

Protection of the environment in relation to armed conflicts

Joint civil society submission to the Secretary General of the International Law Commission following First Reading

May 2021

Key recommendations

The final text of the Draft Principles (DPs) on the 'Protection of the Environment in Relation to Armed Conflicts' (PERAC) should:

- 1. Include a new DP dealing with the responsibility of non-state armed groups (NSAGs).** Given the increasing number of non-international armed conflicts (NIACs) in contemporary times and the concomitant role that NSAGs tend to assume, the DPs should establish measures to prevent, remedy, and prosecute environmental damage, and associated human rights violations, caused by NSAGs;
- 2. Include a new DP recommending the establishment of an international mechanism to monitor the implementation of the DPs and make recommendations based on good policies and practices.** For the effectiveness of the DPs, it is indispensable to have an international mechanism tasked with monitoring and making recommendations regarding PERAC;
- 3. Include a new DP on the prohibition on attacking works or installations containing dangerous forces and objects indispensable for the civilian population,** such as water infrastructure, even where these objects are military objectives, if such attack may be expected to cause significant damage to the environment;
- 4. Ensure meaningful consultation with indigenous peoples and affected communities at all stages of environmental protection in relation to armed conflicts;**
- 5. Ensure that environmental protection is not used to legitimise prolonged occupation and/or annexation, and that the rights of the protected population are not undermined;**
- 6. Strengthen the DPs on remedial measures in order to require cooperation, assistance, and relief.** Such measures are necessary to ensure the DPs establish a comprehensive and effective framework for PERAC.

Submission prepared by:



AL-HAQ



Conflict and
Environment
Observatory



Submission endorsed by:



Please direct any correspondence regarding this submission to the Conflict and Environment Observatory: contact@ceobs.org

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Introduction

This joint submission contains comments, observations, and suggestions pertaining to the Draft Principles (DPs) and their commentaries on the topic of ‘Protection of the Environment in Relation to Armed Conflicts’ (PERAC), which the International Law Commission (ILC) adopted on first reading in July 2019. Pursuant to the invitation by the ILC,¹ this joint submission is addressed to the Secretary General of the ILC for consideration by the Commission in the context of adopting the PERAC DPs and their commentaries on second reading during the 73rd session of the ILC in 2022.

The co-authors would like to express their deep appreciation to the ILC, and in particular to the two Special Rapporteurs, the former one, Marie Jacobsson, and the current one, Marja Lehto, for the sustained and constructive engagement in developing a comprehensive set of principles. The ILC has brought to the fore the topic of PERAC and generated the interest of States and other stakeholders.

We hope that the PERAC DPs, in accordance with their purpose, will form a watershed moment in the history of PERAC, lead to better implementation of the relevant legal framework, and so enhance environmental protection. In this respect, we express our commitment to promote the DPs and highlight their importance in relevant fora.

Against this background, we submit certain comments and observations pertaining to the current text of the DPs and their commentaries, with the objective of bolstering their protective potential and scope.

General comments

Before delving into our specific suggestions on the wording of the DPs, and their commentaries, we think it is important to share our views on certain general themes that have attracted the attention of the ILC and States at the Sixth Committee of the United Nations General Assembly (UNGA).

The term ‘environment’

With respect to the issue of consistent terminology, we deem it is appropriate to refer to the ‘environment’ instead of the ‘natural environment’ throughout the document, including in Part Three on Principles applicable during armed conflict. This ensures consistency with the title of the DPs, and also broadens the scope of protection. Since the drafting of the 1977 Additional Protocol I to the 1949 Geneva Conventions, which refers to ‘natural environment’, many developments have occurred, especially in the field of international environmental law.

1. International Law Commission, ‘Report of the International Law Commission of its 71st session’ (29 April–7 June and 8 July–9 August 2019), A/74/10, Chapter VI ‘Protection of the environment in relation to armed conflicts’, 210, para 68 [2019 ILC Report].

For instance, the Geneva List of Principles on the Protection of Water Infrastructure (GLP), which systematize the main rules applicable to the protection of water infrastructure during armed conflicts, also adopted the term ‘environment’ instead of ‘natural environment.’

It is also quite telling that apart from Part Three no reference to the ‘natural environment’ is made throughout the text of the DPs, and more importantly, even within Part Three DP 12 refers to the ‘environment’.²

Normative value

We take note of the fact that certain delegations and ILC members have expressed concerns or made (critical) remarks regarding the normative value of the DPs. The ILC has skilfully navigated the occasionally fluid line between the codification and the progressive development of international law, indicating in the commentaries where appropriate when it delved into the first or the second prong of its mandate, as found in article 1 of the Statute of the ILC. In our view, comments questioning the normative value of the DPs at hand fail to take into account the dual mandate of the ILC, instead focusing exclusively on its codification component.

Proposals for the adoption of new principles

Before advancing our proposals on the current version of the DPs, we urge the ILC to consider adopting DPs on certain additional topics, as we strongly believe that they deserve stand-alone DPs.

Responsibility of non-State armed groups

In spite of the political challenges, we think it is important to include a DP dealing with the responsibility of NSAGs. Given the increasing number of NIACs in contemporary times and the concomitant role that NSAGs tend to assume, it is timely to take up this topic. The DPs should establish measures to prevent, remedy, and prosecute environmental damage, and associated human rights violations, caused by NSAGs.

Many ILC members and state delegations have voiced similar positions. For instance, 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 member proposed that states should provide reparations to

2. See Geneva Water Hub, ‘The Geneva List of Principles on the Protection of Water Infrastructure’ (GLP: Geneva, 2019), Principle 15 and its commentary. This reference document was prepared by the Geneva Water Hub and other organizations for the use of parties to armed conflicts, international organizations, and other practitioners working in the contexts of armed conflicts, including in pre- and post-conflict situations. In addition to compiling relevant rules, it sets forth recommendations which go beyond existing law.

victims of organised armed groups and their leaders for violations of environmental obligations under international law. A third suggested a principle calling on non-state armed groups to provide reparations directly to victims of violations of the law of armed conflict, with due regard to the matter of environmental damage.³ Certain States speaking at the UNGA Sixth Committee also urged the Commission to focus on this topic and others expressed their views on the appropriate way of regulating the topic under consideration.⁴

International cooperation and monitoring

We propose the addition of the following DP in Part Two of the DPs:

‘States should strengthen their cooperation on the protection of the environment in relation to armed conflicts and put in place an international mechanism to monitor the implementation of these draft principles and make recommendations based on good policies and practices.’

