2005), 30 June 2005.

and security threat,¹³² even though this crisis did not have any link to armed conflict or the use of force. The Ebola resolution is a significant precedent in terms of climate change as it demonstrates the furthest expansion as to what may constitute a threat to international peace and security.¹³³ These examples support the argument that climate change should be recognized as a threat consistent with UNSC practice in exercising its discretionary powers under article 39. Moreover, as outlined below, there is growing consensus in the international community to do so.

On April 17, 2007, the UNSC addressed climate change as an international security issue for the first time.¹³⁴ Then, on July 20, 2011, the UNSC held a controversial debate on climate change as a security concern, producing a *Presidential Statement* setting out that:¹³⁵

“The Security Council expresses its concern that possible adverse effects of climate change may, in the long run, aggravate certain existing threats to international peace and security. [...] [P]ossible security implications of loss of territory of some States caused by sea-level rise may arise, in particular in small low-lying island States.”¹³⁶

Expanding on this position, a major focus of Germany's two-year membership of the UNSC, between 2019 and 2020, was the nexus between climate change and security. The *Berlin Call to Action*¹³⁷ was a notable product of

¹³² SC Res. 2177, UN Doc S/RES/ (2014), 18 September 2014.

¹³³ H. Nasu, ‘The Place of Human Security in Collective Security’, 18 *Journal of Conflict & Security* (2013) 1, 95.

¹³⁴ United Nations Meetings Coverage and Press Releases, Security Council Holds First-Ever Debate on Impact of Climate Change on Peace, Security, Hearing Over 50 Speakers (17 April 2007), available at <https://www.un.org/press/en/2007/sc9000.doc.htm> (last visited 24 February 2020).

¹³⁵ During the debate Russia, China and many representatives of the Group of 77 (G-77) opposed the UNSC discussion of climate change as a security concern, but a coalition of OECD countries and the Pacific Small Island states stressed the need to address climate security implications in the UNSC from a proactive perspective.

¹³⁶ Statement by the President of the Security Council on Maintenance of Peace and Security: Impact of Climate Change, S/PRST/1011/15, 20 July 2011, available at <https://www.securitycouncilreport.org/un-documents/document/cc-sprst-2011-5.php> (last visited 24 February 2020). This statement reflected the lowest common denominator of the debate.

¹³⁷ Berlin Climate and Security Conference 2019, ‘Berlin Call for Action’ (2019), available at <https://berlin-climate-security-conference.de/callforaction> (last visited 24 February 2020).

this focus, which outlined the following three concrete areas to tackle the risks climate change poses to peace and security:

- “1. risk-informed planning: Create a better understanding and sound analysis of how climate change exacerbates conflicts;
2. enhanced capacity for action: Strengthen the [UN]’s ability to act in the area of climate and security [...]; [and]
3. improving operational responses: Consider climate, sustainable development, security and peacebuilding as related issues in all programmes.”¹³⁸

More recently, numerous States have called for the UNSC to establish an international mechanism to address the nexus between climate change and international security. At a UNSC debate on July 11, 2018 titled *Understanding and Addressing Climate-related Security Risks*, Iraq, Nauru (on behalf of the Group of Pacific Small Island Developing States), Peru, Cote d’Ivoire, Sweden, the Netherlands, Kazakhstan, the United Kingdom, France, Bolivia, Ethiopia, Equatorial Guinea, Poland, Trinidad and Tobago, and Sudan called for a greater response by the international community to the security factors that are emerging with climate change.¹³⁹ Sweden and Nauru requested a *Special Representative on Climate and Security* be appointed to an *institutional home* to deal with climate-related security risks within the UN system.¹⁴⁰ However, some States, such as Russia, expressed concerns about whether the UNSC is an appropriate body to address climate change’s security implications.

In view of our considerations on how climate change acts as a driver of conflict, and the growing international consensus on the need to address the nexus between climate change and security, we argue that it falls within the scope of what may constitute a threat to international peace and security. While the UNSC’s approach to conflict resolution is largely case-oriented, circumstances where the impacts of climate change induce and exacerbate conflict warrant its close attention. However, given that climate change is an overarching and intensifying problem, taking a broader approach and declaring it as a threat to international peace and security would provide the groundwork to strengthen the UN’s institutional responses.

¹³⁸ *Ibid.*

¹³⁹ UN SCOR, UN Doc S/PV.8307 (2018), 11 July 2018.

¹⁴⁰ *Ibid.*, 8.

