

## The ILC's work stream on protection of the environment in relation to armed conflict

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### 1. *Introduction*

In its 2015 post-conflict environmental assessment on Côte d'Ivoire, the United Nations Environment Programme (UNEP) found that following a decade of armed conflict, significant flora and fauna had been lost from the Comoé UNESCO World Heritage Site and Marahoué National Park (including their populations of lions and elephants), the chimpanzee population of the Tai National Park had dropped by half, the Ébrié Lagoon was polluted by heavy metals and pesticides, and the major city of Abidjan was suffering from water pollution, hazardous waste and severe land degradation.<sup>1</sup> Similarly, in its 2002 post-conflict environmental assessment report on Afghanistan, UNEP observed that, 'Nearly 25 years of armed conflict, and four years of extreme drought, have created widespread human suffering and environmental devastation across the country.'<sup>2</sup> Other UNEP reports detail the long-lasting impacts of oil spills<sup>3</sup>, toxic chemical pollution<sup>4</sup> and destruction of agricultural resources<sup>5</sup> as a consequence of armed conflict. Indeed, in its expansive collection of post-conflict environmental assessments, UNEP has catalogued the harms that warfare has caused not only to the environment, but also to human health, and to the food and water security

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<sup>1</sup> UNEP, 'Côte d'Ivoire: Post-Conflict Environmental Assessment' (UNEP, Nairobi, 2015) 9-10.

<sup>2</sup> UNEP, 'Afghanistan: Post-Conflict Environmental Assessment' (UNEP, Nairobi, 2003) 14.

<sup>3</sup> UNEP, 'Lebanon: Post-Conflict Environmental Assessment' (UNEP, Nairobi, 2007) 132-143.

<sup>4</sup> *ibid* 153-4.

<sup>5</sup> UNEP, 'Environmental Assessment of the Gaza Strip following the escalation of hostilities in December 2008 – January 2009' (UNEP, Nairobi, 2009) 32-34.



of vulnerable war-torn populations around the globe. It is clear, therefore, that warfare damages the environment and, yet, there is no specific requirement in international law for states to remedy the environment following an armed conflict.

Post-conflict environmental remediation is, however, the focus of the recent Third Report of the Special Rapporteur<sup>6</sup>, Ambassador Marie Jacobsson, for the International Law Commission's (ILC) work stream on the 'Protection of the Environment in Relation to Armed Conflict' (PErAC).<sup>7</sup> While Ambassador Jacobsson has reached the end of her term of office, the topic is not yet complete and so it is unclear whether the new Special Rapporteur, who has yet to be selected, will continue the topic in the same vein. The main topic of this contribution, therefore, is the recently reported Draft Principles setting out a series of post-conflict provisions. This author will also address the temporal approach selected by the Special Rapporteur as a mechanism of approaching the topic, as well as the relationship of other legal regimes with humanitarian law, such as international environmental law and human rights.

## 2. *Origins of the study*

The ILC's PErAC work stream originated in a request by UNEP in its 2009 report, written in partnership with the Environmental Law Institute (ELI), entitled, 'Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law'.<sup>8</sup> Thus, in Recommendation 3 of the 2009 Report, UNEP urged the ILC to 'examine the existing international law for protecting the environment during armed conflict and recommend how it can be clarified, codified and expanded'.

<sup>6</sup> 'Third report on the protection of the environment in relation to armed conflicts. Submitted by Marie G. Jacobsson, Special Rapporteur' (3 June 2016) UN Doc A/CN.4/700.

<sup>7</sup> See 2011 recommendation of the Working-Group on the long-term programme of work, ILC, 'Report of the International Law Commission on the Work of its 63th Session (23 April-3 June and 4 July-12 August 2011) UN Doc A/66/10, paras 365-368.

<sup>8</sup> *ibid* Annex E, paras 22-23.