For the effectiveness of the DPs, it is indispensable to have an international mechanism tasked with monitoring and making recommendations regarding PERAC. The 2009 UNEP report on ‘Protecting the Environment During Armed Conflict’ noted the absence of a permanent international mechanism to monitor legal infringements and address compensation claims for environmental damage sustained during international armed conflict (IACs).⁵ Under its Recommendation No. 6, it mentioned that *‘A permanent UN body to monitor violations and address compensation for environmental damage should be considered’*.

While the Security Council established the UN Compensation Commission to process compensation claims relating to the 1990-1991 Gulf War, Member States of the United Nations may want to consider how a similar structure could be established as a permanent body, either under the General Assembly or under the Security Council. Such a body could investigate and make determinations regarding alleged violations of international law during international and non-international armed conflicts, as well as handle and process compensation claims related to environmental damage and loss of economic opportunities.⁶ The DPs provide an opportunity to establish an international mechanism that promotes good policies and practices on PERAC.

3. Conflict and Environment Observatory (CEOBS), ‘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, available at <https://ceobs.org/briefing-paper-strengthening-the-international-law-commissions-newly-adopted-draft-principles-on-the-protection-of-the-environment-in-relation-to-armed-conflicts/#3>

4. See Stavros Pantazopoulos, ‘CEOBS Report: 2019’s UN General Assembly debate on the protection of the environment in relation to armed conflicts’, December 2019, section 7, available at <https://ceobs.org/report-2019s-un-general-assembly-debate-on-the-protection-of-the-environment-in-relation-to-armed-conflicts/#3>

5. United Nations Environment Programme (UNEP), ‘Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law’, November 2009 (UNEP 2009) 51. See also C. Droegge and M.-L. Tougas, ‘The protection of the natural environment in armed conflict – existing rules and need for further legal protection’, *Nordic Journal of International Law*, vol. 82 (2013), 21–52, esp section 4.3.

6. UNEP, ‘Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law’ (n 5) 53.

Dangerous forces and indispensable objects

Moreover, we propose the following text, which could be added in Part Three of the DPs:

‘Works or installations containing dangerous forces and objects indispensable for the civilian population, such as water-infrastructure, should not be made the object of attack, even where these objects are military objectives, if such attack may be expected to cause significant damage to the environment.’

Under international humanitarian law (IHL), some categories of objects benefit from special protection. Under the IHL of both IAC and NIAC, objects indispensable for the survival of the civilian population, and works and installations containing dangerous forces such as dams, dykes, and nuclear facilities are covered under a special protection regime.⁷ IHL implies that, in principle, the latter category of objects may not be used for military purposes given that an attack would inflict serious harm to the environment and civilian population.⁸ Thus, such objects or nearby military objectives should not be made the object of attack if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population and significant damage to the environment.⁹

Though article 56 of Additional Protocol I, and article 15 of Additional Protocol II restricts the scope of ‘works and installations containing dangerous forces’ to dams, dykes, and nuclear facilities, according to the ICRC Study on Customary International Humanitarian Law, such protection should extend to chemical plants and petroleum refineries as attacks on such installations may cause severe damage to the civilian population and the natural environment.¹⁰ For instance, the destruction of oil rigs might result in oil spills into the internal or international waters and could have an acute impact on the environment.

States should extend the protection provided for dams and dykes to all water infrastructure containing dangerous forces both for the sake of the civilian population and the environment. The protection of water infrastructure indispensable for the civilian population covers much more infrastructure than the dams and dykes covered under ‘works or installations containing dangerous forces.’ Attacks against water-infrastructures will, directly and indirectly, affect the environment.¹¹ Water treatment plants and pumping stations may have reserves of toxic industrial chemicals, such as substances for the treatment of water, chlorine, or fuel for back-up generators, which can potentially have significant adverse effects on the environment if released. The damage to the environment can include the contamination of surface and ground-water resources, degradation of flora, fauna, and soil.

7. See ICRC Customary International Humanitarian Law Study Rules 42 and 54; Arts 54 and 56, Additional Protocol I to the Geneva Conventions; and arts 14 and 15, Additional Protocol II to the Geneva Conventions.

8. UNEP, ‘Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law’ (n 5) 52 (‘the general humanitarian principles of distinction, necessity, and proportionality may not be sufficient to limit damage to the environment’).

9. Information available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule42

10. Ibid.

11. See GLP (n 2) Principle 15 and its commentary.

Attacks on such infrastructure could also indirectly affect the environment since the civilian population depending on such infrastructure would either search for new means of procuring water, e.g. by drilling wells in an uncontrolled manner or migrate in masses which would have a destructive effect on the environment and cause a breakdown of the sustainable management of the water resources. Concerning the protection of water-infrastructure, the Berlin Rules on Water Resources adopted by the International Law Association (ILA) prohibit the destruction of water installations when such an act ‘would cause widespread, long-term, and severe ecological damage prejudicial to the health or survival of the population or if such acts would fundamentally impair the ecological integrity of waters.’¹²

The threshold of ‘not causing significant damage,’ which is used under this draft principle, is in line with the accepted standard under international law regarding damages to the environment. For instance, the International Court of Justice (ICJ) in the case concerning Pulp Mills on the River Uruguay, involving the issue of the protection of the environment, held that not to cause ‘significant damage’ to the environment is part of the corpus of international law relating to the environment.¹³ Likewise, the UN Watercourses Convention stipulates that in utilizing an international watercourse in their territories, watercourse States ‘take all appropriate measures to prevent causing of significant harm to other watercourse States.’¹⁴ Similarly, the ILA Madrid Rules refer to ‘substantial damage’ as a threshold for the protection of the ‘ecological balance’ during armed conflicts.¹⁵

The new DP and its commentaries should also address the criminal responsibility resulting from the breach of the protection afforded to works or installations containing dangerous forces. Attacks against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects (article 85(3)(c) of Additional Protocol I) consist of war crimes and entail individual criminal responsibility. In this regard, the ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict (Rule 28) note that States must investigate war crimes, including those that concern the natural environment, allegedly committed by their nationals or armed forces, or on their territory, or other war crimes over which they have jurisdiction, and, if appropriate, prosecute the suspects.

12. ILA, The Berlin Rules on Water Resources, Report of the 71st Conference (2004) (Berlin Rules), art 52. The Berlin Rules seek to clarify customary international law on water management and progressively develop the law to address new challenges.

13. *Case Concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay) (Judgment) 2010, ICJ Reports 14, para. 101.

14. See art 7, Convention on the Law of the Non-Navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) UNGA RES 51/229 (21 May 1997) UN Doc. A/RES/51/229.

