



# **Briefing paper: Strengthening the International Law Commission's newly adopted draft principles on the protection of the environment in relation to armed conflicts**

October 2019

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## **Introduction**

CEOBS welcomes the adoption of the entire set of the draft principles and their commentaries on the *Protection of the environment in relation to armed conflicts* (PERAC) on first reading during the International Law Commission's (ILC) 2019 session.<sup>1</sup> During this session, the ILC also adopted eight new draft principles. These are the focus of this briefing, which identifies opportunities to strengthen or clarify their terms.<sup>2</sup> In addition, this briefing also highlights two themes that should be further addressed by the Commission and states during the UN General Assembly's Sixth Committee debate on the work of the ILC.

As the PERAC project is nearing its completion, with the final adoption of the draft principles due to take place in 2021, we urge all states to adopt the outcome of the ILC's work on PERAC and to begin developing reporting mechanisms to support their implementation.<sup>3</sup>

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1. For the text of the draft principles, see ILC, 'Report of the International Law Commission on the Work of its 71st Session' (29 April-7 June and 8 July-9 August 2019) UN Doc. A/74/10, Chapter VI 'Protection of the environment in relation to armed conflicts', Section C: Text of the draft principles on protection of the environment in relation to armed conflicts, adopted by the Commission on first reading, 211-15 <https://undocs.org/en/A/74/10>

2. Many of the points raised herein draw on our earlier work, see, 'New UN legal report addresses the responsibility of states and corporations for environmental damage in conflict' (21 May 2019), available at <https://ceobs.org/new-un-legal-report-addresses-the-responsibility-of-states-and-corporations-for-environmental-damage-in-conflict>; 'UN lawyers approve 28 legal principles to reduce the environmental impact of war' (16 July 2019), available at <https://ceobs.org/un-lawyers-approve-28-legal-principles-to-reduce-the-environmental-impact-of-war>

3. CEOBS' provisional study of the United Kingdom's practice on the PERAC draft principles can be found at <https://ceobs.org/report-the-united-kingdoms-practice-on-the-protection-of-the-environment-in-relation-to-armed-conflicts>

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## **Conflict and Environment Observatory (CEOBS)**

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[contact@ceobs.org](mailto:contact@ceobs.org) | [www.ceobs.org](http://www.ceobs.org) | @detoxconflict | +44 (0) 300 302 1130 | charity number 1174115

# 1. Comments on the eight new draft principles (DPs) adopted during the ILC's 2019 session

## 1.1 DP8 Human displacement

States, international organizations and other relevant actors should take appropriate measures to prevent and mitigate environmental degradation in areas where persons displaced by armed conflict are located, while providing relief and assistance for such persons and local communities.

### Background

DP8 concerns 'both international and internal displacement', while the terms 'relief and assistance' 'refer generally to the kind of assistance involved where human displacement occurs'.<sup>4</sup> The principle deals with situations that may arise both during and after armed conflicts. DP8 reflects developing practice in the humanitarian sector and is to be commended.

### How could it be strengthened?

The protective function of DP8 could be strengthened by expanding its scope to cover the geographical areas crossed by displaced persons, as the environment of these areas can also become stressed.

An example of this was the movement of Iraqi refugees to Jordan following the Iraqi invasion and occupation of Kuwait, which was the subject of a claim brought by Jordan before the UN Compensation Commission.<sup>5</sup> The refugees fled with their livestock and, in the process, large tracts of the Jordanian Badia – a fragile dryland ecosystem – were affected by overgrazing. Shrubs that take decades to grow and stabilise were degraded and destroyed in a matter of weeks and months.

## 1.2 DP9 State responsibility

1. An internationally wrongful act of a State, in relation to an armed conflict, that causes damage to the environment entails the international responsibility of that State, which is under an obligation to make full reparation for such damage, including damage to the environment in and of itself.

2. The present draft principles are without prejudice to the rules on the responsibility of States for internationally wrongful acts.