3. Preventing Climate-Induced Conflict Through Human Rights Treaties

As environmental treaties lack a compulsory complaint and enforcement mechanism, dispute resolution mechanisms in regional human rights treaties could provide an avenue for bringing complaints of breaches of environmental obligations. In this way, individuals may have standing to influence the resolution of disputes without resorting to armed conflict. The ILC Special Rapporteur, Marja Lehto, in her first report stated that “[...] environmental degradation may be linked to the violation of several human rights, such as the right to life, right to private and family life, right to health, or right to food”.¹⁴¹ Further, the Committee on Economic, Social and Cultural Rights has commented that the right to life extends to “[...] detrimental environmental conditions that directly or indirectly impact upon human health”.¹⁴² Arguably, the protection of human rights, such as the rights to life and to health, should involve protecting their environmental preconditions (i.e. having healthy and functional planetary ecosystems).¹⁴³ Given the normative status of human rights, the force of doing so would be considerable.

As a starting point, it is well accepted that human rights, inclusive of the right to life, and the right to health, are *erga omnes* obligations that States owe to the international community.¹⁴⁴ Further, it is arguable that a right, such as the right to life, is a *jus cogens* obligation. This is subject to much juridical debate, with some considering it a *jus cogens* norm,¹⁴⁵ especially when considering *obiter dicta* in various judicial decisions.¹⁴⁶ Others have rebutted,

¹⁴¹ *First Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto*, UN Doc A/CN.4/720, 30 April 2018, 33, para. 64.

¹⁴² Committee on Economic, Social and Cultural Rights, *CESCR General Comments No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, UN Doc E/C.12/2000/4, 11 August 2000, 5, para. 15.

¹⁴³ F. Schuppert, ‘Beyond the National Resource Privilege: Towards an International Court of the Environment’, 6 *International Theory* (2014) 1, 68, 93.

¹⁴⁴ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, ICJ Reports 1970, 3.

¹⁴⁵ B. Ramcharan, *The Right to Life in International Law (International Studies in Human Rights)* (1985), 297.

¹⁴⁶ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, 226; *Al-Adsani v. the United Kingdom*, ECtHR Application No. 35763/97, Judgement of 21 November 2001, per the Majority at 59 and 60.

based on the derogation provisions contained in human rights treaties¹⁴⁷ and by reference to State practice.¹⁴⁸ It is, at the very least, a substantive obligation that States must positively enforce.¹⁴⁹ As such, protecting the environmental preconditions to both the right to life and the right to health could bring the international community's attention to the threat of climate change to human life. Additionally, this approach could make environmental obligations, such as the prevention of transboundary harm in the context of GHG emissions, positive obligations that are part of States' *erga omnes* responsibilities.¹⁵⁰ In circumstances where non-derogable human rights apply during times of conflict,¹⁵¹ protecting the environmental preconditions to those rights could assist in enforcing environmental law and influence future actions that may occur in times of armed conflict.

There is potential for individuals impacted by climate change to influence the resolution of disputes through regional human rights treaties. For example, in the case of *SERAP v. Nigeria*, the Court of Justice of the Economic Community of West African States held that “[t]he quality of human life depends on the quality of the environment”, acknowledging the impacts of environmental degradation on human rights.¹⁵² The Inter-American Commission on Human Rights in *San Mateo de Huanchor v. Peru* applied the precautionary principle to require the development of an environmental impact statement in the context of the right to life.¹⁵³ Further, given that the ICJ has observed that States are bound to comply with the *International Covenant on Civil and Political Rights* (ICCPR),

¹⁴⁷ See for example the derogation exceptions in the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222 (amended by the provisions of Protocol No. 14 (CETS No. 194)) [ECHR], Art. 15.

¹⁴⁸ I. Park, *The Right to Life in Armed Conflict* (2018), 16.

¹⁴⁹ *Ibid.*

¹⁵⁰ Schuppert, *supra* note 143, 93.

¹⁵¹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), Art. 75; see further, Human Rights Committee, *General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13, 26 May 2004.

¹⁵² *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, Judgment of 14 December 2012, ECOWAS, Doc No ECW/CCJ/JUD/18/12, 25, para. 100.

¹⁵³ *Community of San Mateo de Huanchor v. Peru*, IACtHR Petition 504/03, Report No. 69/04.

where jurisdiction is exercised outside national territories,¹⁵⁴ there is potential for States to be held accountable for damage caused to individuals who reside outside their national territories.