15. ILA, Resolution on the Protection of Water Resources and Water Installations in Times of Armed Conflict, Report of the 57th Conference (1976) (Madrid Rules).

Comments on Part One – Introduction

DP 1 on ‘Scope’

We endorse the ILC’s choice not to explicitly differentiate between IACs and NIACs, as this approach is consistent with their gradual convergence under IHL. In any event, the ILC draws the necessary distinctions in the commentaries of the DPs, thus dispelling any doubts about the suitability of this approach.

Moreover, we commend the ILC for the temporal approach that was adopted. This approach, which has already been followed in other soft law instruments, such as the Geneva List of Principles on the Protection of Water Infrastructure, enabled the ILC to examine the legal protections relevant to the entire conflict cycle and thus render its work on PERAC a more comprehensive point of reference.

We recommend that DP 1 explicitly mention the applicability of the DPs to situations of occupation, as DP 1 covers the scope of application. By disjoining occupation from its relation to armed conflict the overall temporal structure tends to fold prolonged occupation with post-armed conflict. In a very real sense this can allow those seeking to annex territory a mechanism to consolidate such a status by reference to environmental concerns. We feel that all provisions referring to armed conflict should explicitly reference that they include occupation. Accordingly, we suggest the following change in the text of DP 1, which, like all proposed changes, are highlighted in italics:

‘The present draft principles apply to the protection of the environment before, during or after an armed conflict, including in situations of occupation.’

At a minimum, we suggest that such mention be made in the commentaries to DP 1.

Furthermore, and drawing on our suggestion to add a specific DP on NSAGs, we recommend including in the commentaries a sentence affirming that they are obligation-holders under IHL and acknowledging the growing acceptance that they also have obligations stemming from international human rights law. Such a sentence could be added to paragraph 3 of the commentaries to DP 1, which would harmoniously follow the proposition of a no-differentiation approach between IACs and NIACs, for the purposes of the current DPs.

DP 2 on ‘Purpose’

We suggest incorporating the protection of human rights into the purpose of the DPs. According to the Framework Principles on Human Rights and the Environment, ‘Human rights and environmental protection are interdependent. A safe, clean, healthy and sustainable environment is necessary for the full enjoyment of human rights...’¹⁶ While some DPs (DP 10, DP

16. In the Framework Principles, the then-Special Rapporteur on human rights and the environment, Mr. John H. Knox, pro-

11 and DP 20) already acknowledge the links between the environment and human health, the protection of the right to health and all other human rights should be an explicit common purpose of all DPs. If not possible to incorporate into DP 2, the point should be made in the commentaries to DP 2.

We welcome the emphasis on both preventing and remediating harm. DP 2 should be re-phrased as follows:

‘The present draft principles are aimed at enhancing the protection of the environment in relation to armed conflict, and in turn helping to promote the enjoyment of human rights. Such measures include ~~through~~ preventive measures for avoiding or minimizing damage to the environment during armed conflict and ~~through~~ remedial measures.’

Comments on Part Two – Principles of general application

DP 3 on ‘Measures to enhance the protection of the environment’

We recommend the following change to paragraph 11 of the commentaries regarding treaty-based obligations, and to its accompanying footnotes:

A large number of states have further obligations not to use weapons, such as landmines and cluster munitions, that contaminate the environment during and after conflict.¹⁷ These and other states also have treaty-based obligations to record the locations of and clear landmines, cluster munition remnants, and explosive remnants of war.¹⁸

DP 4 on ‘Designation of protected zones’

We want to commend the ILC for the adoption of DP 4 and its sister DP 17, since these DPs

poses 16 principles related to human rights and the environment that are based on existing work of the human rights system: United Nations Special Rapporteur on Human Rights and the Environment, Framework Principles on Human Rights and the Environment (A/HRC/37/59), 2018.

17. Art 1, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999), 2056 UNTS 211 (hereinafter Mine Ban Treaty); Art 1, Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010) 2688 UNTS 39.

18. See, for example, Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II, as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Geneva, 3 May 1996) (hereinafter, ‘amended Protocol II to the Convention on Certain Conventional Weapons’), 2048 UNTS 93; Art 5, Mine Ban Treaty; Art 4, Convention on Cluster Munitions; Arts 3-4, Protocol on Explosive Remnants of War, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol V) (Geneva, 3 May 1996), 2399 UNTS 100.

hold great potential to contribute to environmental protection. While we agree with the statement that ‘[t]he formulation [“areas of major environmental and cultural importance”] leaves open the precise meaning of this requirement on purpose, to allow room for development’, we call on the ILC to amend its wording so as to clarify that the conditions – environmental and cultural importance – could be fulfilled disjunctively. Considering that IHL allows for agreements on designating demilitarized zones on any basis, the fulfilment of one condition should be sufficient and we suggest the following phrasing:

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

DP 5 on ‘Protection of the environment of indigenous peoples’

We understand that DP 5 reflects an existing obligation under international law, as established, for example, in article 4(1) of the ILO Convention 169. Therefore, we suggest that both paragraphs of DP 5 be rephrased with ‘shall’ instead of ‘should’. International law also obliges States to obtain the free, prior and informed consent from indigenous peoples when applying measures which may affect them or their territories.¹⁹ Therefore, we propose the inclusion of an explicit mention to the obligation of obtaining the free, prior and informed consent in both paragraphs of DP 5.

Additionally, we urge the ILC to adopt established terminology pertaining to the environment of indigenous peoples. According to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), ‘[i]ndigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources ...’.²⁰ In light of the above, DP 5 should be rephrased to:

‘1. States ~~should~~ *shall* take appropriate measures, in the event of an armed conflict, to protect the environment, *including the land, territories, and resources traditionally owned, occupied, used or otherwise acquired by indigenous peoples. In taking such measures, States shall undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate*

19. Art 6, International Labour Organization (ILO) Convention (No. 169) concerning indigenous and tribal peoples in independent countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 U.N.T.S. 383; Arts 19, 29(1) and 30(2), UNGA, United Nations Declaration on the Rights of Indigenous Peoples: resolution /adopted by the General Assembly, 2 October 2007, A/RES/61/295, available at: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf. See also the related jurisprudence of regional human rights bodies: Case of the Sarakama People v. Suriname, Judgment (Preliminary Objections, Merits, Reparations, and Costs), Series C, No. 172, 28 November 2007, Inter-American Court of Human Rights, para 214(5); Centre for Minority Rights Development and Minority Rights Group International and Centre on Housing Rights and Evictions (intervening) (on behalf of Endorois Welfare Council) v Kenya, Merits, Comm 276/2003, 46th Ordinary Session (11-25 November 2009), 27th Activity Report, IHRL 3591 (ACHPR 2009), November 2009, African Commission on Human and Peoples’ Rights, para 291. See also, Committee on the Elimination of Racial Discrimination, General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 212 (2003), para 4(d).

