

**Is the ILC's work enhancing protection for the environment  
in relation to warfare?**

**A reply to Stavros-Evdokimos Pantazopoulos  
and Karen Hulme**

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1. *Introduction*

In this reply we would like to follow up on the contributions written by Stavros-Evdokimos Pantazopoulos<sup>1</sup> and Karen Hulme<sup>2</sup> concerning the International Law Commission's (ILC) work on the topic 'Protection of the Environment in relation to Armed Conflict.' Based on our experiences working closely to Special Rapporteur Marie Jacobsson at the ILC,<sup>3</sup> we would like to share some of our views on the Commission's work. Most importantly, we wish to highlight the vast potential of the topic: as it transcends several fields of public international law, it can strengthen the protection of the environment by connecting and integrating obligations as well as mechanisms of different legal frameworks. The ILC has already dealt with topics such as the 'Fragmenta-

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<sup>1</sup> S-E Pantazopoulos, 'Protection of the environment during armed conflicts: An appraisal of the ILC's work' (2016) 34 Questions of Intl L 7-26.

<sup>2</sup> K Hulme, 'The ILC's work stream on protection of the environment in relation to armed conflict' (2016) 34 Questions of Intl L 27-41.

<sup>3</sup> Dienelt assisted Georg Nolte and Sean Murphy during the sixty-fifth and sixty-seventh sessions (2014-2015) of the International Law Commission (ILC). She also consulted Special Rapporteur Marie Jacobsson during the sixty-seventh session in 2015. Dienelt is conducting a doctoral thesis on environmental protection in relation to armed conflict, which is supervised by Andreas L. Paulus, University of Goettingen. Sjöstedt assisted Special Rapporteur Marie Jacobsson during the sixty-fourth to sixty-eighth sessions (2013-2016) of the ILC. Jacobsson was also the supervisor of Sjöstedt when conducting her PhD thesis *Protecting the environment in relation to armed conflict – the Role of Multilateral Environmental Agreements* (completed May 2016).



tion of International Law'<sup>4</sup> as well as 'Effects of Armed Conflict on Treaties'<sup>5</sup> and, thus, prepared the groundwork to fully explore how the international legal system can offer a unified protection of the environment in relation to armed conflict. In line with the analysis of the fragmentation report, when complementing obligations from the laws of armed conflict, international environmental law and human rights law, legal obligations can be clarified and the level of legal protection for the environment reinforced. To this end, the Special Rapporteur's choice to apply a temporal approach seizes the opportunity to enable such interplay of legal norms. This legal interplay will be the overall theme of our reply to Pantazopoulos and Hulme.

We start chronologically by commenting on Pantazopoulos' observations on the Draft Principles provisionally adopted by the ILC regarding the *during* armed conflict phase (during-phase) and turn to Hulme's remarks regarding the Draft Principles on the *post*-conflict phase (post-phase). We then move on to some more general points raised by Pantazopoulos and Hulme. Finally, we discuss whether the project has in fact enhanced the protection of the environment in relation to armed conflict.

## 2. *The Draft Principles applicable in the during-phase – a reply to Pantazopoulos*

In regard to the Draft Principles applicable in the phase during an armed conflict, we would like to raise three points concerning, first, the distinction between international armed conflict (IAC) and non-international armed conflict (NIAC), and second, the threshold of widespread, long-term and severe environmental damage. This is mainly where our opinions depart from Pantazopoulos'. In a third remark we turn to the so-called protected zones and their so far underestimated role for the topic.

<sup>4</sup> ILC, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law,' Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi ILC Report (13 April 2006) UN Doc A/CN.4/L.682.

<sup>5</sup> ILC, 'Report of the International Law Commission on the Work of its 63rd session' (2011) UN Doc A/66/10 ch VI paras 89–101.



