

## Protection of the environment during armed conflicts: An appraisal of the ILC's work

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### 1. *Introduction*

Being responsive to the devastating effects that armed conflicts cause on the environment, the International Law Commission (ILC) has recently taken on board the issue of the protection of the environment in relation to armed conflicts. Special Rapporteur Marie Jacobsson has already submitted three reports addressing the protection of the environment by reference to each relevant stage. Against this background, I will first provide certain remarks regarding two general themes permeating the whole topic, namely the temporal approach chosen by the Special Rapporteur and the distinction between different types of armed conflict. Then, I will examine the draft principles that have been provisionally adopted by the ILC regarding the *in bello* phase, with particular emphasis placed to their relationship with existing international law. Subsequently, I will address the issue of the final form of the text and then I will offer certain concluding thoughts.

### 2. *General remarks*

#### 2.1. *The temporal approach*

The ILC has decided to deal with the topic under consideration by dividing it into three temporal periods (pre-, in-, and post-conflict). The

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Special Rapporteur has noted that there are no clear-cut boundaries between the various phases and that it is essential to read the reports together.<sup>1</sup> The temporal division enables a better understanding of the topic at hand, notwithstanding the fact that Part One of the draft principles' text is devoted not only to the pre-conflict stage, but also to principles applicable throughout the three phases. The alternative would be to approach the issue at hand from the perspective of the different applicable international law regimes, such as international environmental law, the law of armed conflict and international human rights law. In the latter scenario, however, the topic would be more difficult to manage and to delineate, and the issue of the temporal approach would still remain unresolved. In the context of the proceedings before the Sixth Committee of the United Nations General Assembly (UNGA) in 2015, some States have supported the temporal approach followed by the Special Rapporteur,<sup>2</sup> while other States have expressed their doubts about this approach.<sup>3</sup> The issue at hand attracted considerable attention by ILC members, with the views ranging from regarding this approach as appropriately facilitating the methodological treatment of the relevant problems<sup>4</sup> to being difficult to follow.<sup>5</sup> All in all, the present author considers the temporal approach employed by the Special Rapporteur convincing and easier to follow for all parties concerned.

<sup>1</sup> 'Third report on the protection of the environment in relation to armed conflicts. Submitted by MG Jacobsson, Special Rapporteur' UN Doc A/CN.4/700 (3 June 2016) para 147.

<sup>2</sup> Norway (on behalf of the Nordic countries) (UN Doc A/C.6/69/SR.25) para 133; Portugal (UN Doc A/C.6/69/SR.26) para 6; Belarus (UN Doc A/C.6/69/SR.26) para 27; Greece (UN Doc A/C.6/69/SR.26) para 32; Czech Republic (UN Doc A/C.6/69/SR.26) para 41; Singapore (UN Doc A/C.6/69/SR.26) para 66; India (UN Doc A/C.6/69/SR.26) para 110; New Zealand (UN Doc A/C.6/69/SR.27) para 3; Indonesia (UN Doc A/C.6/69/SR.27) para 67; El Salvador (UN Doc A/C.6/70/SR.24) para 96; Italy (UN Doc A/C.6/70/SR.22) para 116 and Lebanon (UN Doc A/C.6/70/SR.24) para 60.

<sup>3</sup> Italy (UN Doc A/C.6/69/SR.22) para 52; Russian Federation (UN Doc A/C.6/69/SR.25) para 101; Republic of Korea (UN Doc A/C.6/69/SR.27) para 73 and Spain (UN Doc A/C.6/70/SR.25) para 109.

<sup>4</sup> UN Doc A/CN.4/SR.3268 (10 July 2015) Ms Escobar Hernández.

<sup>5</sup> UN Doc A/CN.4/SR.3267 (9 July 2015) Mr Kamto.



## 2.2. *The distinction between conflicts of an international character and conflicts of a non-international character*

An issue that is pertinent to the *rationae materiae* scope of the draft principles relates to the type of the armed conflict to which they are purported to apply. Quite remarkably, the ILC has not made any differentiation between armed conflicts of an international character and armed conflicts of a non-international character in the text of the provisionally adopted draft principles. This lack of distinction raises concerns about the status of the draft principles that will be included in the final text, given that the law of non-international armed conflict is under-developed in comparison to the law of international armed conflict. Unsurprisingly, some States were skeptical about the inclusion of non-international armed conflicts within the scope of the topic under consideration,<sup>6</sup> whereas a significant number of States favored dealing with both types of armed conflict.<sup>7</sup> It should be recalled that the ILC does not aim at merely reflecting existing international law in this field, but also at progressively developing it, in line with its mandate. In other words, some draft principles should be viewed as codifying the law in relation to a non-international armed conflict, while some other provisions – and this will happen more often than not – will be suggestion of progressive development.