20. Art 25, UNDRIP.

procedures and in particular through their own representative institutions, in order to obtain their free, prior and informed consent.'

'2. After an armed conflict that has adversely affected the environment of the land, territories, or resources that indigenous peoples inhabit traditionally own, occupy, or use, States shall take remedial measures, effectively consulting and cooperating with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, in order to obtain their free, prior and informed consent.'

DP 6 on 'Agreements concerning the presence of military forces in relation to armed conflict'

Given that the ILC itself acknowledges that DP 6 is 'not mandatory in nature',²¹ we propose the following amendment to the second sentence of paragraph 7 of the commentary to DP 6:

'First, agreements on the presence of military forces in relation to armed conflict are sometimes concluded under urgent circumstances in which issues of environmental protection should be addressed to the extent possible.'

DP 7 on 'Peace operations'

DP 7 indicates that international organisations assume some obligations, in particular, in situations of peace operations. However, there is no corresponding provision regarding their responsibility, as it is the case with States under DP 9. Accordingly, we suggest that the ILC address in the commentaries the responsibility of international organisations for environmental damage in relation to armed conflicts, including damage that results in human rights violations.

We also suggest that in the related commentaries the ILC highlight the need to undertake effective public consultations, particularly with affected persons and communities, at all stages of the decision-making process concerning remedies for environmental damage in the course of peace operations (similar to the wording of DP 5 on indigenous peoples). The Framework Principles on Human Rights and the Environment affirm that 'States should provide for and facilitate public participation in decision-making related to the environment and take the views of the public into account in the decision-making process'. It explains that 'such decision-making includes the development of policies, laws, regulations, projects and activities'.²² Such an inclusive approach is a well-established principle of victim assistance and analogous measures are found in disarmament treaties.²³

21. 2019 ILC Report, 228, commentaries to DP 6, para 2.

22. Framework Principles on Human Rights and the Environment (n 16) para 23.

23. See, for example, art 5(2), Convention on Cluster Munitions. See also Oslo Action Plan, APLC/CONF/2019/5/Add.1, adopted at the final plenary meeting on 29 November 2019, para 11, available at <https://www.osloreviewconference.org/fileadmin/APMBC-RC4/Fourth-Review-Conference/Oslo-action-plan-en.pdf>

DP 8 on ‘Human displacement’

The protective function of DP 8 could be strengthened by expanding its scope to cover the areas crossed by displaced persons, as the environment of these areas can also become stressed. For example, the movement of Iraqi refugees to Jordan following the Iraqi invasion and occupation of Kuwait was the subject of a claim brought by Jordan before the UN Compensation Commission.²⁴ 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. Accordingly, the text of DP 8 could read as follows:

‘States, international organizations and other relevant actors should take appropriate measures to prevent and mitigate environmental degradation in *both urban and rural areas* where persons displaced by armed conflict are located *and areas through which these persons transit*, while providing relief and assistance for such persons and local communities’.

In addition, we suggest that the commentaries to DP 8 clarify that the primary actors are States, and especially the territorial State and, in situations of occupation, the Occupying Power. We also suggest highlighting in the commentaries to DP 8 the role of other States and international cooperation in addressing environmental degradation.²⁵

Moreover, we think that the commentaries would be even more comprehensive should non-state armed groups be included in the list of ‘other relevant actors’, which are indicatively referenced in paragraph 7 of the commentaries to DP 8.

Lastly, we maintain that it would be more accurate to explicitly mention in paragraph 11 of the commentaries that:

‘conflict-related human displacement is a phenomenon that may have to be addressed during and after an armed conflict, *and in situations of occupation*.’

DP 9 on ‘State responsibility’

We suggest that the commentary to DP 9 mention the responsibility of States for human rights violations resulting from environmental damage in relation to armed conflicts.

Additionally, given that other DPs, such as DP 11, specify to whom remedies should go, we encourage the ILC to include a brief analysis in the related commentaries to DP 9, urging States to channel the granted reparations to the affected individuals and communities. As suggested in our comments to DP 7, the commentary to DP 9 should also highlight the need to undertake effective consultations with persons and communities affected at all stages of the

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

25. United Nations High Commissioner for Refugees, ‘Global Compact on Refugees’, UN Doc A/73/12 (Part II) (2 August 2018), paras 78-79.

decision-making process concerning the provision of remedies.

DP 10 on ‘Corporate due diligence’

We suggest that the DPs follow the UN Guiding Principles on Business and Human Rights and that they only use the term ‘business enterprises’, and delete ‘corporations’ altogether.²⁶ Accordingly, we recommend that the titles of both DP 10 and DP 11 change to ‘*Due diligence of business enterprises*’ (DP 10) and ‘*Liability of business enterprises*’ (DP 11), respectively.

Moreover, as raised in the commentaries to DP 2, we suggest that DP 10 explicitly refer to the relationship between environmental protection and all human rights, instead of limiting it to human health.

We also suggest that the second sentence of DP 10 be rephrased to explicitly include further activities relating to natural resources that can lead to negative environmental impacts, such as processing, trading, refining, etc. Consequently, we recommend that this be revised as follows:

‘Such measures include those aimed at ensuring that natural resources are purchased, obtained, or used in an environmentally sustainable manner.’

Additionally, we suggest that the obligation of business enterprises to respect and take into account applicable rules of IHL, international human rights law and international environmental law when they operate in an area of armed conflict, in situations of occupation, and in a post-armed conflict situation be included in the commentaries as a constituent element of the notion of ‘due diligence’. In fact, the applicable threshold in ‘complex operating environments including conflict-affected areas’ should be that of ‘enhanced due diligence’ and this development should be reflected throughout the DPs.²⁷

We also recommend that paragraph 12 of commentaries to DP 10 introduce a definition of ‘sustainable’.

The ILC should further clarify in the commentaries whether the term ‘area of armed conflict’ refers to areas where active hostilities are taking place or to areas falling within the territorial scope of IHL’s application. The scope of the phrase ‘area of armed conflict’ is less clear than that of ‘post-armed conflict situation’. This point applies equally to DP 11.