First, not to distinguish between IACs and NIACs follows a general trend in the field of laws of armed conflict. Pantazopoulos calls the ILC's approach not to differentiate 'quite progressive'.<sup>6</sup> However, we would like to stress that in the commentaries to some of the Draft Principles, the Commission regularly underscores the differences regarding IACs and NIACs.<sup>7</sup> Moreover, Pantazopoulos correctly cites the International Committee of the Red Cross (ICRC) Study<sup>8</sup> on customary international humanitarian law, which has sought to apply to NIACs several rules applicable in IACs.<sup>9</sup> Similarly, international criminal courts have applied numerous of the rules exclusively applicable for IACs in NIACs.<sup>10</sup> Even though these cases were not concerned with the protection of the environment, the practice of the courts indicates a movement towards a unified framework for IACs and NIACs. Specifically regarding the environment, the Review Committee established by the Prosecutor of the ICTY that investigated the NATO Bombing Campaign regarded the articles applicable to the environment in Protocol I as emerging customary law.<sup>11</sup> In addition, the 1998 Rome Statute contains an environmental-related war crime prohibiting wilful widespread, long-term and severe damage excessive to the military advantage.<sup>12</sup> It is also noteworthy

<sup>6</sup> Pantazopoulos (n 1) 10.

<sup>7</sup> Cf Draft Principle 9 [II-1] on the general protection of the natural environment during armed conflict, para. 7; Draft Principle 10 [II-2] on the application of the laws of armed conflict to the natural environment, paras 4, 6 and 10; special focus was placed on NIACs in the commentary to Draft Principle 12 [II-4] on the prohibition of reprisals, para 7.

<sup>8</sup> J-M Henckaerts, L Doswald-Beck, *Customary International Humanitarian Law: Volume I and II, Rules and Practices* (CUP 2005).

<sup>9</sup> Pantazopoulos (n 1) 10.

<sup>10</sup> The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) famously stated that what is considered inhuman in an IAC should also be considered inhuman in NIAC. ICTY, *The Prosecutor v Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction IT-94-1-A (2 October 1995) para 119.

<sup>11</sup> The Review Committee stated that: 'Article 55 may, nevertheless, reflect current customary law'. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (13 June 2000) para 15 <[www.icty.org/sid/10052](http://www.icty.org/sid/10052)>.

<sup>12</sup> Art 8(2)(b)(iv) of the 1998 Rome Statute states that: 'Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated'.

thy that the crime does not fully correspond to the environmental protection standard in Protocol I as it introduces a proportionality assessment as an additional restriction in regard to how the environmental damage relates to the military advantage. As noted by several scholars, the inclusion of this war crime in the 1998 Rome Statute is a result of a customary rule applicable to individuals not to cause such damage to the environment in wartime rather than based on binding treaty law.<sup>13</sup> Thus, a corresponding customary rule for states is probably underlying the environmental war crime as incorporated in the 1998 Rome Statute. In regard to the ILC's work on 'Effects on Treaties of Armed Conflict', the Commission opted for applying the Draft Articles to both IACs and NIACs, albeit it noted that there might be some differences in the application as NIACs, in principle, would not impact the treaty relations between states.<sup>14</sup> Still, despite some progress, there is resistance among States for creating a unified regulation of IACs and NIACs. However, at least in regard to the Draft Principles applicable in the during-phase that are based on the cardinal principles of the laws of armed conflict, re-formulated to specifically address the environment, there is sufficient ground to argue that these apply to both IACs and NIAC without making a distinction.<sup>15</sup> Therefore, in contrast to Pantazopoulos' view, we think it is certainly possible not to make a general distinction regarding the application of the Draft Principles in IACs and NIACs. After all, in addition to the codification of international law, the Commission is also tasked with the progressive development of international law according to Article 13, paragraph (1)(a) of the Charter of the United Nations. Instead, we welcome the Commission's choice to provide clarifications in

<sup>13</sup> K Hulme, 'Natural Environment' in E Wilmshurst, S Breau, (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007), 206. See also S Freeland, *Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court* (Intersentia 2015) 35.