### 3. *The temporal approach*

When the Special Rapporteur began studying the topic she was very clear that it was not simply to be a study of the law of armed conflict and the military hostilities phase of conflict. The phrasing of the study's title reflected her specific approach that protection was to be 'in relation to' armed conflict, and not just 'in' armed conflict. She was, therefore, able to cover all three phases of before, during and after conflict, as well as anything else that was clearly necessary to that remit. It is clear, however, that while the Special Rapporteur has managed to highlight a number of areas of law that would be important to consider for the topic, the workload has not been possible to complete within the short timeframe.

States appear to have been largely supportive of the Special Rapporteur's suggested approach of tackling the topic by the temporal phases of before conflict, during conflict and post conflict.<sup>9</sup> This structure is novel and has certainly helped in allowing the Special Rapporteur to approach the research questions from new angles and has thrown up new issues for consideration. One example of such new considerations is, indeed, the post-conflict section of the study, which looks at the issue of post-conflict environmental remediation – an issue which is generally omitted from legal instruments. One conceptual difficulty with the approach, however, has concerned the linkage or overlap between pre and post conflict obligations. This issue has certainly been raised by states in their comments, and it may be that the final draft principles or draft articles will benefit from a preliminary section detailing the overarching responsibilities of states in the pre and post phases, which are supplemented by specific rules for each phase. The temporal approach has also allowed the Special Rapporteur to give equal weighting and consideration to all three phases in her research, and has allowed the work to extend beyond simply analysing the law of armed conflict in relation to the environment. The Special Rapporteur has undertaken invaluable work, which has teased out issues of remediation, liability and coopera-

<sup>9</sup> For a good assessment of the various state views see D Weir, 'States Back Further Progress on Conflict and Environment in UN Legal Debate' Toxic Remnants of War Network (9 November 2016) <[www.trwn.org/states-support-further-legal-work-on-environmental-protection-in-conflict/](http://www.trwn.org/states-support-further-legal-work-on-environmental-protection-in-conflict/)>.

tion, but also highlights the important work being carried out by UNEP in its post-conflict environmental assessments.

Compiling Draft Principles for the pre and post conflict phases is, however, generally a harder task than compiling those that relate to the combat phase of armed conflict itself. One reason for this complexity is, arguably, because they will be drawn from a number of different legal regimes, and little research has occurred on such topics to date. There are also clear overlaps between the two phases of pre and post conflict, which will cause additional complexity. Principally in both the pre and post conflict phases the applicable law is all the 'peacetime' international environmental laws, human rights, arms control laws, state responsibility rules, and other rules of international law more generally. But this is not to say that the rules apply in exactly the same manner to environmental hazards or damage caused during conflict as those harms caused in peacetime. Thus, it is not sufficient to say that, for example, in the post conflict phase international environmental law is fully applicable, since the peacetime responsibility and liability provisions – as they relate to harm caused in warfare which continues post-conflict, at least, will not necessarily be the same. In addition, any treaty obligations allowing a degree of progressive realisation will be altered by the new reality on the ground.

#### 4. *The final product*

As for the final form that the work will take, whether draft articles, a treaty or guidelines, it is not clear yet from the ILC reports which option will be chosen. State comments in the General Assembly regarding this issue were very mixed, with many preferring either draft articles or draft principles.<sup>10</sup> The difficulty probably lies in the fact that, as yet, there has been little discussion of the issues raised in the pre and post conflict phases – and what obligations these phases should mean for

<sup>10</sup> ILC, 'Report of the International Law Commission on the Work of its 68th Session' (2 May-10 June and 4 July-12 August 2016) UN Doc A/71/10, Chapter X 'Protection of the environment in relation to armed conflicts' para 161.



states, outside of this process.<sup>11</sup> Thus, states appeared to be confused as to whether the current draft principles, particularly those covering the post-conflict phase, were in fact a reflection of existing legal obligations. A number of states, therefore, questioned the legal basis for many of the draft principles, with some principles consequently being redrafted following the ILC meeting so as to match more closely the current legal position.<sup>12</sup> This approach is a little disappointing, even for the generally conservative ILC. A suggestion for the Special Rapporteur, or her successor, therefore, is to aim for a mixed approach of rules clearly drawn from state practice, which are supplemented by good practice guidelines. Within the latter, the Special Rapporteur could develop principles which clearly extend beyond the current law and help deliver greater protection for the environment.