The Inter-American Court of Human Rights held in the non-binding *Advisory Opinion on the Environment and Human Rights* that “[...] a person is subject to the jurisdiction of the State of origin if there is a causal connection between the incident that took place on its territory and the violation of the human rights of persons outside its territory”.¹⁵⁵ This suggests that a State has an obligation to protect the human rights of individuals impacted by transboundary harm (i.e. pollution), caused by that State.¹⁵⁶ Arguably, these cases form the basis for contending that States are under positive obligations to address circumstances where the adverse impacts of climate change are impinging on human rights within their jurisdiction, such as the right to life, and the right to health. While international human rights treaties may lack the capacity to respond to the extraterritorial detrimental impacts of climate change, the above cases demonstrate the potential for individuals to seek redress for environmental damage and could provide a legal approach to avoiding armed conflict.

4. International Court for the Environment

A further option involves the establishment of an International Court for the Environment (ICE) that would serve an important role in the enforcement and interpretation of legal principles and obligations.¹⁵⁷ There is a growing global movement supporting the need for such a court. For example, the ICE Coalition advocates “[...] for an international rule of law that protects the global environment for present and future generations. We propose that an

¹⁵⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 178, para. 107-110.

¹⁵⁵ *Advisory Opinion on Environment and Human Rights*, Advisory Opinion of 15 November 2017, IACtHR Series OC, No. 23, 4.

¹⁵⁶ A. Boyle, ‘Climate Change, the Paris Agreement and Human Rights’, 67 *International & Comparative Law Quarterly* (2018) 4, 759, 773.

¹⁵⁷ See for instance S. Bruce, ‘The Project for an International Environment Court’, in C. Tomuschat, R. Mazzeschi and D. Thürer (eds), *Conciliation in International Law* (2016), 133; International Bar Association, ‘Achieving Justice and Human Rights in an Era of Climate Disruption’ (2014), available at <https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx> (last visited 13 March 2020), 28; A. Lehmen, ‘The Case for the Creation of an International Environmental Court: Non-State Actors and International Environmental Dispute Resolution’, 26 *Colorado Natural Resources, Energy and Environmental Law Review* (2015) 2, 180.

international court for the environment is necessary to address significant gaps in the current international environmental legal order.”¹⁵⁸ The ICE could provide a forum for the judicial settlement of disputes and create a means for States to seek redress and remedy for climate induced damage.

The ICE, with a broad jurisdiction over the corpus of international environmental law, is much needed. In this respect, the ICE could opine upon disputes concerning environmental issues, such as access to resources and transboundary environmental threats. It could then assist States in judicially resolving environmental issues, rather than resorting to armed conflict, and examine the applicability of the precautionary principle and the principle of prevention to protecting the environment from potential damage prior to harmful activities taking place. Moreover, it could provide a clear and stable mechanism to enforce the International Climate Change Regime.¹⁵⁹

However, the extent and bounds of an ICE’s jurisdiction will be a determinative factor as to whether States are accepting its jurisdiction. It is unlikely that the ICE, with broad jurisdiction covering “[...] any environmental dispute involving State responsibility to the international community [...],” will gain traction amongst prospective signatories.¹⁶⁰ Rather, it is arguable that States would be more receptive towards the ICE with jurisdiction over specific environmental treaties and obligations. In this regard, Pedersen draws attention to the willingness of States to accept the compulsory jurisdiction of specialist courts, such as the International Criminal Court’s (ICC) compulsory jurisdiction in respect of crimes of genocide, crimes against humanity, war crimes, and the crime of aggression. Its complementary nature also allows States to take judicial and diplomatic steps prior to the ICC’s involvement.¹⁶¹ A further example is the International Tribunal for the Law of the Sea, where States have accepted and utilized the dispute settlement procedures in place to determine issues in relation to breaches of the *United Nations Convention on the Law of the Sea*.¹⁶² In this vein, there are arguable prospects for the ICE with jurisdiction to resolve disputes arising from breaches of specific environmental treaties.¹⁶³

¹⁵⁸ ICE Coalition, available at <http://www.icecoalition.org/> (last visited 24 February 2020).

¹⁵⁹ Schuppert, *supra* note 143, 90.

¹⁶⁰ Being the kind of jurisdiction envisaged by early proponents of an ICE, see further O. Pedersen, ‘An International Environmental Court and International Legalism’, 24 *Journal of Environmental Law* (2012) 3, 547, 549.

¹⁶¹ *Ibid.*, Pedersen, 557.

¹⁶² *United Nations Convention on the Law of the Sea*, 16 November 1994, 1833 UNTS 3.

¹⁶³ UN Charter, *supra* note 70, Art. 1.