Against this background the issue of methodology for the identification of customary international law was raised before both the UNGA Sixth Committee<sup>8</sup> and the ILC.<sup>9</sup> The basic issue in this respect concerns the assessment of the practice of non-state actors, which is potentially highly relevant for the establishment of customary international law in

<sup>6</sup> China (UN Doc A/C.6/70/SR.22) para. 74; Republic of Korea (UN Doc A/C.6/70/SR.25) para 82 and Viet Nam (UN Doc A/C.6/70/SR.25) para 41.

<sup>7</sup> Austria (UN Doc A/C.6/70/SR.24) para 70; Croatia (UN Doc A/C.6/70/SR.24) para 86; El Salvador (UN Doc A/C.6/70/SR.24) para 96; Italy (UN Doc A/C.6/70/SR.22) para 118; Lebanon (UN Doc A/C.6/70/SR.24) para 60; New Zealand (UN Doc A/C.6/70/SR.25) para 101; Portugal (UN Doc A/C.6/70/SR.24) paras 78-79; Slovenia (UN Doc A/C.6/70/SR.24) para 40 and Switzerland (UN Doc A/C.6/70/SR.25) para 98.

<sup>8</sup> France (UN Doc A/C.6/70/SR.20) para 22.

<sup>9</sup> See, *inter alia*, UN Doc A/CN.4/SR.3265 (7 July 2015) Mr Forteau; UN Doc A/CN.4/SR.3321 (15 July 2016) Sir Wood.



relation to an armed conflict not of an international character.<sup>10</sup> Divergent views were voiced in the ILC, notwithstanding the fact that the identification and formation of customary international law comprises another topic in the ILC's agenda.<sup>11</sup> Moreover, the legally relevant practice is scarce. Thus, while it would be legally more precise to distinguish in certain occasions between the two types of armed conflict, the ILC, faced with all the above hindrances and in light of the general nature of the draft principles, chose to mention specific instances of such practice in its commentaries and to avoid distinctions between applicable law of an international armed conflict and the applicable law of non-international armed conflict. All things considered, the position adopted by the ILC is quite progressive in this respect, bearing also in mind that even the ICRC Study on Customary IHL lists only one out of the three environment-specific rules as being applicable to both types of armed conflict (rule 43), the rest two applying *arguably* to a non-international armed conflict (rules 44-45).<sup>12</sup>

### 3. *The applicable draft principles during armed conflict*

In the present section, I will consider the draft principles that are included in part two of the ILC's text, which concerns principles applicable *during* armed conflict.<sup>13</sup> Before delving into the examination of these draft principles, it is noteworthy that two issues are still pending. First, it is not yet decided whether the final text will contain a draft principle outlining the definitions of the two key notions, that is, of the 'environment' and of 'armed conflict'. The tentative proposal on the use

<sup>10</sup> UN Doc A/CN.4/SR.3266 (8 July 2015) Mr. Park.

<sup>11</sup> The ILC adopted on first reading the text of 16 draft conclusions and their commentaries in its last session. See ILC, 'Report of the International Law Commission on the Work of its 68th Session (2 May-10 June and 4 July-12 August 2016) UN Doc A/71/10, Chapter V 'Identification of customary international law'.

<sup>12</sup> See J-M Henckaerts, L Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (CUP 2005) 143-158, Rules 43-45.

<sup>13</sup> For a comprehensive account of the ILC's work regarding the protection of the environment in the post-conflict phase, see the contribution by Professor Hulme in this same issue: K Hulme, 'The ILC's Work Stream on Protection of the Environment in Relation to Armed Conflict'.



of terms was referred to the Drafting Committee at the request of the Special Rapporteur on the understanding that the provision was referred for the purpose of facilitating the debate.<sup>14</sup>

Second, the ILC has not concluded whether the term ‘environment’ or ‘natural’ environment’ is preferable for all or some of the draft principles. This issue will be reconsidered at a later stage.

Be that as it may, it bears mentioning that Additional Protocol I<sup>15</sup> refers to ‘natural environment’, which is the established term regarding environmental protection in times of armed conflict. This is evinced by draft principle 12 on the prohibition of reprisals that mentions explicitly the ‘natural environment’. Having said that, the reference to ‘natural environment’ for the *in bello* period would be reasonable, as it stands in accordance with existing law and is more likely to gather States’ approval.

**‘Draft principle 9.**

**General protection of the natural environment during armed conflict**

1. The natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.
2. Care shall be taken to protect the natural environment against widespread, long-term and severe damage.
3. No part of the natural environment may be attacked, unless it has become a military objective.’

Draft principle 9 consists of three paragraphs that intend to afford general protection to the natural environment during armed conflict. Firstly, paragraph 1 stipulates the obligation to respect and protect the natural environment in accordance with applicable international law and thus it could be construed as merely referring to existing international law. In any event, it could serve as a fallback guiding provision, bearing in mind that the obligations to respect and protect are well-

<sup>14</sup> ‘Report of the International Law Commission on the Work of its 68th Session (n 11) Chapter X ‘Protection of the environment in relation to armed conflicts’ Commentaries to the draft principles provisionally adopted by the Commission, 321, para 4.