The issue of continuation of the topic beyond the current office of the Special Rapporteur, which ended this year, was generally met with approval. It is unclear yet, however, as to who will be selected to take the work forward and in what form that person would choose. Similarly, states were of mixed views concerning what issues, additional to those already covered, the new Special Rapporteur should study. Suggestions reportedly ranged from the inclusion of occupation, to the obligations of non-state armed groups and the question of legal responsibility.<sup>13</sup> Unsurprisingly, a number of states also wished to see some matters excluded from PErAC's future work remit.<sup>14</sup>

<sup>11</sup> Although note Resolution 2/15, United Nations Environment Agency, 'Protection of the environment in areas affected by armed conflict' (4 August 2016) UNEP/EA.2/Res.15.

<sup>12</sup> See ILC, Protection of the environment in relation to armed conflicts, Statement of the Chairman of the Drafting Committee, Mr Pavel Šturma (9 August 2016) UN Doc A/CN.4/SR.3342.

<sup>13</sup> 'Third Report' (n 6) paras 33, 269; the comments of Poland on non-state armed groups (UN Doc A/C.6/70/SR.25, para 18) and Greece (UN Doc A/C.6/70/SR.25, para 43).

<sup>14</sup> For example, Israel suggested that consideration of specific weapons and the effects of such weapons on the environment should be excluded as well as cultural heritage, natural resources and indigenous peoples, all of which were suitably addressed in other bodies of law, Israel (UN Doc A/C.6/70/SR.25, para 77). See also comments by the United Kingdom of Great Britain and Northern Ireland (UN Doc A/C.6/70/SR.24, para 22).



### 5. *Other bodies of law*

The Draft Principles are drawn from state practice of a number of legal regimes other than the law of armed conflict. International environmental law, human rights law and the Articles on State Responsibility are specifically referenced in addition to the Law of the Sea Convention and arms control treaties. As the Special Rapporteur states, international environmental law was discussed in relation to its continuation during armed conflict in the ILC's recent topic on the Effect of Armed Conflicts on Treaties.<sup>15</sup> However, certain aspects of that topic received a difficult reception by some states, one being the suggestion of the *prima facie* continuation of international environmental treaties during armed conflict.<sup>16</sup> Since most environmental treaties were not drafted with armed conflict in mind and do not contain a 'continuity clause', their continued application for a state party depends on their content, as well as their object and purpose, in relation to the context of the territorial extent, scale and intensity of the particular conflict.<sup>17</sup> Continuity is, however, only the first question, the second being how would the peacetime obligations need to be adapted to fit within a situation of armed conflict.<sup>18</sup> This issue has again been raised by states during the PErAC topic discussions specifically in relation to the reference to environmental law obligations during armed conflict.<sup>19</sup> Clearly, much more comprehensive analysis is needed on this issue in order to assess what such adapted obligations might be, which again is undoubtedly beyond the resources of the Special Rapporteur.

Another valuable source of law is that of human rights. While particularly valuable in the pre and post-conflict phases, human rights law clearly applies throughout all phases. Again, however, the Special Rapporteur was not able to analyse this dimension of the research due to

<sup>15</sup> See 2011 Draft Articles on the Effects of Armed Conflicts on Treaties with Commentaries thereto, ILC, 'Report of the International Law Commission on the Work of its 63th Session' (n 7) para 101.

<sup>16</sup> Note the scepticism of the United Kingdom (UN Doc A/C.6/60/SR.20, para 1).

<sup>17</sup> Draft Article 6, 2011 Draft Articles on the Effects of Armed Conflicts on Treaties (n 15).

<sup>18</sup> ILC, 'Report of the International Law Commission on the Work of its 68th Session' Chapter X (n 10) para 157.