Furthermore, the ILC should note the UN database regarding companies involved in Israeli settlements.²⁸ This initiative could provide a useful basis for addressing the conduct of busi-

26. Available at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

27. Working Group on the issue of human rights and transnational corporations and other business enterprises, ‘Statement on the implications of the Guiding Principles on Business and Human Rights in the context of Israeli settlements in the Occupied Palestinian Territory’. 6 June 2014, at 9, available at <https://www.ohchr.org/Documents/Issues/Business/OPTStatement6June2014.pdf>

28. UN Doc. A/HRC/43/71 28 February 2020, available at: <https://undocs.org/en/A/HRC/43/71>. See also UN Independent

ness enterprises and should be referenced in the commentaries to either DP 10 or DP 11.

In addition, DPs 10 and 11 primarily refer to areas of armed conflict and post-armed conflict situations, and only indirectly cover situations of occupation through *renvoi* from footnote 1116. If one DP explicitly acknowledges application to occupation, the failure of another DP to make this connection might be read as excluding application to occupation, even if the general point is made elsewhere. Accordingly, we suggest the addition of an explicit reference to their applicability in situations of occupation in paragraph 13 of the commentaries to DP 10 and paragraph 12 of the commentaries to DP 11, respectively.

DP 11 on ‘Corporate liability’

As in DP 10, we suggest that DP 11 mention the relation between environmental protection and human rights, instead of restricting its reference to human health. We also urge the ILC to clarify that the liability of business enterprises encompasses both civil and criminal liability.

Additionally, we note that the use of the phrase ‘harm caused by them [corporations and other business enterprises]’, when discussing the liability of business enterprises for the actions of their subsidiaries, sets *prima facie* a high threshold. Therefore, it is important to read it together with the second paragraph of the commentaries to DP 11. Accordingly, we propose the following rephrasing to the second sentence of DP 11:

‘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 *or contributed to, by any entity which it controls or is able to control.*’

We suggest that, in addition to business enterprises, DP 11 cover individuals. For example, foreign individuals may incorporate companies locally (in the area of armed conflict or post-armed conflict situation) through which environmental harm is caused. It would also facilitate holding officers of business enterprises liable for crimes that caused environmental harm.

We also call on the ILC to strengthen the reference to ‘adequate and effective procedures and remedies’ by referring explicitly in the commentaries to substantive reparations as an inextricable component of such remedies, as well as to the need to undertake effective public consultation, particularly with persons and communities affected, following previous suggestions with respect to DPs 7 and 9.

Lastly, with respect to ‘adequate and effective procedures and remedies’, the commentaries should refer to non-state-based grievance mechanisms, in line with operational principles 28-31 of the 2011 UN Guiding Principles on Business and Human Rights.²⁹

International Fact-Finding Mission on Myanmar, ‘The economic interests of the Myanmar military’, UN Doc. A/HRC/42/CRP.3, 5 August 2019, available at: <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/EconomicInterestsMyanmarMilitary.aspx>

29. Available at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

Comments on Part Three – Principles applicable during armed conflict

DP 12 on ‘Martens clause with respect to the protection of the environment in relation to armed conflict’

We welcome the inclusion of DP 12, which powerfully evinces ‘that humanitarian and environmental concerns are not mutually exclusive’ (paragraph 7 of the commentaries to DP 12), and thus underscores that environmental impacts should be taken into account in Martens clause assessments.

DP 13 on ‘General protection of the natural environment during armed conflict’

We deem it beneficial to draw in the commentaries the linkage between the duty of care under DP 13(2) and the international environmental law principle of no-harm, as they both encompass, *inter alia*, a due diligence standard of conduct.

Moreover, the ILC commentaries mention that there are two approaches to using the three elements of ‘widespread’, ‘long-lasting/long-term’ and ‘severe’, cumulatively or as separate requirements. We suggest that the ILC follow the approach of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977 - i.e. to use the three conditions as *disjunctive* rather than as cumulative requirements. Accordingly, the ILC should take the lead to broaden the scope of this prohibition not only to ensure consistency between DP 13 (2) and DP 19, but also to align itself with the critical demand to strengthen protection for the environment.

We also suggest that the commentaries to DP 13 highlight that other rules of international law, such as international environmental law and international human rights law, continue to apply during times of armed conflict. Accordingly, we suggest that paragraph 5 of the commentaries to DP 13 be rephrased as follows:

‘...but that other rules of international law providing environmental protection, such as international environmental law and international human rights law, ~~remain relevant~~ *continue to apply*’.

Paragraph 7 of the commentaries to DP 13 states: ‘This includes international armed conflicts, understood in the traditional sense of an armed conflict fought between two or more States, as well as armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination; as well as non-international armed conflicts, which are fought either between a State and organized armed group(s) or between organized armed groups within the territory of a State.’

We are flagging this up as an example of why occupation needs to be clearly set out as a subset of armed conflict in a consistent manner. Here, for example, the concept of occupation is one of a fighting occupation, of an occupation that is being resisted through ‘hot’ military action, and as such is quite apart from the ‘secure’ and prolonged occupation that is referenced elsewhere. The commentary does acknowledge the range of factual ways that an occupation might manifest in practice yet the legal regime is singular and applies equally across all examples.

DP 14 on ‘Application of the law of armed conflict to the natural environment’

We suggest that paragraph 11 of the commentaries to DP 14 mention the parties’ duty to take precautions against the effects of attacks, in line with article 58(c) of Additional Protocol I and customary IHL.³⁰

DP 17 on ‘Protected zones’

As the DPs currently stand, it appears that, even though such areas can be designated as protected zones through multiple ways under DP 4, i.e., ‘through agreement *or otherwise*,’ only those designated by agreement would enjoy the protection afforded pursuant to DP 17. Accordingly, we concur with the view voiced at the 2019 UNGA Sixth Committee that DPs 4 and 17 should be harmonised so that ‘areas of major environmental and environmental importance’ benefit from the protection envisioned for protected zones,³¹ irrespective of the type or way of their designation. Moreover, we find it appropriate that the commentaries specifically refer to the issue of habitat/ecosystem protection, as one among many reasons justifying the designation of protected zones.

DP 18 on ‘Prohibition of pillage’

We welcome the reference in paragraph 8 of the relevant commentaries that this prohibition also applies to situations of occupation. As already noted, either such a paragraph is included at every DP under Parts Three and Four, or be made explicit at the very first DP. Furthermore, we urge the ILC to explicitly refer to the economic and social rights of the people under occupation in the commentaries.³²

For reasons discussed above, we also suggest the following revision to the fourth sentence of paragraph 7 of the commentaries to DP 18:

30. See ICRC, ‘2020 Guidelines on the Protection of the Natural Environment in Armed Conflict’, Rule 9 and related commentary, available at <http://www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating>. See also Henckaerts/Doswald-Beck (eds), ICRC Study on Customary International Humanitarian Law, Vol. I, Rule 22 and commentary, at 68: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule22 and related practice.