<sup>15</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I).



established rules in specific fields of international law, such as the law of armed conflict and international human rights law. Paragraph 1 remains applicable as long as the law of armed conflict applies; in other words, the said paragraph may be relevant throughout all three phases. The notion of ‘respect’ in relation to the environment was mentioned by the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons*,<sup>16</sup> while Article 48(1) of Additional Protocol I provides that civilian objects shall be respected and protected, implicitly pointing to the qualification of parts of the natural environment as civilian objects.

Paragraph 2 establishes a duty of care and is very similarly worded to Article 55(1) of Additional Protocol I.<sup>17</sup> It should be stressed, however, that the draft principle is of more general scope, since it covers both international and non-international armed conflicts, while Article 55 of Additional Protocol I applies only to conflicts of the former type. Both provisions contain the threshold of the prescribed environmental damage in warfare, that is, widespread, long-term and severe damage, which is now well-established under the law of armed conflict, even though it is too difficult to reach given the cumulative connection of its three qualifying adjectives. Interestingly, the eco-centric approach reflected in the first part of Article 55(1) Additional Protocol I is also identified in the first part of Rule 44 of the ICRC Study, according to which ‘(m)ethods and means of warfare must be employed with due regard to the protection and preservation of the natural environment’.<sup>18</sup> Nevertheless, Rule 44 is clearly discernible from draft principle 9(3), in that the former drops any threshold of the prescribed environmental damage. Given that international law usually tends to address environmental damage only if it exceeds a certain threshold, ICRC’s attempt seems not to reflect customary international law. Therefore, the ILC chose the appropriate course of action by following a different wording that stands closer to the wording of Additional Protocol I. Accordingly, States

<sup>16</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 30.

<sup>17</sup> The text of art 55(1) of Additional Protocol I reads as follows: ‘Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.’

<sup>18</sup> Henckaerts, Doswald-Beck (n 12) 147, Rule 44.



would presumably be more willing to follow this route as far as the obligation to take care is concerned.

Article 55(1) Additional Protocol I calls for more detailed scrutiny as it is not clear whether it contains one or two separate obligations. In this regard, the term ‘includes’ obfuscates matters as reliance upon it may support the supposition that the ‘prohibit’ part of the provision serves as a mere illustrative example of the ‘care’ obligation.<sup>19</sup> Nevertheless, from the literal reading of Article’s 55(1) second sentence it is inferred that the latter is exclusively related to the first sentence’s ‘protect’ component and hence the ‘care’ obligation of the first sentence assumes a wider scope of application, irrespective of human suffering.<sup>20</sup> The concomitant implication is that the ‘care’ obligation of the first sentence ‘recognizes environmental protection *per se*, absent the element of consequential human harm required for the prohibition (in the second sentence) to apply’.<sup>21</sup> Taking into consideration the fact that the ILC opted not to adopt a provision that resembles the second sentence of Article 55(1), despite the suggestions made both by members of the ILC as well as by States in the Sixth Committee of the UN General Assembly so that the proposed text would not be weakened, it could be deduced that the draft principles favor an eco-centric approach, at least in this respect.

Remarkably, an obligation of taking ‘care’ seems to stand in contrast to the absolute language that generally prevails within the laws of war.<sup>22</sup> In relation to the obligation ‘to care’, the lack of any notion to ensure protection of the natural environment instructs to consider the former as an obligation of conduct rather than of result.<sup>23</sup> Therefore, the said obligation should be construed as one of taking reasonable steps, in attack and defense, to protect the environment, often referred to as an obligation of due diligence.<sup>24</sup>

The obligation of taking care to protect the natural environment during armed conflict seems closer to the international environmental

<sup>19</sup> See K Hulme, *War Torn Environment: Interpreting the Legal Threshold* (Martinus Nijhoff 2004) 74.

<sup>20</sup> *ibid.*

<sup>21</sup> *ibid.* 80.

<sup>22</sup> *ibid.* 81.

<sup>23</sup> K Hulme, ‘Taking Care to Protect the Environment Against Damage: A Meaningless Obligation?’ (2010) 92 *Intl Rev of the Red Cross* 675, 679.

<sup>24</sup> *ibid.* 680. For examples of implementing the obligation under consideration, see *ibid.* 681.



law principles of due diligence and prevention, and even carries the potential to enclose the precautionary principle, on the condition, of course, that states would endorse such an approach, and bearing in mind that so far this is not the case. In short, the obligation of taking care to protect the natural environment comprises an overarching guiding principle, given that it has retained a threshold of the prescribed environmental damage.