<sup>19</sup> *ibid.*



limited time and resources. And again human rights is also a complex area of law in relation to armed conflict and raises state opposition. One aspect that seems to have pervaded the responses to the study by some states is that of the anthropocentric nature of the debate once human rights are discussed. For example, in referencing human rights, emphasis needs to be placed on environmental resources as property<sup>20</sup> or environmental damage in terms of harm to human health.

#### 6. *The post-conflict draft principles*

This section will analyse the current Draft Principles in relation to the post-conflict phase. In this section five principles have been adopted by the ILC following discussion of the Special Rapporteur's text in plenary session and amendments made by the Drafting Committee. The five Draft Principles are as follows:

**'Draft principle 14 Peace processes**

1. Parties to an armed conflict should, as part of the peace process, including where appropriate in peace agreements, address matters relating to the restoration and protection of the environment damaged by the conflict.
2. Relevant international organizations should, where appropriate, play a facilitating role in this regard.

**Draft principle 15 Post-armed conflict environmental assessments and remedial measures**

Cooperation among relevant actors, including international organizations, is encouraged with respect to post-armed conflict environmental assessments and remedial measures.

**Draft principle 16 Remnants of war**

1. After an armed conflict, parties to the conflict shall seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment. Such measures shall be taken subject to the applicable rules of international law.

<sup>20</sup> See comments by the Special Rapporteur, 'Third Report' (n 6) para 193.

2. The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic and hazardous remnants of war.

3. Paragraphs 1 and 2 are without prejudice to any rights or obligations under international law to clear, remove, destroy or maintain minefields, mined areas, mines, booby-traps, explosive ordnance and other devices.

**Draft principle 17 Remnants of war at sea**

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

**Draft principle 18 Sharing and granting access to information**

1. To facilitate remedial measures after an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under international law.

2. Nothing in the present draft principle obliges a State or international organization to share or grant access to information vital to its national defence or security. Nevertheless, that State or international organization shall cooperate in good faith with a view to providing as much information as possible under the circumstances.’

Draft Principle 14 is composed of two paragraphs on the inclusion of environmental protection and restoration in peace processes – as a whole, as opposed to just the peace agreement.<sup>21</sup> The Drafting Committee was able to strengthen the language from the Special Rapporteur’s suggestion of ‘encouragement’ of the parties to include the environment in the peace agreements, to an obligation that parties ‘should’ address such environmental matters. As the Chairman of the Drafting Committee, Mr. Pavel Šturma, explained in his report, the rationale for the inclusion of the provision reflects the fact that environmental considerations are ‘to a greater extent’ being taken into consideration in peace processes. This finding is based on the research presented by the Special Rapporteur, which evidences the inclusion of environmental mat-

<sup>21</sup> Statement of the Chairman of the Drafting Committee (n 12) 9.



ters in the peace processes of Darfur, DRC, Sudan, Uganda, Burundi, El Salvador and Northern Ireland.<sup>22</sup> The Drafting Committee also managed to avoid limiting the provision to NIACs only as desired by some members of the Committee. Replacing the Special Rapporteur's terminology to 'settle' matters relating to the restoration and protection of the environment, the Drafting Committee chose the concept of 'addressing' such matters.<sup>23</sup> Again this appears to be a positive change, which should clarify the provision to some extent, and avoids the notion of dispute or compensation settlement which was otherwise implied – and which did not appear to form a central part of the Special Rapporteur's context for this particular provision. Clearly, state practice shows a varied approach to what states include within their peace processes, some of which do include issues of responsibility, land redistribution and sustainable development.