<sup>14</sup> See commentary to Draft art 2 on the Effects of Armed Conflicts on Treaties, with Commentaries, adopted at the 63rd session of the ILC (2011) II(2) YB Intl L Commission. It should be noted, however, that the degree of outside involvement of third states in NIACs could be a factor affecting the status of the treaties. See art 6 lit b and para 4 of its commentary of the Draft Articles.

<sup>15</sup> These include Draft Principle 9 [II-1] para 3 referring to the principle of distinction; Draft Principle 10 [II-2] referring to the principles and rules on distinction, proportionality; Draft Principle 11 [II-3] referring to the principle of proportionality and the rules on military necessity.



the commentaries in those instances where it is needed to make such a distinction.

Second, most of the Draft Principles have been precariously drafted with the purpose to clarify the application of the rules under the laws of armed conflict to protect the environment. However, we think it is unfortunate that the Commission maintained without clarifying the extraordinarily high and unclear threshold of ‘widespread, long-term and severe’ environmental damage in Draft Principle 9[II] para. 2<sup>16</sup> when addressing the obligation to take care to protect the environment. The cumulative requisite of ‘widespread, long-term and severe’ damage lacks a proper definition: the Draft Principle’s origin, that is Article 55(1) Additional Protocol I (AP I),<sup>17</sup> has never been applied in practice, as pointed out by Pantazopoulos.<sup>18</sup> Scholars have not been able to agree on how to interpret the threshold of widespread, long-term and severe damage but they do agree that it sets an exceptionally high yardstick that has hardly ever been encountered in warfare.<sup>19</sup> It is particularly unfortunate that the threshold was kept in relation to the obligation to take care of the environment. It would be preferable in our view if a Draft Principle were based on the first sentence of Rule 44 of the Cus-

<sup>16</sup> **Draft principle 9 [II-1] 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.

<sup>17</sup> **Article 55 AP I Protection of the natural environment**

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

<sup>18</sup> Pantazopoulos (n 1) 11.

<sup>19</sup> For further reading, see M Bothe et al, ‘International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities’ (2010) 92:879 *Intl Rev of the Red Cross* 569-592; Y Dinstein, ‘Protection of the Environment in International Armed Conflict’ (2001) 5 *Max Plank YB of United Nations L* 523-546; R Falk, ‘Evaluating the Adequacy of Existing International Law Standards’, in J Austin, C Bruch, (eds), *The Environmental Consequences of War* (CUP 2000) 137-155.



tomary Law Study.<sup>20</sup> The first sentence of Rule 44 contains the obligation to pay ‘due regard’ to the environment, without linking it to a specific threshold. Correspondingly, the ICRC did not refer to the damage threshold when it included an obligation to take care of the environment in its ‘Guidelines on the Protection of the Environment in Times of Armed Conflict’<sup>21</sup> either. Also, several military manuals have not incorporated a damage threshold when taking care of the environment is required.<sup>22</sup> Furthermore, international environmental principles expressed in soft law documents, such as the Stockholm Declaration on the Human Environment,<sup>23</sup> the World Charter for Nature<sup>24</sup> or the Rio Declaration on Environment and Development<sup>25</sup> do not include any threshold when addressing an obligation to take care of the environment. Because the laws of armed conflict are ambiguous in regard to this specific issue, the ILC could have used this opportunity to disconnect the care obligation from the threshold and, in addition, thereby demonstrating the interplay with international environmental law. Such an approach would sit well with the obligations under Article 57(1) AP I,<sup>26</sup> reflecting the principle of precautions in attacks and the demand that ‘constant care’ is undertaken in relation to civilian objects, which include at least parts of the environment. It requires parties to minimise collateral damage and to undertake steps to spare civilians and civilian

<sup>20</sup> **Rule 44 Due Regard for the Natural Environment in Military Operations**

Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. 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. [...]