Paragraph 3 constitutes the concretized application of the principle of distinction to the natural environment, providing that no part of the latter may not be attacked unless it has become a military objective. In this form, the paragraph under examination qualifies as an environment-specific provision, affording direct protection to the natural environment. The implication is that parts of the natural environment qualify as civilian objects and this move unsurprisingly raises the question whether the transposition of IHL rules to the protection of the environment is appropriate and legally sound. The same concern has been voiced within the ILC<sup>25</sup> and therefore it should be explored in more detail. The consequence that this qualification entails lies in that it carries the potential of affording to the natural environment significant protection in cases of environmental damage beneath the threshold of ‘widespread, long-term and severe’, since ‘attacks shall be limited strictly to military objectives’.<sup>26</sup>

With regard to its legal basis, the definition of a ‘civilian object’ within the IHL’s field of application is articulated negatively by Article 52(1) of Additional Protocol I, according to which ‘[c]ivilian objects are all objects which are not military objectives’.<sup>27</sup> Pursuant to Article 52(2) of Additional Protocol I:

‘[M]ilitary 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.’<sup>28</sup>

<sup>25</sup> See UN Doc A/CN.4/SR.3267 (9 July 2015) Mr Kamto.

<sup>26</sup> Additional Protocol I art 52(2).

<sup>27</sup> *ibid* art 52(1).

<sup>28</sup> *ibid* art 52(2).



The definition echoes Article 24(1) of the 1923 Hague Rules on Air Warfare<sup>29</sup> and has been repeated in Article 2(4) of Protocol II, in Article 1(3) of Protocol III to the 1980 Certain Conventional Weapons Convention,<sup>30</sup> in Article 1(f) of the 1999 Protocol II to the Hague Cultural Property Convention,<sup>31</sup> in Rule 8 of the ICRC Study on Customary IHL,<sup>32</sup> and in paragraph 40 of the 1995 San Remo Manual on International Law Applicable to Armed Conflicts at Sea.<sup>33</sup> In 2000, the ICTY Committee established by the Prosecutor to review the 1999 NATO bombing campaign against Yugoslavia concluded that despite criticism:

‘it provides the contemporary standard which must be used when attempting to determine the lawfulness of particular attacks. (. . .) The definition is, however, generally accepted as part of customary law.’<sup>34</sup>

Accordingly, the elements of the environment that do not contribute effectively to military action should be regarded as civilian objects. This supposition is also supported by the inclusion of Article 55 Additional Protocol I in a chapter entitled ‘Civilian Objects’.<sup>35</sup> An explicit qualification of the environment as a civilian object is found in the San Remo

<sup>29</sup> Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare (adopted 19 February 1923) Part II, drafted by a Commission of Jurists, The Hague, December 1922–February 1923, art 24(1).

<sup>30</sup> Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996, (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 168, art 2(4); Protocol (III) on Prohibitions or Restrictions on the Use of Incendiary Weapons (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 171, art 1(3).

<sup>31</sup> Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 3511, art 1(f).

<sup>32</sup> Rule 8 applies in both types of armed conflict. Henckaerts, Doswald-Beck (n 12) 29, Rule 8.

<sup>33</sup> L Doswald-Beck, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea: International Institute of Humanitarian Law* (CUP 1995) para 40.

<sup>34</sup> ICTY Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, *Final Report to the ICTY Prosecutor* (2000) para 42.

<sup>35</sup> See EV Koppe, ‘The Principle of Ambiguity and the Prohibition against Excessive Collateral Damage to the Environment during Armed Conflict’ (2013) 82 *Nordic J Intl L* 53, 69.



Manual for the law of non-international armed conflicts.<sup>36</sup> Taking into account the customary status of the principle of distinction in both international and non-international armed conflicts,<sup>37</sup> it would follow that the said paragraph accurately depicts the state of law.

Nevertheless, it must be reckoned at all times that even though '[e]lements of the environment are most often civilian objects', they 'can easily become military objectives'.<sup>38</sup> An example of the environment or parts of it qualifying as military objectives, which was inspired by the use of chemical defoliants during the Vietnam War,<sup>39</sup> could be drawn from Protocol III to the 1980 Conventional Weapons Convention. According to Article 2(4) of Protocol III:

'It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.'<sup>40</sup>

A variety of arguments have been advanced in juxtaposition to the natural environment benefiting from protection as a civilian object, which, despite their appeal at first sight, in the end fail to convince for their merits. First, it has been argued that civilian objects are 'material things that can be seen or touched' and therefore, '[t]he natural environment as the sum total of different and differing natural components and processes may not be characterized as such an object'.<sup>41</sup> Nonetheless, as Droege and Tougas have convincingly contended, IHL follows a binary

<sup>36</sup> MN Schmitt, C Garraway, Y Dinstein, *The Manual on the Law of Non-International Armed Conflict* (International Institute of Humanitarian Law 2006) para 4.2.4.1 ('[T]he natural environment is a civilian object').

<sup>37</sup> For a detailed account, see Henckaerts, Doswald-Beck (n 12) 29-32, Rule 8.