Draft principle 14 is certainly a very positive development. Many armed conflicts today and looking ahead for, at least, the next few generations are likely to include at least one environmental issue, whether it is environmental damage, scarcities or inequalities as a causal factor in the conflict, or exploitation of natural resources as a war-sustaining or financing activity, or just environmental damage caused in warfare. Thus, in addition to Draft Principle 14 it would be useful to establish a set of environmental guidelines to inform future peace processes.<sup>24</sup>

Draft Principle 15 contains provision for post-conflict environmental assessments and remedial measures. The importance of reviews was generally recognised by members of the ILC, but questions were raised as regards the legal basis for the principle with some members suggesting that it was a reflection only of policy, not law.<sup>25</sup> The Special Rapporteur's report contained extensive discussion of the work of UNEP in conducting post-conflict environmental assessments, which illustrated the range of environmental problems caused by armed conflict. The current draft principle strongly resembles that suggested by the Special Rapporteur, and refers to the notion of cooperation between the various

<sup>22</sup> 'Third Report' (n 6) paras 154-160.

<sup>23</sup> Statement of the Chairman of the Drafting Committee (n 12) 9.

<sup>24</sup> See D Jensen, S Lonergan (eds), *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding* (Earthscan 2012).

<sup>25</sup> ILC, 'Report of the International Law Commission on the Work of its 68th Session' Chapter X (n 10) para 168.



‘relevant actors’ – which could clearly include non-state actors (as in her original draft), including international organisations, as being encouraged with respect to post-conflict environmental assessments. The provision also refers to ‘remedial measures’ – a slight change from the Special Rapporteur’s notion of recovery but no real change in meaning. The key point raised in the Drafting Committee was again the fact that this was not considered to be a current legal obligation, due to the ‘scarce practice in this field’.<sup>26</sup> While this recognition is undoubtedly true, in that there is no specific principle of international environmental law, human rights law or humanitarian law which calls for such post-conflict environmental assessments, it could be argued that many environmental treaties contain some basic requirement of protection of sites or species, or the reduction of pollution. Thus, arguably, states would have to undergo such assessments as these in order to fulfil their environmental law treaty obligations in any event – at least for certain environmental spaces. The 1992 Biodiversity Convention, for example, requires ongoing monitoring of conservation sites and protection of biodiversity more generally, and, thus, would surely require an assessment following any major incident such as armed conflict. The same would undoubtedly be true for the obligations under the 1972 Convention for the Protection of World Cultural and Natural Heritage. One could also argue the same point for many human rights obligations, such as the environmental health dimensions of the right to health, water, food and life.<sup>27</sup> Maybe states could be reminded of such obligations in the Commentary that will accompany the Draft Principles. It may also be worth pointing out that international funding could be provided for states that are unable to afford such assessments. A key issue for such post-conflict assessments, of course, is timeliness of the study, so as to ensure that remediation efforts can be commenced as soon as possible. Clearly, environmental assessments also loop back around to the pre-conflict phase, in that efforts to remedy environmental damage help to remove negative social and economic impacts of the conflict on communities, and can help communities to rebuild their social structure and livelihoods, and

<sup>26</sup> Statement of the Chairman of the Drafting Committee (n 12) 12.

<sup>27</sup> For example, see Committee on Economic, Social and Cultural Rights, General Comment no 14, ‘The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)’ UN Doc E/C.12/2000/4 (11 August 2000) para 15.



help in cementing peace. Environmental assessments can also aid the state in its recovery by pinpointing the worst affected environmental areas and so help with prioritisation of resources, as well, of course, as building an evidential basis for any legal claim of responsibility for harm.

There are two provisions dealing with remnants of war, Draft Principle 16 is general in nature with Draft Principle 17 relating more specifically to remnants of war at sea. Draft Principle 16 as originally envisaged by the Special Rapporteur required the clearance, removal, destruction or maintenance of remnants 'without delay after the cessation of hostilities', but this obligation was reformulated in the Drafting Committee to refer more directly to the post-conflict period with the phrasing 'after an armed conflict'. Some members had apparently been critical of the 'without delay' formulation, which they suggested was not reflective of practice nor was it realistic.<sup>28</sup> Removal, it was suggested, would only be a priority after hostilities if it was needed to satisfy the immediate needs of the population.<sup>29</sup> Clearly, the original wording was suggested as it mirrored that used in the context of mine and remnant clearance obligations in the Amended Mines Protocol II<sup>30</sup> and the 2003 Protocol V on Explosive Remnants of War<sup>31</sup> to the 1980 Conventional Weapons Convention, and so it was a shame that certain states took this perspective.