<sup>21</sup> The 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict provide: ‘(11) Care shall be taken in warfare to protect and preserve the natural environment.’ Published in (1996) 36 *Intl Rev of the Red Cross* 230-237.

<sup>22</sup> Extracts with the exact wording of the respective military manuals of Australia, Burundi, Côte d’Ivoire, Netherlands, UK, US Naval Handbook 2007 as well as the San Remo Manual are available at the ICRC’s website at <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule44](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule44)>.

<sup>23</sup> UN Doc A/Conf.48/14/Rev 1(1973); (1972) 11 *Intl Legal Materials* 1416.

<sup>24</sup> GA Res 37/7, UN GAOR 37th Sess Supp no 51 at 17, UN Doc A/37/51 (1982), (1983) 22 *Intl L Materials* 455.

<sup>25</sup> Principles no 2 and 24, UN Doc A/CONF.151/26 vol I (1992) 31 *Intl L Materials* 874.

<sup>26</sup> **Article 57 AP I Precautions in attack**

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects. [...]



objects.<sup>27</sup> The application of Article 57 AP I does not contain any threshold. Hence, the ILC could have elaborated further on how it applies specifically to the environment. Such an approach could have referred to international environmental principles and international environmental treaty law on how to safeguard the environment during an armed conflict. As highlighted by Pantazopoulos, it is an overarching principle to take care of the environment.<sup>28</sup> That is why we think it is a lost opportunity that Draft Principle 9[II] para. 2 preserves and contributes to cement the notion of a widespread, long-term and severe damage in order to obligate parties to take care of the environment during armed conflict. Keeping the threshold will render the Draft Principle inapplicable in most cases of warfare, unless the requirement of widespread, long-term and severe damage is properly explained in the commentaries in a manner that reflects environmental damage that actually may occur on the battlefield.

Lastly, in relation to the other Draft Principles applicable in the during-phase, we would like to add that we greatly appreciate the inclusion of Draft Principles 5 [I-(x)]<sup>29</sup> and 13 [II-5]<sup>30</sup> on protected zones.

<sup>27</sup> **Article 57 AP I Precautions in attack**

[...] 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 and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them; (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

<sup>28</sup> Pantazopoulos (n 1) 14.

<sup>29</sup> **Draft Principle 5 Designation of protected zones**

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

<sup>30</sup> **Draft Principle 13 Protected zones**

An area of major environmental and cultural importance designated by agreement

Establishing protected areas is an important tool within international environmental law to secure biodiversity for instance. However, a link to environmental treaties such as the World Heritage Convention,<sup>31</sup> the Ramsar Convention on International Wetlands<sup>32</sup> and the Biological Diversity Convention<sup>33</sup> could have been emphasised more strongly; the commentary to Draft Principle 5 [I-(x)] refers to the World Heritage Convention and the Biological Diversity Convention only with regard to cultural aspects and indigenous peoples.<sup>34</sup> The reference to cultural important areas, however, and linking it to rights of indigenous peoples is a very significant contribution that the ILC is making. Nevertheless, both Draft Articles should have been used by the Commission, in addition, to highlight the interplay between the laws of armed conflict, international environmental law and human rights law. To specifically assess how protected zones, such as natural heritage sites, demilitarized zones and the protected lands of indigenous peoples, and their respective legal protection interact with each other would have been another valuable path the ILC could have taken. This unifying and complementing approach in line with the fragmentation debate could have led to a more dogmatic assessment, but with highly practical implications on the ground.

### 3. *The Draft Principles applicable in the post-phase – a reply to Hulme*

The second contribution that we respond to deals with the Draft Principles applying in the post-phase. It is challenging to codify principles for the pre- and post-phases as there is no clear legal framework to

as a protected zone shall be protected against any attack, as long as it does not contain a military objective.