<sup>38</sup> M Bothe and others, 'International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities' (2010) 92 *Intl Rev of the Red Cross* 569, 576.

<sup>39</sup> Many examples of the environment or parts of it turning into military objectives are provided by E Talbot Jensen, 'The International Law of Environmental Warfare: Active and Passive Damage during Armed Conflict' (2005) 38 *Vanderbilt J Transnational L* 145, 170-171.

<sup>40</sup> Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, art 2(4).

<sup>41</sup> W Heintschel von Heinegg, M Donner, 'New Developments in the Protection of the Natural Environment in Naval Armed Conflicts' (1994) 37 *German YB Intl L* 281, 289.



categorization between civilian objects and military objectives and therefore anything that is not qualified as a military objective, is treated automatically as a civilian object.<sup>42</sup> Second, the qualification of the environment as a civilian object could be criticized for being too anthropocentric. However, it should be reminded that as long as parts of the environment are qualified as civilian objects they shall not be the object of an intentional, direct attack regardless of civilians' presence around them and hence the criticism at hand seems to lose sight of this idea.<sup>43</sup>

Overall, draft principle 9 enshrines the following general and equally significant obligations in relation to the protection of the environment during an armed conflict: to respect, to protect, to take care, and not to attack any part of it, unless it has become a military objective. As the above analysis demonstrated, some of them are better entrenched in the normative terrain of the law of armed conflict. In any case, this observation should not detract from acknowledging their important contribution to environmental protection during an armed conflict.

**'Draft principle 10.**

**Application of the law of armed conflict to the natural environment**

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

Draft principle 10 is applicable during armed conflict and intends to 'strengthen the protection of the environment in relation to armed conflict, and not to reaffirm the law of armed conflict'.<sup>44</sup> It follows from the last pronouncement that the draft principle under scrutiny moves beyond the mere reflection of customary international law to progressively develop international law. Draft principle 10 provides for the application of the law of armed conflict to the natural environment, explicitly singling out the cardinal principles and rules on distinction, proportionality, military necessity, and precautions in attack. Given that

<sup>42</sup> C Droege, M-L Tougas, 'The Protection of the Natural Environment in Armed Conflict: Existing Rules and Need for Further Legal Protection' (2013) 82 *Nordic J Intl L* 21, 27.

<sup>43</sup> Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn, CUP 2010) 204.

<sup>44</sup> Commentaries to the draft principles provisionally adopted by the Commission (n 14) 332, para 1.

these principles and rules are listed among the foundations of the law of armed conflict, States might be more willing not only to accept their application to the natural environment, but also to go even further by applying them in all types of armed conflict.

Given the widely accepted legal status of the above principles and rules in the law of armed conflict, there are only few points that necessitate closer treatment. At first, draft principle 10 operates on the assumption that parts of the natural environment qualify as civilian objects, unless they have turned into military objectives. In this respect, the preceding analysis in relation to draft principle 9(3) is of great relevance. At second, the concern of repetition and overlap with other draft principles, namely draft principles 9(3) and 11, was expressed. Accordingly, it was suggested that some of them should be deleted or merged.<sup>45</sup> Granted, these concerns seem *prima facie* justified. On the other hand, the value of a draft principle that explicitly provides for the application of the law of armed conflict to the natural environment should not be underestimated, especially when it ‘introduces an objective’, that is, to protect the environment, ‘go(ing) further than simply affirming the application of the rules of armed conflict to the environment’.<sup>46</sup> In other words, such an application is not self-evident and this is precisely the reason that draft principle 10 is of significant value.

A last minor remark concerns the principle of proportionality: the commentaries to draft principle 10 correctly state that ‘...“collateral damage” to the natural environment may be lawful in certain instances’.<sup>47</sup> The above ‘collateral damage’, though, may in no instance exceed the threshold of the prescribed environmental damage in warfare, which, as mentioned above, is established as widespread, long-term and severe, the threshold being an absolute one.<sup>48</sup>

<sup>45</sup> See UN Doc A/CN.4/SR.3265 (7 July 2015) Mr Forteau; UN Doc A/CN.4/SR.3266 (8 July 2015) Mr Wisnumurti.

<sup>46</sup> Commentaries to the draft principles provisionally adopted by the Commission (n 14) 335, para 12.

<sup>47</sup> *ibid* 334, para 8.

<sup>48</sup> Hulme, *War Torn Environment* (n 19) 77.