31. Or whatever the eventually agreed terminology will be. For that topic, see our comments *supra* under DP 4.

32. See relatedly, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 168; Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (Cambridge University Press, 2015) esp ch. 5.

‘Illegal exploitation of natural resources’, as used in the relevant Security Council resolutions is a general notion that may cover the activities of States, non-State armed groups, or other non-State actors, including ~~corporations and other business enterprises, and~~ private individuals.’

DP 19 on ‘Environmental modification techniques’

See our comments under DP 13.

Comments on Part Four – Principles applicable in situations of occupation

On the Commentaries’ introduction to Part Four, we note that while in theory ‘stable occupation shares many characteristics with a post-conflict situation and may with time even come to “approximating peacetime” conditions’ (para 1), there needs be consideration given to the fact that ‘peacetime’, understood as the absence of armed conflict, might nonetheless be characterised by racism, violence, widespread human rights abuses, and crimes against humanity.³³

This concern is amplified at paragraph 7 – with the suggestion that ‘The draft principles in Part Five addressing post-armed conflict situations would primarily have relevance for situations of prolonged occupation’. Where prolonged occupation is a vehicle for annexation, such an approach can legitimise and perpetuate occupation and annexation rather than contribute to its conclusion. The urge to protect the environment cannot be allowed to be exploited by Occupying Powers as a means of achieving what they cannot otherwise do lawfully.

Turning to paragraph 3 of the commentaries to the introduction of Part Four, it is important to highlight the significance of the notion of ‘territory’ for the purposes of the law of occupation. As the commentaries rightly note:

‘The established understanding of the concept of occupation is based on article 42 of the Hague Regulations, which stipulates that a territory is considered occupied “when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised”’.³⁴

Furthermore, we see no justification for excluding the application of occupation law to maritime areas on the basis that a whole territory be occupied. For one, the commentaries refer to

33. While it is correct to note that occupation may manifest in many forms, we remain concerned that equating occupation with post-armed conflict, or occupation with peacetime, risks undermining the applicable law by reference to a factual political situation rather than a factual legal regime. Peace, as such, is not a legal category, and while an occupation might be peaceful, suggesting rules adapted from a post-armed conflict situation be merged with the occupation regime risks legitimising annexation.

34. 2019 ILC Report, 266, commentaries to Introduction of Part Four, para 2 [citation omitted].

the Oxford Manual as authority (footnote 1277), which does not reference the ‘whole territory’ but rather states: ‘Art. 88. Occupation: extent and effects. Occupation of maritime territory, that is of gulfs, bays, roadsteads, ports, and territorial waters, exists only when there is at the same time *an occupation of continental territory*, by either a naval or a military force. The occupation, in that case, is subject to the laws and usages of war on land.’

Besides, the second sentence of common article 2 of the 1949 Geneva Conventions provides for the following: ‘The Convention shall also apply to all cases of *partial* or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.’ Paragraph 4 of DP 22 is useful in this regard as it prioritizes control over sovereignty or title. All things considered, given that the test for occupation is control of territory, we maintain that the commentaries’ reference requiring any maritime occupation to have been preceded by total physical territory occupation of an entire state³⁵ is incorrect.

Additionally, there does not appear to be any basis to limit harm to transboundary harm as opposed to harm within a certain territory, as the last sentence of paragraph 3 of commentaries to the introduction of Part Four suggests.

In light of the above, we suggest the following amendment in paragraph 3 of the commentaries to the Introduction of Part Four:

‘Once established in the *occupied* territory of an occupied State, at least when the whole territory is occupied, the temporary authority of an Occupying Power may extend to the adjacent maritime areas over which the territorial State is entitled to exercise *sovereignty*. Therefore, the authority of the Occupying Power may extend to the airspace over the occupied territory and over the territorial sea. Such authority underscores the obligation of the Occupying Power to take appropriate steps to prevent transboundary environmental harm.’

DP 20 on ‘General obligations of an Occupying Power’

In line with the suggestions made to DP 2, DP 10 and DP 11, we propose that paragraph 2 of DP 20 cover all human rights, in addition to the right to the enjoyment of the highest attainable standard of physical and mental health.

Moreover, as two co-authors of this submission have previously noted,³⁶ the term ‘*population of the occupied territory*’ in DPs 20(2) and 21, and indeed across the entirety of the DPs, should be changed to the ‘*protected population*’ in order to align it with the Fourth Geneva Convention, and address the risk that the protections afforded under the Convention for the protected occupied population be applied equally to settler populations. To expand the scope

35. Ibid, para 3.

36. The following two paragraphs draw on CEOBS and AI Haq: Strengthening the International Law Commission’s draft principles on environmental protection in situations of occupation, October 2018, available at: <https://ceobs.org/ceobs-ai-haq-strengthening-the-international-law-commissions-draft-principles-on-environmental-protection-in-situations-of-occupation> [and sources cited therein].

of this DP to a general population would be to legitimise settlement. This is a fundamental point on which there can be no compromise, as otherwise it would allow for the basic undermining of the entire logic and function of the law of armed conflict.

There have been cases where Occupying Powers have distorted the protections afforded under the Fourth Geneva Convention for the protected occupied population to apply equally to settler populations. These settlers are unlawfully transferred into the occupied territory for the purpose of colonisation and are then considered as part of the population of the occupied territory. Under the Convention, the protected population is defined as persons who ‘...at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power *of which they are not nationals*’.³⁷

Accordingly, we suggest that DP 20(2) be rephrased as follows:

‘...to prevent significant harm to the environment of the occupied territory that is likely to prejudice the *enjoyment of human rights and well-being of the protected population of the occupied territory*.’

Additionally, we propose that the commentary to DP 20 explains that paragraph 2 also refers to ensuring activities of the Occupying Power in its own territory, including those performed by business enterprises and other non-state actors, do not cause significant harm to the environment of the occupied territory.

Paragraph 3 of the commentaries to DP 20 concludes that ‘Obligations established under such treaties protect a collective interest and are owed to a wider group of States than the ones involved in the conflict or occupation.’ This proposition requires acknowledgement that in no way can the rights of the protected population be undermined in order to meet these wider obligations.