<sup>31</sup> Convention Concerning the Protection of the World Cultural and Natural Heritage, 1037 UNTS 151; 27 UST 37; (1972) 11 Intl L Materials 1358 (World Heritage Convention).

<sup>32</sup> Convention on Wetlands of International Importance especially as Waterfowl Habitat 996 UNTS 245; TIAS 11084; (1972) 11 Intl L Materials 963 (Ramsar Convention).

<sup>33</sup> Convention on Biological Diversity 1760 UNTS 79; (1992) 31 Intl L Materials 818 (Biological Diversity Convention).

<sup>34</sup> ILC, 'Report of the International Law Commission on the Work of its 68th session' (2016) UN Doc A/71/10, ch X, 323, paras 6, 9 and 11.





base such principles on, in particular regarding the post-conflict phase, as pointed out by Hulme.<sup>35</sup> There is, however, a growing scholarly literature on the framework on *jus post bellum* and transitional justice looking at rules that apply in the aftermath of armed conflict,<sup>36</sup> which the Commission could consult in its future work. Regarding the post-phase, we address and highlight two of the issues that were raised by Hulme: anthropocentrism and human rights as well as the issue of remnants of war.

In the post-phase, the legal fields of human rights law and international environmental law need to be explored more; their interaction with the laws of armed conflict should be further assessed. Hulme cites criticism regarding human rights and their anthropocentric approach to the topic,<sup>37</sup> but interestingly the laws of armed conflict as well as international environmental law all started out following an anthropocentric approach,<sup>38</sup> which only eventually led to protecting the environment as such. The legal protection for the sake of the people, a shared basis of all three legal fields, should not be used as an argument to exclude human rights from the topic. It is agreed today that human rights law does continue to apply during armed conflict.<sup>39</sup> Hence, human rights could

<sup>35</sup> Hulme (n 2) 30.

<sup>36</sup> For further reading see C Stahn, “Jus ad bellum”, “jus in bello” ... “jus post bellum”? – Rethinking the Conception of the Law of Armed Force’ (2006) 17 *European J Intl L* 921-943; D Fleck, ‘Jus Post Bellum as Partly Independent Legal Framework’ in C Stahn, J Easterday, J Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (OUP 2014) 43-57. On the particular issue of protecting the environment in post-conflict, see B Sjöstedt, ‘Protecting the Environment During and After Armed Conflict through Multilateral Environmental Agreements’ in C Stahn, J Easterday, J Iverson (eds) *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles and Practices* (OUP 2017) (forthcoming).

<sup>37</sup> Hulme (n 2) 33.

<sup>38</sup> Regarding human rights, see A Boyle, ‘Human Rights or Environmental Rights: a Reassessment’ (2011) 1 *Human Rights and the Environment* 472, 484; KF Braig, ‘Umweltschutz durch die Europäische Menschenrechtskonvention’ (Helbing&Lichtenhahn 2013) 277. Regarding international environmental law, see S Emmenegger, A Tschentscher, ‘Taking Nature’s Rights Seriously: The Long Way to Biocentrism in Environmental Law’ (1993) 6 *Georgetown Intl Environmental L Rev* 545-592; D Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2010) 6, 58 ff. For the laws of armed conflict, see D Fleck, *The Handbook of International Humanitarian Law* (OUP 2013) paras 102, 211.

<sup>39</sup> See eg Resolution XXIII on Human Rights in Armed Conflicts of the 1968 UN Conference on Human Rights, UN Doc A/CONF.32/41 adopted on 12th May 1968 or UNHCHR, ‘International Legal Protection of Human Rights in Armed Conflicts’. Re-

complement the legal protection offered by the laws of armed conflict and international environmental law. Furthermore, there is vast case law on human rights and the environment,<sup>40</sup> with great potential for armed conflicts as stated in the second report of Special Rapporteur Jacobsson.<sup>41</sup> Generally speaking, the dependence on a sound environment to fully enjoy human rights is crucial and could be stated more strongly in the Draft Principles, since this is also true in context of armed conflict. Specifically, human rights such as the right to life, the right to property, or right to water can also clarify and complement the protection of the environment in relation to armed conflict.