The obligation of removal of remnants was also set more specifically upon the 'parties to the conflict', but it is unlikely that many non-state armed groups would be able to do more than provide location information of remnants. Again, existing human rights obligations would clearly require the removal of remnants by the state, which are dangerous or hazardous to people or human health, and, depending on the location, so might international environmental law. The Draft Principle's

<sup>28</sup> ILC, 'Report of the International Law Commission on the Work of its 68th Session' Chapter X (n 10) para 172.

<sup>29</sup> *ibid.*

<sup>30</sup> Article 10, 1980 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW) (1980) 19 Intl Legal Materials 1523–36.

<sup>31</sup> Article 3(2)(3), Protocol V to the 1980 CCW, available at <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=22EFA0C23F4AAC69C1256E280052A81F&action=openDocument>>.



wording, however, now specifies that states shall seek to clear such remnants because of the damage or risk of damage that they are causing *to the environment*. This phraseology specifically relating to clearance because of environmental harm is a monumental step for protection of the environment and responds to comments made by members of the Committee that the Special Rapporteur's original draft was probably overly reliant on human and property harm as justification.<sup>32</sup>

On the other hand, we cannot, of course, gloss over the notion that states are mandated only to 'seek to' remove, and it is unclear exactly what this obligation might entail. Clearly, one could envisage a situation where a state was unaware of hazardous remnants despite due diligence in carrying out environmental assessments, but such remnants did in fact later cause environmental harm, or a situation where a state simply cannot afford clearance operations. The statement of Drafting Committee, does, however, appear to suggest that states chose the 'seek to' language to avoid the connotation of the previously suggested term, 'attempt' to, being that the obligation was optional. It is not clear to this author, however, that the notion of 'seeking to' remove such remnants is of weightier normative force, or connotes a mandatory obligation. Again, it is to be hoped that this understanding of the term is included in the Commentary.

While the current draft is to be congratulated on the absence of a threshold of harm for environmental damage, it is unfortunate that the conjunctive is used in that the remnants appear to have to be both 'toxic' and 'hazardous'. It is also to be hoped that states are, if anything, overly cautious in deciding the level of 'risk' of environmental damage that they are willing to entertain. The Draft Principle also appears to be careful in avoiding the inclusion of any obligation of 'financial' assistance by the user state. Finally, newly inserted paragraph 3 reminds states that they may have other obligations of clearance, for example, via membership of the 2008 Cluster Munitions Convention<sup>33</sup>, Protocol V on Explosive Remnants of War, or the many mines provisions.<sup>34</sup> The

<sup>32</sup> ILC, 'Report of the International Law Commission on the Work of its 68th Session' Chapter X (n 10) para 170.

<sup>33</sup> Text available at <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=00E3441C08D5B5B9C12574C6002EE0D3&action=openDocument>>.

<sup>34</sup> See, for example, the 1997 Ottawa Treaty on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (1997) 36 Intl Legal Materials 1507.



inclusion of paragraph 3 is certainly an improvement on the earlier version, which used the phrase in paragraph 1 that the suggested removal obligations were 'in accordance with obligations under international law'. The Drafting Committee's formulation is much improved, therefore, since it adds a new obligation (current paragraph 1) rather than simply repeating the *lex lata*. This principle has possibly, therefore, gone beyond what the Special Rapporteur thought would be acceptable to the Committee members.