### Background

The first paragraph of DP9 on State responsibility adjusts the general framework of the law on state responsibility, as elaborated by the ILC in its 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts,<sup>6</sup> to the circumstances of a violation of international law that causes wartime environmental damage. This includes a provision whereby pure environmental damage can be addressed by reparations. This principle was established by the UN Compensation Commission and used in a peacetime context by the International Court of Justice in its 2018 compensation judgement in the case between Costa Rica and Nicaragua.<sup>7</sup>

### How could it be strengthened?

DP9 comprises a restatement of international law, adjusted to environmental damage caused during armed conflict, and should be accepted by states. However, two points warrant consideration.

4. See ILC, 'Report of the International Law Commission on the Work of its 71st Session' (n 1), commentaries to draft principle 8, 232, para 1 and 234, para 7.

5. See <https://uncc.ch/hashemite-kingdom-jordan>

6. ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' A/CN.4/SER.A/2001/Add.1 (Part 2), Report of the Commission to the General Assembly on the work of its fifty-third session' (23 April to 1 June and 2 July to 10 August 2001) *Yearbook of the International Law Commission*, Vol. II.

7. *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica, Judgment of 2 February 2018, para 42, available at <https://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-00-EN.pdf>

Firstly, DP9 does not engage with the responsibility of non-state armed groups (this topic is treated in more detail in section 2.1 below). Secondly, DP9's commentaries currently refer to a non-exhaustive list of fields of international law whose rules apply in relation to armed conflict, such as the law of the use of force and international human rights law; in our view this would be strengthened by an explicit reference to international environmental law.<sup>8</sup>

### 1.3 DP10 and DP11 Corporate due diligence and liability

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

States should take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories can be held liable for harm caused by them to the environment, including in relation to human health, in an area of armed conflict or in a post-armed conflict situation. Such measures should, as appropriate, include those aimed at ensuring that a corporation or other business enterprise can be held liable to the extent that such harm is caused by its subsidiary acting under its *de facto* control. To this end, as appropriate, States should provide adequate and effective procedures and remedies, in particular for the victims of such harm.

#### Background

DP10 and DP11 build on the “protect, respect and remedy” framework established by the 2011 UN Guiding Principles on Business and Human Rights.<sup>9</sup> They also draw from other non-binding initiatives, such as the 2011 OECD Guidelines for Multinational Enterprises.<sup>10</sup> DP10's explicit reference to “natural resources” demonstrates the important role that the extractive industries may play in the context of an armed conflict.

By addressing the topic of corporate liability, DP11 complements DP10. DP11's second sentence attends to the relationship between the parent entity and its subsidiary, setting the threshold of corporate parent liability at the level of ‘*de facto*’ control. This is a welcome development that reflects trends in domestic case-law. DP11's third sentence encourages states to provide adequate and effective procedures and remedies. It draws on guiding principle 25 of the UN Guiding Principles on Business and Human Rights,<sup>11</sup> which provides for the duty of states to grant access to effective remedy to those affected by business-related human rights abuses.

#### How could they be strengthened?

The reference to ‘adequate and effective procedures and remedies’ should be strengthened by referring explicitly in the commentaries to substantive reparations as an inextricable component of such remedies.<sup>12</sup>

8. See ILC, ‘Report of the International Law Commission on the Work of its 71st Session’ (n 1), commentaries to draft principle 9, 235, para 3.

9. Available at [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

10. Available at <http://www.oecd.org/daf/inv/mne/48004323.pdf>

11. ‘As part of their duty to protect against business-related human rights abuse, States must 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.’ Guiding Principle 25, 2011 UN Guiding Principles on Business and Human Rights (n 9).

12. In Van Ho's words, when commenting on the recent General Comment no. 24, which was adopted by the Committee on Economic, Social and Cultural Rights (CESCR), ‘establishing expectations in the area of business and human rights often note the need for procedural remedies capable of holding businesses accountable without addressing the importance of those processes being capable of ordering the full range of substantive remedies a victim may need and be entitled to. This could inadvertently lead tribunals to favor financial compensation over other, often more difficult but quite necessary, forms of substantive reparations.’ Tara Van Ho, ‘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)’ (2019) 58(4) *International Legal Materials*, 872, 873.