**Draft principle 11.**

**Environmental considerations**

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

Draft principle 11 is inspired by the respective *dictum* of the ICJ in the *Legality of the Threat or Use of Nuclear Weapons*, pursuant to which

‘States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that goes into assessing whether an action is in conformity with the principles of necessity and proportionality.’<sup>49</sup>

However, during the ILC’s session the question arose why this draft principle was not merged with the previous draft principle, if not altogether deleted. Nonetheless, the added value of the draft principle under consideration is found in its specificity. Put otherwise, draft principle 11 is of operational importance since it stipulates *how* the principles of proportionality and the rules of military necessity should apply in relation to the protection of the environment in times of armed conflict.<sup>50</sup> Several States have already included environmental considerations as a relevant element of the targeting process in their military manuals.<sup>51</sup> On a different note, the commentaries seem to favor an ecosystem approach, in line with modern ecological understandings, by declaring that ‘environmental considerations cannot remain static over time, they should develop as human understanding of the environment develops.’<sup>52</sup>

<sup>49</sup> *Legality of the Threat or Use of Nuclear Weapons* (n 16) 226, para 30.

<sup>50</sup> Commentaries to the draft principles provisionally adopted by the Commission (n 14) 335-6, para 3.

<sup>51</sup> See, for example, Australia, *The Manual of the Law of Armed Conflict* (11 May 2006) para 5.50; Germany, *Law of Armed Conflict Manual* (1 May 2013) paras 434-436; United Kingdom, *The Joint Service Manual of the Law of Armed Conflict* (2004) para 12.24.

<sup>52</sup> Commentaries to the draft principles provisionally adopted by the Commission (n 14) 336, para 5.



**‘Draft principle 12.  
Prohibition of reprisals**

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

Draft principle 12 reproduces *verbatim* the text of Article 55(2) of Additional Protocol I and, unsurprisingly, became the object of controversy during the debates in the ILC. Two issues call for detailed examination: first, the legal status of this provision, and second, whether conflicts not of an international character would be covered by such a rule.

In relation to the first topic, some members of the ILC supported the stance that the prohibition of reprisals reflects customary international law, whereas other members and delegations before the Sixth Committee<sup>53</sup> were reluctant to go further than recognizing that the provision exists only as a treaty rule under Additional Protocol I. In the light of the above, some members of the ILC were concerned that draft principle 12 could be construed as being applicable to non-parties to Additional Protocol I, since the latter instrument has not been universally ratified. Moreover, certain States parties have attached reservations and declarations, mainly advocating, even if implicitly, a general exemption of nuclear weapons from the scope of Additional Protocol I.<sup>54</sup> All things considered, it would be difficult and risky to proclaim with certainty the status of the customary law of armed conflict in this respect and a thorough analysis of this topic could not be undertaken here.

In the light of the above, it comes as no surprise that the ILC preferred not to explicitly and directly address this issue. On the one hand, it admits that the draft principle under consideration ‘can be seen as promoting the progressive development of international law’, implying that Article 55(2) does not reflect customary international law. On the other, it mirrors the wording 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*.’<sup>55</sup>

<sup>53</sup> ‘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) para 65.

<sup>54</sup> Commentaries to the draft principles provisionally adopted by the Commission (n 14) 337, paras 4-5.

<sup>55</sup> *ibid* 339, para 10 (emphasis added).



The latter phrase, not being specifically limited to treaty law, could be construed as implying that Article 55(2) is the existing *customary* rule under the law of armed conflict.

Regarding the second issue, namely the validity of belligerent reprisals against the natural environment in a non-international armed conflict, no safe conclusion could be drawn, even though the ICRC Study refers to an absolute prohibition.<sup>56</sup> In fact, no provision corresponding to Article 55(2) exists with respect to non-international armed conflict, the relevant state practice is scarce, and no *opinio juris* demonstrating the existence of a customary right to resort to belligerent reprisals in non-international armed conflict can be deduced from the relevant practice.<sup>57</sup> As Turns rightfully observes in relation to the ICRC Study, '[i]t is hard to see how something that does not even exist as a concept can be the subject of a specific customary rule prohibiting it: normally such prohibitions arise because a particular practice has existed in the past, but there can be no State practice against something which does not exist'.<sup>58</sup>

In conclusion, both issues pose difficult interpretative issues the answers to which are not readily available. Be that as it may, the ILC should be lauded for taking the correct stance in such a delicate matter. To put it in other words, if Article 55(2) is part and parcel of customary international law for all types of armed conflict, then the ILC simply got it right. Even if this not the case and Article 55(2) does not reflect customary international law, the provision should be retained as it stands, since any other formulation would be an unfortunate departure from a significant treaty provision, and because the normative standard of conduct would have been lowered.

<sup>56</sup> Henckaerts, Doswald-Beck (n 12) Rule 148.

<sup>57</sup> V Bílková, 'Belligerent Reprisals in Non-International Armed Conflicts' (2014) 63 ICLQ 31, 54 (2014).

<sup>58</sup> D Turns, 'Implementation and Compliance' in E Wilmshurst, S Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007) 354, 372.