Paragraph 10 of the commentaries to DP 20 concludes that ‘[t]he longer the occupation lasts, the more evident is the need for proactive action and to allow the Occupying Power to fulfil its duties under the law of occupation, including for the benefit of the population of the occupied territory. At the same time, the Occupying Power is not supposed to take over the role of a sovereign legislator.’

Beyond embracing environmental protections, the principal obligation of an Occupying Power is to end the occupation. While paragraph 12 of the commentaries to DP 20, with the assertion that ‘the Occupying Power may not introduce permanent changes in fundamental institutions of the country and shall be guided by a limited set of considerations: the concern for public order, civil life, and welfare in the occupied territory’ seeks to acknowledge such a situation, the overall tone remains problematic, and we must again note the necessity of replacing ‘population’ as a generic term with the specific reference to ‘protected population’. DP 21 on ‘Sustainable use of natural resources’

37. Art 4, 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 [emphasis added].

In line with the above observations, we further suggest that DP 21 be rephrased as follows:

‘ ... for the benefit of the *protected* population of the occupied territory and for other lawful purposes under the law of armed conflict, ... ’.

We also suggest that paragraph 3 of the commentaries to DP 21 explicitly states that an Occupying Power is prohibited from administering and using the natural resources in an occupied territory for the benefit of any settlers/settlements in the occupied territory.

We recommend that DP 21 be closely aligned to article 55 of the 1907 Hague Regulations.³⁸ Caution must be exercised in light of bad faith interpretations of IHL by an Occupying Power. For example, in critically responding to the Israeli courts’ application of article 43 of the Hague Regulations so as to facilitate the exploitation of new quarries on Palestinian lands in the occupied Palestinian territory,³⁹ a number of Expert Opinions by eminent academics on the law of occupation point to article 55 as ‘a single, specific and limited provision, one of many in the entire body of the laws of occupation.’⁴⁰

DP 22 on ‘Due diligence’

Lastly, we urge the ILC to address in the text of DP 22, or its commentaries, the need for an Occupying Power to exercise due diligence to ensure that activities on its own territory do not cause significant harm to the environment of the occupied territory.

Similarly, we propose that the commentaries to DP 22 also address that the notion of ‘due diligence’ includes the duty to take appropriate measures in case activities in neighbouring states to the occupied territory are causing significant transboundary harm to the environment of the occupied territory or the enjoyment of human rights and well-being of the protected population.

38. Art 55, Regulations respecting the laws and customs of war on land (The Hague, 18 October 1907) (the Hague Regulations).

39. *Yesh Din — Volunteers for Human Rights v Commander of the IDF Forces in the West Bank and ors*, Israel, Supreme Court as High Court of Justice judgment, HCJ 2164/09, ILDC 1820 (IL 2011), 26th December 2011.

40. Expert Legal Opinion, HCJ 2164/09, *Yesh Din – Volunteers for Human Rights v Commander of IDF Forces in West Bank and ors* (December 26, 2011), para 101, available at: <https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/%D7%A2%D7%AA%D7%99%D7%A8%D7%95%D7%AA%D7%9E%D7%97%D7%A6%D7%91%D7%95%D7%AA/Quarries+Expert+Opinion+English.pdf>; See also, Iain Scobbie and Alon Margalit, ‘The Israeli Military Commander’s Powers under the Law of Occupation in relation to Quarrying Activity in Area C’ (2012), available at: <https://www.diakonia.se/globalassets/documents/ihl/ihl-resources-center/expert-opinions/quarrying-in-area-c---final---july-2012.pdf>

Comments on Part Five – Principles applicable after armed conflict

We welcome the inclusion of principles to address the effects of conflict-related damage to the environment, but we recommend that the commentaries make clear that many of the DPs under Part Five may apply during as well as after armed conflict, and regardless of whether there is a situation of occupation. For example, while efforts to gather information, provide relief and assistance, and clear remnants of war are crucial post-armed conflict activities, when possible, they should begin during the armed conflict itself. Such an addition would be consistent with paragraph 2 of the commentaries to DP 2.

DP 24 on ‘Sharing and granting access to information’

DP 24 should be broadened to also include the period during armed conflict because remedial measures may take place while a conflict is ongoing.

Moreover, the commentaries should mention that the discussion about the right to information on environmental health threats is not only about the sharing of information, but also about the generation of relevant information.⁴¹

Regarding paragraph 4 of the commentaries to DP 24, it would be more accurate to refer to the ‘*amended* Protocol II to the Convention on Certain Conventional Weapons’, in line with the terminology used in other parts of the commentaries.

Furthermore, it would be appropriate to include language that reflects our suggested addition to paragraph 11 of the commentaries to DP 3. The majority of States, including most state Parties to Amended Protocol II to the Convention on Certain Conventional Weapons, have joined the Mine Ban Treaty. The commentaries should make clear that for those states, emplacement of antipersonnel landmines is unlawful and thus keeping a record of new use should not be relevant. The Mine Ban Treaty and the Convention on Cluster Munitions do, however, require states to record and report on existing areas contaminated with antipersonnel landmines and cluster munition remnants, which facilitates clearance and thus advances environmental protection.⁴²

DP 25 on ‘Post-armed conflict environmental assessments and remedial measures’

The commentaries to this DP mention that ‘[t]he phrase “are encouraged” is hortatory in nature and is to be seen as an acknowledgment of the scarcity of practice in this field’ (para. 2).

41. See art 6, Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean [Escazú Agreement] (adopted 4 March 2018, entered into force 22 April 2021) C.N.195.2018. TREATIES-XXVII.18 of 9 April 2018. See also Framework Principles on Human Rights and the Environment (n 16) para 17.

42. Arts 5 and 7, Mine Ban Treaty; Arts 4 and 7, Convention on Cluster Munitions.

There is strong precedent, however, for *requiring* cooperation in remedial measures, including in the clearance of remnants of war and provision of assistance to victims. For example, the Mine Ban Treaty, the Convention on Cluster Munitions, and the Treaty on the Prohibition of Nuclear Weapons include obligations regarding international cooperation and assistance for clearance and victim assistance.⁴³ Thus, we recommend that language stronger than ‘is encouraged’ be used.

We further recommend this DP refer explicitly to assistance as well as to cooperation.⁴⁴ This addition would help ensure that relevant actors take concrete action and would be consistent with the disarmament treaties mentioned above. It is also suggested that the DP be extended to apply during armed conflict, including in situations of occupation, since it could be decades before the conflict is considered to have ended.