## 1.4 DP12

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

In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

### Background

Since its first inclusion in the 1899 Hague Convention II,<sup>13</sup> the Martens clause has been stipulated or reformulated in numerous international humanitarian law (IHL) treaties. The Martens clause establishes the minimum standard of conduct for both states and non-state actors, but it aspires to achieve more positive outcomes in that it encourages its addressees to surpass standards specified within existing international law.<sup>14</sup> By virtue of the importance that the international community attaches to environmental protection, it is appropriate for it to be covered by all three sources of protection articulated in the Martens clause.<sup>15,16</sup> This formulation of the Martens clause applies both during armed conflicts, and in situations of occupation.

### How could it be strengthened

No changes are suggested to DP12 or its commentaries. States should be aware that during the 2019 ILC plenary, a few members sought to argue that the ‘principles of humanity’ do not encompass the environment, since they have been traditionally understood to only protect human beings. DP12’s commentaries forcefully and rightfully rebut this, not only because the Martens clause contains this phrase in all its formulations, but more importantly to evince ‘that humanitarian and environmental concerns are not mutually exclusive’.<sup>17</sup> Finally, we urge states to include consideration of the Martens clause in their weapon reviews (see also section 2.2 below).

## 1.5 DP18

# Prohibition of pillage

Pillage of natural resources is prohibited.

### Background

The prohibition against pillage comprises a well-established and widely accepted prohibition in IHL,<sup>18</sup> which covers occupied territories, international and non-international armed conflicts.<sup>19</sup> The prohibition

13. See Antonio Cassese, ‘The Martens Clause: Half a Loaf or Simply Pie in the Sky?’ (2000) 11 *European Journal of International Law* 187, 193-8.

14. Jeffrey Kahn, ‘Protection and Empire: The Martens Clause, State Sovereignty, and Individual Rights’ (2016) 56 *Virginia J Int’l L* 1, 48.

15. These three sources are: a) established custom, b) the principles of humanity, and c) the dictates of public conscience.

16. Michael Bothe and others, ‘International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities’ (2010) 92 *International Review of the Red Cross* 569, 589. In contradistinction to this view, it was argued at the 2019 ILC plenary that the ‘principles of humanity’ do not encompass the environment, since they have been traditionally understood to protect human beings.

17. ILC, ‘Report of the International Law Commission on the Work of its 71st Session’ (n 1), commentaries to draft principle 12, 249, para 7, citing *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 241, para 29 (‘The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn’).

18. The prohibition of pillage was enshrined in the early codifications of IHL. Art 44, Instructions for the Government of Armies of the United States in the Field, originally adopted as General Orders No. 100: The Lieber Code (24 April 1863) (Washington D.C., Government Printing Office, 1898); arts 18 and 39, the Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 August 1874) (Brussels Declaration).

19. In the context of international armed conflicts, see arts 28 and 47, Hague Convention IV; art 33(2), Convention IV relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV). In the context of non-international armed conflicts, see art 4(2)(g), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted

has been widely incorporated into national legislation, as well as in military manuals.<sup>20</sup>

The pillage of natural resources has garnered the interest of the international community on numerous occasions. It helped inspire the establishment of the Kimberley Process Certification Scheme,<sup>21</sup> as well as private sector initiatives to ensure that natural resources are traded fairly and do not help finance armed conflicts. In 2005, the International Court of Justice held Uganda responsible for ‘looting, plundering and exploitation of natural resources’, including diamonds, gold and coffee, in the territory of the Democratic Republic of Congo, regarding it as pillage, and therefore prohibited under articles 47 of the Hague Convention IV and 33 of the Geneva Convention IV.<sup>22</sup>

### **How could it be strengthened?**

No changes are suggested to DP18 or its commentaries. States should note that the prohibition of pillage of natural resources applies during both armed conflicts and in situations of occupation. In this respect, we welcome the ILC’s reference in the commentaries that implicitly links DP21 on the sustainable use of natural resources by an occupying power to DP18: ‘the principle of self-determination may be invoked in relation to the exploitation of natural resources in territories under occupation, particularly in the case of territories that are not part of any established State.’<sup>23</sup>

## **1.6 DP19 Environmental modification techniques**

In accordance with their international obligations, States shall not engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State.