**'Part One. General principles****Draft principle 5.****Designation of protected zones**

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

**Part Two. Principles applicable during armed conflict****Draft principle 13.****Protected zones**

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

Draft principle 13 addresses the issue of protected zones and should be examined together with draft principle 5 regarding the designation of these zones. The term 'protected zones' was preferred to 'demilitarized zones', even though the latter term is also found in Article 60 of Additional Protocol I. The reason for this choice lies in that the latter term is subject to different understandings.<sup>59</sup> Interestingly, the designation of specific natural areas as areas of major ecological importance with a view to their protection was also envisaged by the ICRC in the context of its 31st International Conference and was submitted to consideration by States.<sup>60</sup>

Draft principle 5 is included in Part One of the draft principles, which not only contains principles applicable in the pre-conflict stage, but also encompasses principles of a more general nature that relate to all three temporal phases.<sup>61</sup> Accordingly, protected zones may be designated before, during, or even shortly after an armed conflict. On the other hand, the corresponding draft principle 13 applies only during an armed conflict, as evidenced both by its inclusion in Part Two of the text ('Principles applicable during armed conflict'), as well as by its text. Another distinction between the two draft principles under consideration could be drawn with respect to the way these protected zones are

<sup>59</sup> Commentaries to the draft principles provisionally adopted by the Commission (n 14) 323, para 1 (commentaries to draft principle 5).

<sup>60</sup> See ICRC, 'Report on Strengthening legal protection for victims of armed conflicts' available at <[http://rcrcconference.org/wp-content/uploads/sites/3/2015/03/31IC\\_5.1.1\\_Report\\_Strength\\_IHL\\_en.pdf](http://rcrcconference.org/wp-content/uploads/sites/3/2015/03/31IC_5.1.1_Report_Strength_IHL_en.pdf)> 17.

<sup>61</sup> Commentaries to the draft principles provisionally adopted by the Commission (n 14) 324, para 1.



established. Draft principle 5 provides for the establishment of such areas ‘by an agreement or otherwise’, including ‘an agreement concluded verbally or in writing, reciprocal and concordant declarations, as well as those created through a unilateral declaration or designation through an international organization.’<sup>62</sup> On the contrary, only areas established by agreement fall within the ambit of draft principle 13.

Leaving aside the differentiating elements, the scope of both draft principles encompasses agreements with non-State actors according to the commentaries,<sup>63</sup> taking into account the fact that the draft principles are intended to apply to both international and non-international armed conflicts alike, their scope being general. The above agreements may be concluded either in peacetime or during an armed conflict, the necessary implication being that peacetime agreements could only be concluded by States insofar as the relevant organized armed groups are not operating for IHL purposes at that period.

Another common element is that both draft principles refer to areas of ‘major environmental and cultural importance’, the latter term being unprecedented within the law of armed conflict. Therefore, the two draft principles could be considered as progressively developing international law, notwithstanding the fact that they serve a substantial role in demonstrating the strong linkage between areas of environmental importance and areas of cultural importance. Granted, cultural objects and cultural property are afforded protection in times of armed conflict through other law of armed conflict provisions and special regimes that have been created for this purpose. True, a danger of ambiguity in relation to the scope of protection lies in that the special regimes may overlap with the potential protection accorded through the draft principles under examination. Nevertheless, these two draft principles should be welcomed, for the explicit linkage between areas of environmental importance and areas of cultural importance signifies the importance of those areas for indigenous peoples (draft principle 6 is devoted to the protection of their environment) and enables to make a stronger case for the cultural value of biodiversity.

<sup>62</sup> *ibid* 325, para 4.

<sup>63</sup> *ibid* (commentary to draft principle 5) and 339, para 1 (commentary to draft principle 13).

Even more important from a practical point of view, draft principle 13 cements the above analysis by mandating that such ‘a protected zone *shall* be protected against any attack, as long as it does not contain a military objective’, hence striking ‘a balance between military, humanitarian, and environmental concerns’.<sup>64</sup> Furthermore, its operational importance has to be highlighted, as parties should include the protection of these zones in their application of the principle of proportionality or the principle of precautions in attack.<sup>65</sup>

All in all, draft principles 5 and 13 provide for area-defined protection, which echoes the special protective regimes, based on area-defined protection, of other special objects under the law of armed conflict. This type of protection could be considered as the way forward regarding the protection of the environment during an armed conflict. Admittedly, the differences and the synergies between the protected zones under the draft principles and other special regimes of protection could be further clarified, as was also suggested in the UNGA Sixth Committee.<sup>66</sup>

#### 4. *The final outcome*

The provisions under consideration have been formulated as draft ‘principles’ on the premise that the final form of the text will be revisited at a later stage. Quite understandably, the issue of the final outcome has garnered a lot of discussion in both the ILC<sup>67</sup> and the Sixth Committee of the UNGA.<sup>68</sup> On the one hand, there are the proponents of the provisions taking the form of draft ‘articles’,<sup>69</sup> which points to the

<sup>64</sup> *ibid* 339, para 3. The inclusion of environmental concerns within the traditional pair of humanity and military necessity is not only consistent with draft principle 11, but could also serve as supporting the claim of an emerging principle of ambiguity within the law of armed conflict, the latter principle advancing the protection of the environment. For the emerging principle of ambiguity, see Koppe (n 35).