garding case law on human rights and armed conflict, see eg ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep para 106; Human Rights Committee, General Comment 29, States of Emergency (Article 4), UN Doc CCPR/C/21/Rev.1/Add.11 (2001) para 3; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel (31 August 2001) UN Doc E/C.12/1/Add.69. For doctrine, see J d'Aspremont, 'Articulating International Human Rights and International Humanitarian Law: Conciliatory Interpretation under the Guise of Conflict of Norms-Resolution' in P Merkouris, M Fitzmaurice (eds), *The European Convention on Human Rights and the UK Human Rights Act* (Brill/Martinus Nijhoff Publishers 2011) 1-31; M Molango, 'The Right of Property in Situations of Armed Conflict: The Application of IHL Principles by the European Court of Human Rights' (2008) available at <[http://works.bepress.com/maheta\\_molango/2/](http://works.bepress.com/maheta_molango/2/)>; C Droegge, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 *Israel L Rev* 310-355; N Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87 *Intl Rev Red Cross* 737-754.

<sup>40</sup> See eg several cases of the Inter-American Court of Human Rights: *Plan de Sánchez Massacre v Guatemala* (merits) case no C-105 (29 April 2004) paras 42(7), 47; *Plan de Sánchez Massacre v Guatemala* (reparations) case no C-116 (19 November 2004) para 73; *Ituango Massacres v Colombia* (preliminary objections, merits, reparations and costs) case no C-148 (1 July 2006) paras 182-183; *Santo Domingo Massacre v Colombia*, (preliminary objections, merits and reparations) case no C-259 (30 November 2012) paras 228-229, 279; *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (preliminary objections, merits, reparations and costs), case no C-270 (20 November 2013) paras 346, 352, 354, 356, 459. For the European Court of Human Rights, see *Mentes and Others v Turkey* App no 23186/94 (28 November 1997) paras 13, 21, 23, 76; *Isayeva and Others v. Russia* App no 57947/00 (24 February 2005) paras 171, 230-233; *Esmukhambetov and Others v Russia* App no 23445/03 (29 March 2011) paras 150 and 174-179; *Benzer and Others v Turkey* App no 23502/06 (12 November 2013) paras 133, 184, 207, 212 and 213.

<sup>41</sup> Cf. M Jacobsson, 'Second report on the protection of the environment in relation to armed conflicts' (28 May 2015) UN Doc. A/CN.4/685, paras 116-119.



Turning to the second point of the post-conflict phase regarding remnants of war, Draft principles 16<sup>42</sup> and 17<sup>43</sup> surprisingly refer to weapons law, which was first excluded by the Special Rapporteur from the analysis.<sup>44</sup> We have doubts on whether these Draft Principles are motivated by the need to protect the environment as such. Interestingly – and the Special Rapporteur stated so in the third report<sup>45</sup> – the contamination of areas with hazardous remnants can protect the environment from harm caused by humans: remnants can actually keep humans out, which means the flora and fauna, as long as a remnant is not toxic or chemical, can recover and increase. Nevertheless, Draft Principle 16 does not only explicitly refer to toxic remnants that pollute the environment, but takes into consideration hazardous ones as well. We believe that the term ‘hazardous’ needs further clarification in this context. For instance, does it refer to ‘hazardous to human health’ or ‘hazardous to the environment’? In the report, the terminology was not clarified, but the references to remnants are mainly based on landmines, unexploded munitions and non-explosive devices, thus directing towards a meaning of hazardous in terms of threatening human health.<sup>46</sup> We do agree with Hulme when she states that the expressed reference to the damage or risk of damage that the remnants cause to the envi-

<sup>42</sup> **Draft Principle 16 Remnants of war**

1. After an armed conflict, parties to the conflict shall seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment. Such measures shall be taken subject to the applicable rules of international law. 2. The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic and hazardous remnants of war. 3. Paragraphs 1 and 2 are without prejudice to any rights or obligations under international law to clear, remove, destroy or maintain minefields, mined areas, mines, booby-traps, explosive ordnance and other devices.