### **Background**

DP19 is inspired by article I of the ENMOD Convention,<sup>24</sup> which prohibits the deliberate manipulation of the environment. DP19 could be applicable during a non-international armed conflict in cases where the environmental modification techniques cause damage in the territory of another state.<sup>25</sup>

### **How could it be strengthened?**

No changes are required to DP19 or its commentaries. States should note that DP19’s wording has been crafted cautiously. This is evident from its introductory phrase, which refers to the treaty obligations of states parties to the ENMOD Convention. It is also apparent from the caveat introduced in the commentaries regarding the customary law equivalent of the norm enshrined in DP19: ‘to the extent that the

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8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II).

20. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (CUP 2009) 182-5, Rule 52, ‘Pillage is prohibited’.

21. The Kimberley Process Certifications Scheme was set up by and then endorsed by the UN. For further information, see <https://www.kimberleyprocess.com/en>

22. *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 168, 252, para 245.

23. ILC, ‘Report of the International Law Commission on the Work of its 71st Session’ (n 1), commentaries to draft principle 21, 277, para 5 [citation omitted].

24. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (adopted 10 December 1976, entered into force 5 October 1978) 1108 UNTS 152 (ENMOD Convention).

25. ILC, ‘Report of the International Law Commission on the Work of its 71st Session’ (n 1), commentaries to draft principle 19, 264, para 3 and sources cited therein.

## 1.7 DP26

### Relief and assistance

When, in relation to an armed conflict, the source of environmental damage is unidentified, or reparation is unavailable, States are encouraged to take appropriate measures so that the damage does not remain unrepaired or uncompensated, and may consider establishing special compensation funds or providing other forms of relief or assistance.

#### Background

DP26 is a recommendation to all states, and not only to former parties to an armed conflict. It makes a pragmatic proposal whereby reparation measures, relief and assistance can take place even without a determination of responsibility. These measures are vital for environmental remediation and for victim assistance. Although DP26 'makes no express reference to international organizations'; it should be read as also including states' provision of relief and assistance through international organisations.<sup>27</sup>

#### How could it be strengthened?

The inclusion of the principle of victim assistance in the commentaries to DP26 is welcome.<sup>28</sup> However, this connection could be expressed more explicitly, and the commentaries would benefit from a wider examination of the means through which victims of conflict-linked harm can be assisted.<sup>29</sup>

In light of the critical importance of post-conflict assistance for addressing harm to people and ecosystems, we would also encourage the ILC to revert back to the original formulation of DP26 (proposed draft principle 13 *quater* paragraph 2):

'When the source of environmental damage in armed conflict is unidentified, or reparation from the liable party unavailable, States *should* take appropriate measures to ensure that the damage does not remain unrepaired or uncompensated, and may consider the establishment of special compensation funds or other mechanisms of collective reparation for that purpose.'<sup>30</sup>

The original 'should' formulation was softened to 'are encouraged'. Reviving the Special Rapporteur's earlier phrasing would make a significant contribution to addressing harm.

26. Ibid, commentaries to draft principle 19, 264, para 2 [emphasis added]. The corresponding customary international law norm according to the ICRC Study on Customary International Humanitarian Law is Rule 45, pursuant to which '(d) destruction of the natural environment may not be used as a weapon'. Henckaerts and Doswald-Beck (n 21) 151, Rule 45.

27. ILC, 'Report of the International Law Commission on the Work of its 71st Session' (n 1), commentaries to draft principle 26, 292, para 5.

28. Ibid, 290-91, para 2.

29. In this context, victim assistance may include but is not limited to: medical care, rehabilitation, and psychological support; provisions for victims' social and economic inclusion; measures to facilitate participation in cultural life; acknowledgement of harm; remediation of damaged environments; access to accurate and comprehensive information regarding environmental risks; and measures to ensure victims can fully realise their human rights.