<sup>65</sup> Commentaries to the draft principles provisionally adopted by the Commission (n 14) 340, para 5.

<sup>66</sup> Topical summary of the discussion held in the Sixth Committee (n 53) para 66.

<sup>67</sup> ‘Report of the International Law Commission on the Work of its 68th Session’ (n 11) Chapter X, Protection of the environment in relation to armed conflicts, 312, para 161.

<sup>68</sup> See Third report (n 1) para 51.

<sup>69</sup> See, for example, before the Sixth Committee of the UNGA: Poland (UN Doc A/C.6/70/SR.25) para 19 (either draft articles or conclusions). Before the ILC: UN Doc



direction of a potential convention; on the other, there are the supporters of a potential soft (less hard) law document, that is, in the form of ‘principles’ or guidelines.<sup>70</sup> Taking all the above into consideration, it is rightly observed in the Commentaries that principles do not lack normativity, rather they ‘are cast normatively at a general level of abstraction’.<sup>71</sup> Principles provide greater flexibility and States might accept them more readily than a set of articles. In any event, States will have the final word in this respect, but it should be recalled that the ILC has produced draft principles in the past, for example, in its work regarding the allocation of loss in the case of transboundary harm arising from hazardous activities in 2006.<sup>72</sup>

##### 5. *Concluding remarks*

As far as the protection of the environment during armed conflict is concerned, the provisionally adopted draft principles are on the right track. By either reflecting current international law or progressively developing it, the ILC operates within its mandate, while at the same time making substantial contributions to the protection of the environment. All draft principles examined above are carefully worded and can achieve their objective to act as standards of conduct.

More specifically, the explicit application of the general principles and rules of the law of armed conflict to the natural environment, as well as the provision on protected zones are more than welcomed de-

A/CN.4/SR.3264 (6 July 2015) Mr Murase (in favor of draft articles); UN Doc A/CN.4/SR.3268 (10 July 2015) Ms Escobar-Hernández (in favor of draft articles without dismissing the option of draft principles); UN Doc A/CN.4/SR.3319, 13 July 2016 Mr Peter.

<sup>70</sup> See, for example, before the Sixth Committee of the UNGA: Netherlands (UN Doc A/C.6/70/SR.24) para 28), Singapore (UN Doc A/C.6/70/SR.23) para 124 and United Kingdom (UN Doc A/C.6/70/SR.24) para 21. Before the ILC: UN Doc A/CN.4/SR.3267 (9 July 2015) Mr Šturma; UN Doc A/CN.4/SR.3268 (10 July 2015) Mr Hmoud.

<sup>71</sup> ‘Report of the International Law Commission on the Work of its 68th Session’ (n 11) 321, para. 2.

<sup>72</sup> For a concise account on the ILC’s choice regarding the final form of its activities, see J Katz Cogan, ‘The Changing Form of the International Law Commission’s Work’ in R Virzo, I Ingravallo (eds), *Evolutions in the Law of International Organizations* (Brill/Nijhoff 2015) 275.



velopments. Another element to discern is the general nature of the draft principles, which amounts to their applicability in all types of armed conflict. On the other hand, the danger of overlapping draft principles that would cause ambiguity should not be ignored. But it should not be overstated either, as the ILC has skillfully managed to avoid these difficulties in this text, for example, by explaining in the commentaries that draft principle 11 does bring added value, which lies in its operational significance, and thus the concern of its overlapping with draft principle 10 is addressed.

A useful addition could be a draft principle encouraging States to carefully test new weapons and prepare adequate military manuals in anticipation of future armed conflicts.<sup>73</sup> The above draft principle brings in mind Article 36 of Additional Protocol I regarding the review of new weapons. Pursuant to the ICRC, in complying with the latter provision the reviewing authority will have to take into account a wide range of ‘military, technical, health and *environmental factors*’.<sup>74</sup> On the other hand, it is not at all certain that States would be willing to subscribe to such an interpretation. Having said that, such a draft principle could only serve to enhance the afforded protection to the environment, in line with the purpose of the draft principles, as enshrined in draft principle 2.

Taking into account the above analysis, the ILC seems to have moved beyond existing law in many aspects regarding the topic under consideration. Nevertheless, the results it has produced so far are commendable. It goes without saying that these results are owed, to a great extent, to the Special Rapporteur, Ambassador Marie Jacobsson. The Special Rapporteur has not sought re-election and the future of this topic will be decided by her successor. All in all, Special Rapporteur Jacobsson has paved the way and put the topic on track; hopefully, her successor will follow the same route.

<sup>73</sup> See ‘Report of the International Law Commission on the Work of its 68th Session’ (n 11) 317, para 178.

<sup>74</sup> ICRC, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare Measures to Implement Article 36 of Additional Protocol I of 1977* (ICRC, 2006) 17 (emphasis added).