<sup>43</sup> **Draft Principle 17 Remnants of war at sea**

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

<sup>44</sup> Cf M Jacobsson, ‘Preliminary report on the protection of the environment in relation to armed conflict’ (30 May 2014) UN Doc A/CN.4/674, para 66.

<sup>45</sup> Cf M Jacobsson, ‘Third report on the protection of the environment in relation to armed conflicts’ (3 June 2016) UN Doc A/CN.4/700, para 240.

<sup>46</sup> *ibid* para 233.

ronment is an immense achievement.<sup>47</sup> However, this is only correct regarding toxic remnants. Hazardous remnants directed against human health do not harm the environment: they keep humans out of the ‘contaminated’ area and render agricultural land and property inaccessible.<sup>48</sup> They thus do not fall within the category of hazardous remnants described in Draft Principle 16. In this case, we must disagree and would recommend to the new Special Rapporteur to clarify the issue.

#### 4. *Is the ILC’s work enhancing protection for the environment?*

Now turning to the more overarching remarks on whether the ILC’s work contributes to enhance environmental protection in an armed conflict context, we would like to express our agreement with Pantazopoulos and Hulme on two issues: namely the role that the Special Rapporteur has played in taking the topic to its current place on the ILC’s agenda; and the adoption of a temporal approach.

We fully endorse the appreciation of the work of Special Rapporteur Jacobsson expressed by both Hulme and Pantazopolous. Being privileged to have been able to follow the work closely since its incorporation on the Commission’s long-term agenda of work in 2011 and the appointment of Jacobsson as Special Rapporteur in 2013, we know that it has been a challenging task – both in a legal as well as strategic sense. The legal difficulties have consisted of finding a balance between codifying rules in an area that is characterised by its fragmented and unclear rules and where the environment is protected differently depending on the lens it is assessed under, i.e. whether it is under the laws of armed conflict, human rights law or international environmental law. The strategic challenges lie in being able to persuade the members of the Commission as well as seeking approval of the States in the 6<sup>th</sup> Committee. The Commission and its members as well as the States in the 6<sup>th</sup> Committee may not always be in agreement. For handling such a task there is a need to recognise that many of the members in the ILC as well as many States in the 6<sup>th</sup> Committee are positive towards a strong environmental protection in relation to armed conflict and willing to

<sup>47</sup> Hulme (n 2) 38.

<sup>48</sup> Eg Jacobsson (n 46) 253.

develop it further. At the same time, several of the members of the ILC and (often militarily powerful) States have had a hard time to accept openly any new written rules limiting the conduct of warfare – regardless of what is being discussed, but they are even more skeptical with regard to the environment. Nevertheless, the Special Rapporteur has skillfully maneuvered the topic on a thorny and tricky path to bring it so far ahead. Special Rapporteur Jacobsson has done a tremendous job that sets the foundation for the topic. At the same time, her approach as well as comments by the other members, by States and by scholars have revealed that one question of great interest has still remained unanswered: How do the three fields of international law regulating the topic, namely the laws of armed conflict, international environmental law and human rights law, actually interplay and impact each other? This brings us to our next point regarding the temporal approach, which allows for a demonstration of a possible interplay.