30. ILC, 'Second report on protection of the environment in relation to armed conflicts by Marja Lehto, Special Rapporteur', UN Doc. A/CN.4/728, para 162 [emphasis added], available at <http://legal.un.org/docs/?symbol=A/CN.4/728>

## 2. Gaps to be addressed

### 2.1 The conduct of non-state armed groups

The two draft principles on corporate environmental conduct in relation to armed conflict are a welcome contribution to the progressive development of the law. Nevertheless, the ILC shied away from addressing the responsibility of non-state armed groups for causing environmental damage in the course of armed conflicts. While this reluctance is understandable, this issue is a pressing one given the growth in non-international armed conflicts and the increasing number of non-state armed groups involved in them.<sup>31</sup>

The topic attracted much discussion at May's ILC plenary, with members suggesting a number of proposals. One member called for the adoption of state measures 'to ensure that persons who commit crimes that lead to the destruction of the environment during, before or after armed conflict are held criminally responsible'. Another proposed that states should provide for reparations by organised armed groups and their leaders for violations of environmental obligations under international law. A third suggested a principle on the duty of armed groups to provide reparations to victims of violations of the law of armed conflict, with due regard to the matter of environmental damage.

Neither DP9 on State responsibility nor DP26 fit squarely with addressing the responsibility and concomitant reparations owed for environmental damage caused by non-state armed groups in relation to armed conflicts. In light of the important contribution a principle on the responsibility of non-state armed groups could make to environmental protection, we urge the ILC to revisit this topic and dedicate a draft principle to it.

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### 2.1 The environmental impact of weapons

The second gap pertains to the impact of specific weapons on the environment. In spite of a relevant proposal, and interest from states during Sixth Committee debates, the ILC decided that a specific draft principle on the use of weapons was not required. Against this background, we would encourage the inclusion of a draft principle informed by article 36 of Additional Protocol I.<sup>32</sup>

Such a draft principle would call on states to conduct reviews into the environmental impact of weapons, to determine whether their employment would, in some or all circumstances, be prohibited by any applicable rule of international law. However, to be of value, such reviews should be open to external scrutiny, consider both lifecycle and public health implications, be updated as environmental knowledge develops and go beyond the simple criteria provided by Additional Protocol I's cumulative damage threshold of widespread, long-term and severe (articles 35(3) and 55(1)).

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31. See Sarah Owens, 'Report Launch: The Roots of Restraint in War', 18 June 2018, available at <http://intercrossblog.icrc.org/blog/report-launch-roots-of-restraint-in-war>

32. 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), art 36.

### 3. The way forward

The adoption of the draft principles on second reading is expected to take place in 2021. Until then, the ILC will have time to consider comments and observations from governments, international organisations and others.<sup>33</sup> These are to be submitted to the Secretary-General by 1 December 2020.

As mentioned above, the project would benefit immensely from the inclusion of two further draft principles, one dealing with the responsibility of non-state armed groups and the other on the environmental impact of weapons.

We urge all states to submit their views on the PERAC principles prior to December 2020. In this we would particularly encourage states affected by armed conflict to provide insights based on their national experiences.

We also strongly encourage all states to begin the process of transparently reviewing their practice against the benchmark provided by the draft principles. National reviews and reporting will form an important part of the dissemination and implementation of the PERAC principles, help to further mainstream the environment in policies and activities linked to armed conflict and ultimately help to reduce harm to people and ecosystems. For an example of how such a process could be undertaken, please see our preliminary review on the United Kingdom's practice.<sup>34</sup>

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33. These include the United Nations and its Environment Programme, the International Committee of the Red Cross and the Environmental Law Institute.

34. CEOPS provisional study of the United Kingdom's practice on the PERAC draft principles can be found at <https://ceobs.org/report-the-united-kingdoms-practice-on-the-protection-of-the-environment-in-relation-to-armed-conflicts>