Further issues that need to be considered include determining causation, allocating responsibility, matters of standing, calculating damages, and enforcement.¹⁶⁴ Notwithstanding that developing models to address these issues are outside the scope of this paper, we do propose some general approaches to attribution, causation, and standing. First, as discussed above, issues of attribution and causation could be approached using concepts of joint, several, and proportionate liability. Second, and in a similar vein to the scope of jurisdiction, the ICE with broad standing that allows proceedings to be commenced *vis-à-vis* individuals, corporate actors, and States, would be unlikely to gain traction. A more pragmatic and acceptable approach to States would likely be the adoption of procedural rules of standing similar to the rules of the ICJ.¹⁶⁵ Finally, there is also the likelihood that the ICE would face similar issues as the ICJ in terms of the challenges of enforcing decisions. In any event, the ICE could influence the climate debate at the international level by interpreting the norms and standards recognized in international law.¹⁶⁶ Ultimately, and irrespective of questions of jurisdiction, by providing a forum to address environmental disputes, the ICE would comprise a further body that contributes to the maintenance of international peace and security, a key foundation and progression of the international system.

D. Conclusion

Preventing and addressing climate emergencies is an unprecedented global issue that must be mainstreamed into many forms of policy and law. It urgently requires stronger and enforceable international law and policy mechanisms that both reduce GHG emissions and respond to its adverse impacts on peace and security. For mechanisms in this regard to be effective and adhered to, they must include dispute resolution pathways. The impacts of climate change on already vulnerable communities can weaken political, legal, and governance systems and increase the likelihood of international tension and armed conflict. Concerns about a *Warming War* have arisen from the framing of climate change as a security threat that infringes upon development and human rights obligations

¹⁶⁴ D. Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections', 49 *Arizona State Law Journal* (2017), Special Issue, 689, 694.

¹⁶⁵ See UN Charter, *supra* note 70, Art. 93; *Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 993, Art. 35(2).

¹⁶⁶ Bondansky, *supra* note 164, 706.

and endangers human life on earth.¹⁶⁷ This article acknowledges the increasing prioritization of climate change within the security entities of many States. However, it is time to now step up the recognition and preparation for climate driven or exacerbated conflicts. This process of *stepping up* requires constraining the securitization of climate change and military countermeasures that may result in the aggravation of violent conflict, excessive consumption of natural resources (i.e. water and food), pollution of the environment, and prevention of peaceful solutions.¹⁶⁸

Such a *Warming War* can be more effectively tackled by the international community if climate change is legally recognized as a driver of conflict and treated as a threat to international peace and security. Whether climate stress triggers cycles of risk and violence, or rather favors a transition towards cooperation, resilience, and sustainability, depends on legal and policy responses.¹⁶⁹ This approach can ensure compliance and enforcement with methods of environmental protection. It can reduce the occurrence of climate-induced armed conflict and increase cooperation between States.¹⁷⁰ An important condition for such a transition is the emergence of law and policy recognizing the climate-conflict nexus. This recognition ultimately contributes to international cooperation, institution-building and new legal frameworks, and bridges the gap between policy and law to prevent warming wars.

The failure of the International Climate Change Regime and the broader international legal and governance systems to effectively address the impacts of climate change leaves States with little recourse to judicially resolve climate-related disputes. This weakens the ability of the international system to prevent climate induced armed conflict. In these circumstances, it is necessary for the UNSC to identify and address the vulnerabilities that are exacerbated by climate change by formally acknowledging climate change as a threat to international peace and security. Further, it is necessary for the UN's institutional responses to be strengthened to prevent the occurrence of climate induced armed conflict. The establishment of an ICE could provide States with an avenue to resolve

¹⁶⁷ Davies & Riddell, *supra* note 4, 50.

¹⁶⁸ J. Scheffran, 'Verbrannte Erde: Militär als Verursacher von Umweltschäden und Klimawandel', *Friedensforum* 01/2019, 32-44.

¹⁶⁹ Ide *et al.*, 2016, *supra* note 25.

¹⁷⁰ S. Dinar *et al.*, 'Climate Change, Conflict, and Cooperation: Global Analysis of the Effectiveness of International River Treaties in Addressing Water Variability', 45 *Political Geography* (2015), 55-66; P. M. Link, J. Scheffran & T. Ide, 'Conflict and Cooperation in the Water-Security Nexus: a Global Comparative Analysis of River Basins Under Climate Change', 3 *WIREs Water* (2016) 4, 495-515.

climate-related disputes peacefully. Climate induced conflict and damage to the environment resulting from conflict can only be mitigated if climate change is formally embedded within international law as the global threat that it is.