The title of this DP as well as the DP itself should be adjusted accordingly. To reflect the revisions and to more precisely capture the focus of the DP, it would be appropriate to change the title of DP 25 to *International cooperation and assistance*, the title used for comparable provisions in all three of those disarmament treaties.⁴⁵

Moreover, in line with previous suggestions, there should be a reference to the need to undertake effective consultations with affected persons and communities on environmental assessments and remedial measures at all stages of the process (similar to the wording of DP 5 on indigenous peoples). If not included in the text of the DP itself, such language should at least be added to the commentaries.

Finally, we recommend making clear in the text of the DP that the phrase ‘relevant actors’ includes States and non-state actors, as well as international organisations.

In light of the above, we suggest the following amendment in the wording and the title of DP 25:

Draft principle 25

International cooperation and assistance

‘Relevant actors, including States, international organizations, and non-state actors, should cooperate and provide assistance with respect to ~~post-armed-conflict~~ environmental assessments and remedial measures, and effectively consult with the public, particularly with affected persons and communities, at all stages of the process.

43. Arts 5 and 6, Mine Ban Treaty; Arts 5 and 6, Convention on Cluster Munitions; Arts 6 and 7, Treaty on the Prohibition of Nuclear Weapons (adopted 7 July 2017, entered into force 22 January 2021) CN.478.2020.TREATIES-XXVI-9 of 26 October 2020.

44. See also United Nations Environment Assembly resolution 2/15 of 27 May 2016 on ‘Protection of the environment in areas affected by armed conflict’ (UNEP/EA.2/Res.15), op. para 6.

45. Art 6, Mine Ban Treaty; Art 6, Convention on Cluster Munitions; Art 7, Treaty on the Prohibition of Nuclear Weapons.

In relation to paragraph 5 of the ILC commentaries to this DP, we propose the following addition so that assessments address a range of types of impacts:

‘Such assessments *should be conducted* because, if the environmental impacts of armed conflict are left unattended, there is strong likelihood that they may *lead to adverse effects, such as biodiversity loss, human health problems*, and “further population displacement and socio-economic instability”, thereby “undermining recovery and reconstruction in post-conflict zones” and “triggering a vicious cycle”.’

Last but not least, we think it is appropriate to cite in the commentaries the commendable work of the UNEP in relation to the conduct of post-armed conflict environmental assessments.

DP 26 on ‘Relief and assistance’

Echoing certain States’ statements at the 2019 UNGA Sixth Committee and following the international law precedents discussed under DP 25, we recommend the adoption of stronger language. DP 26 should do more than merely ‘encourage’ appropriate measures. In line with previous suggestions, there should be a reference to consultations with affected individuals and communities at all stages of the process (similar to the wording of DP 5 on indigenous peoples) in the text of the DP. Moreover, DP 26 should be broadened to also include the period during armed conflict, including in situations of occupation, because appropriate measures may be taken while a conflict is ongoing.

Finally, we propose adding ‘remedial’ to be consistent with and hark back to DP 25’s call for cooperation and assistance on remedial measures:

‘When, in relation to an armed conflict, the source of environmental damage is unidentified, or reparation is unavailable, States ~~are encouraged~~ *should* take appropriate *remedial* measures so that the damage does not remain unrepaired or uncompensated, and *should* consider establishing special compensation funds or providing other forms of relief or assistance, *effectively consulting with the public, particularly affected persons and communities, at all stages of the process.*’

In paragraph 2, the commentaries could explain why victim assistance is a broader concept than financial aid by inserting the phrase in italics:

‘Victims assistance, *which goes beyond monetary payments*, is a broader and more recent concept...’

We further recommend the commentaries make clear, perhaps in paragraph 4, that ‘other forms of relief and assistance’ include a range of victim assistance. The concept of victim assistance, which provides a useful model for DP 26, encompasses, *inter alia*, medical care,

rehabilitation, and psychological support as well as measures to ensure social and economic inclusion. It seeks to ensure that victims of armed conflict, including of conflict-related environmental damage, can enjoy their human rights.⁴⁶ Additionally, we propose the addition of the following paragraph in the commentaries to DP 26:

‘As water is indispensable for the survival of the civilian population and also linked to the environment, humanitarian relief operations must be allowed to operate and provide access to water. Whenever water infrastructure, installations, and supply lines are damaged in relation to armed conflict, water-related personnel must be given access to the damaged water infrastructure to ensure its operation. Likewise, the equipment necessary for the repair and rehabilitation of the water infrastructure must be given rapid and unimpeded passage.’⁴⁷

DP 27 on ‘Remnants of war’

With respect to paragraph 1 of DP 27, it is suggested that the phrase ‘After an armed conflict’ be deleted because clearance should begin earlier when possible.

It is further suggested that in both paragraphs 1 and 2 of DP 27, the conjunctive articulation of ‘toxic’ and ‘hazardous’ be replaced with the disjunctive ‘or’.

The wording of footnote 1426, in paragraph 3 of the commentaries to DP 27 should refer to the revised definition of ‘toxic remnants of war’: “any toxic or radiological substance resulting from military activities that forms a hazard to humans *or* ecosystems”.⁴⁸

DP 28 on ‘Remnants of war at sea’

Remnants of war at sea pose a threat to marine ecosystems, an explosive and toxicological risk to seafarers and fisherfolk and are a source of pollution.⁴⁹ Their presence can also obstruct economic development, notably in offshore energy and tourism. As these factors can impede the enjoyment of human rights, we suggest that DP 28 be rephrased as follows:

‘States and relevant international organizations should cooperate to ensure that remnants of war at sea do not constitute a danger to the environment *or the enjoyment of human rights*.’

It is also suggested that the commentaries include information on whether an Occupying

46. Art 6(3), Mine Ban Treaty; Art 5, Convention on Cluster Munitions; Arts 6 and 7, Treaty on the Prohibition of Nuclear Weapons.

47. See GLP, 2019, Principles 17 and 21.

48. Aneaka Kellay, ‘Pollution Politics: Power, accountability and toxic remnants of war’, 24 November 2014, available at <https://ceobs.org/pollution-politics-power-accountability-and-toxic-remnants-of-war>

49. Aaron J. Beck et al., ‘Spread, behavior, and ecosystem consequences of conventional munitions compounds in coastal marine waters’ 5 *Frontiers in Marine Science* (2018), 141, available at: <https://www.frontiersin.org/articles/10.3389/fmars.2018.00141/full>

Power during a belligerent occupation is obliged to search for, remove or address remnants of war at sea, that are damaging or potentially damaging and harmful to the environment or to the enjoyment of human rights. Clarification as to when this should be done by the Occupying Power would also be desirable, especially in situations of prolonged occupation.