We join the praise of the Special Rapporteur's choice for the temporal approach.<sup>49</sup> Hulme describes it as a novel approach that offers an outlook from different angles and can take new considerations into account.<sup>50</sup> We agree that the approach allows for a fresh gaze on a topic that has been debated among international scholars for decades.<sup>51</sup> In addition, adopting a temporal approach one can opt for innovative legal solutions when dealing with obligations traversing the laws of armed conflict, international environmental law, and human rights law, thereby potentially averting the phenomena of fragmentation in the international legal system. However, despite the temporal approach being a novel idea, we must also express disappointment that it has not quite fulfilled the expectations of integrating and bringing closer legal fields. The topic is still being studied under one legal field at a time, and the obligations across the fields have not been sufficiently integrated in our opinion. For instance, in regard to the *during-phase*, the rules have mostly been studied under the laws of armed conflict and most of the Draft Principles adopted so far are a re-statement of the unclear rules of

<sup>49</sup> Hulme (n 2) 29; Pantazopoulos (n 1) 7.

<sup>50</sup> Hulme (n 2) 29.

<sup>51</sup> Particularly since the Vietnam War in the 1960-1970s and the use of Agent Orange, and again in the 1990s, after the Iraqi invasion of Kuwait when Iraqi troops intentionally spilled millions of barrels of oil into the Gulf and set oil wells on fire creating a burning inferno polluting the air.

the laws of armed conflict. Here it would have been preferable in our view to see more of the interplay of the various fields of international law. For instance, the environmental principle on inter-generational equity (considering the rights of future generations) could be further assessed in relation to collateral damage requiring the military to take into account long-term damages of an attack when applying the principle of proportionality. Also, when assessing environmental damage, the Draft Principles could have made references to the uncertainty of environmental damage and how environmental protection requires a holistic protection.<sup>52</sup> A more thorough assessment of the connection of pre- and post-conflict phase<sup>53</sup> could also shed some light not only on the interplay of various fields of law, but also on the transition from peace to conflict and *vice versa*.<sup>54</sup> In addition, based on the ILC's work on the 'Effects of Armed Conflict on Treaties,' it would have been useful to investigate specific treaty obligations deriving from international environmental law that continue to apply during situations of armed conflict.<sup>55</sup> Regarding human rights law, a Draft Principle that specifically refers to the right to water could have been re-stated in the during-phase, as well as the right to life and its relevance in this context. We would have liked to see an analysis of how principles of international environmental law and treaty obligations across fields of international law interact with the laws of armed conflict. In sum, the choice of the temporal approach is excellent, but it has not reached its full potential yet.

To conclude, has the ILC contributed to enhance the protection of the environment in relation to armed conflict? Surely, the assessment of

<sup>52</sup> B Sjöstedt, 'The Reconciliatory Approach: How Multilateral Environmental Agreements Can Harmonize International Legal Obligations' in A Jakubowski, K Wierczyńska (eds) *The Arguments on Fragmentation and Constitutionalisation: An Inquiry into the Practice of International Law* (Routledge 2016) 265-287.

<sup>53</sup> Cf Jacobsson (n 46) para 98.

<sup>54</sup> For arguments and examples on linking pre and post-conflict phase, see A Dienelt, 'After the War is Before the War: The Environment, Preventive IHL Measures and Their Post Conflict Impact' in C Stahn, J Iverson, J Easterday (eds) *Environmental Protection and Transitions from Conflict to Peace – Clarifying Norms, Principles, and Practices* (OUP 2017) (forthcoming).

<sup>55</sup> For further reading, see B Sjöstedt, 'The Role of a Multilateral Environmental Agreements: Greenkeeping in Virunga Park – Applying the UNESCO World Heritage Convention in the Armed Conflict of the Democratic Republic of the Congo' (2013) 82 *Nordic J Intl L* 129-153.



the legal framework conducted by the ILC is a constructive way forward to gather scattered rules. However, the Draft Principles need to be drafted carefully with explanatory commentaries. Otherwise they may become a reproduction of unclear rules contributing to even more fragmentation and ambiguity regarding the topic. If the Commission manages to codify the interplay of the laws of armed conflict, international environmental law and human rights law, the work of the ILC will not only be helpful to protect the environment, but it will also be a valuable contribution to international scholarship in the fragmentation debate.