The second provision dedicated to the removal of remnants is Draft Principle 17, which refers specifically to remnants of war at sea. Remnants on land and at sea were both included in Draft Principle 16's removal obligation should they cause or risk causing damage to the environment, and so Draft Principle 17 is very short and refers only to the requirement that states and relevant international organisations should cooperate to ensure that remnants at sea do not constitute a danger to the environment. Reference only to obligations within a state's jurisdiction and control was debated, but not included given the nature of the law of the sea regime in covering zones that are beyond the jurisdiction of states and calls for inter-state cooperation on a host of matters. The Drafting Committee also chose the 'more hortatory' wording of 'should cooperate' rather than the Special Rapporteur's phrasing of 'shall cooperate', explaining that this change in language was because practice was still developing.<sup>35</sup>

It was interesting that the Special Rapporteur in her report focused on many long-standing issues of environmental harm due to remnants. For example, the Special Rapporteur refers to examples of chemical weapons, munitions and hazardous waste dumped at sea, and the damage from oil leaking from sunken ships.<sup>36</sup> At the same time, such wreckage is often located in the marine environments of states that took no part in conflict and who can least afford both the costs of remediation and the ongoing impact on their marine life. Interestingly, in the current Draft Principles, no time limit appears in the wording of the provision, and so on one reading it suggests that states should address all remnants where they constitute a danger to the environment – even those that pre-date the Draft Principles.

<sup>35</sup> Statement of the Chairman of the Drafting Committee (n 12) 16.

<sup>36</sup> 'Third Report' (n 6) paras 259- 264.

Finally, for the post-conflict provisions, is Draft Principle 18 that focuses on sharing and granting access to information to facilitate remedial measures for the environment. By adding the element of ‘after an armed conflict’ the Drafting Committee ensured that the obligation was applicable in the post-conflict phase only, and not throughout the conflict also – while this was one possible reading of the Special Rapporteur’s original version of the Draft Principle its meaning was made clear in placing it in the post-conflict section of the Draft. In her Third ILC report the Special Rapporteur details the principle of cooperation, and its evidence base in international law, both generally and specifically with regard to the protection of the environment<sup>37</sup>, before moving to an analysis of the role of sharing and granting access to information. The content of this Draft Principle certainly links with that of Draft Principle 15, which encourages states and international organisations to cooperate to undertake post-conflict environmental assessments and remedial measures. The Drafting Committee identified that while the notion of ‘sharing’ information related to states and international organisations, the concept of ‘granting access’ to information related primarily to allowing access by individuals.<sup>38</sup> This approach was also detailed in the Special Rapporteur’s report which focused on the human right of access to environmental information, such as that, for example, found under the procedural dimension of Article 8 of the European Convention of Human Rights.<sup>39</sup>

Ultimately, the obligation in Draft Principle 18 is subject to the qualifier ‘in accordance with their obligations under international law’. Thus, obligations of sharing and access to information rest on existing international law requirements, such as human rights law, and, as recognised by the Drafting Committee, the obligations of recording the location information for mines, such as those under Article 9 of Amended Mines Protocol II.<sup>40</sup>

<sup>37</sup> *ibid* paras 130-132.

<sup>38</sup> Statement of the Chairman of the Drafting Committee (n 12) 17.

<sup>39</sup> See, for example, the case of *Guerra and Others v Italy* App no 116/1996/735/932 (ECtHR, 19 February 1998) and the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1999) 38 *Intl Legal Materials* 517-533.

<sup>40</sup> Statement of the Chairman of the Drafting Committee (n 12) 17.



As currently drafted, the provision on sharing and access to information does not seem to really add much, if anything, to what states are already obliged to do in international law, and is rather unclear on what information should be shared and with whom. Certainly, adding the context that the provision was aimed at 'facilitating the remedial measures after an armed conflict', the Drafting Committee helped to refine the provision's objective. But, while adding the qualifier of 'relevant' to the organisations that can expect information to be shared and to the information that should be shared, the provision still ends up being rather unclear in scope. Exactly what sort of information needs to be shared and with whom, and who should be granted access to what information is unclear. Due to the perceived overlap between Draft Principles 15 and 18 one suggestion could be that they are joined, so that Draft Principle 15 becomes three paragraphs in length, and the information aspects are dealt with before moving to the specific issue of remnants in Draft Principles 16 and 17. In this way, states would be encouraged to cooperate with relevant actors on the issue of post-conflict assessments and remedial measures, and obligated to share information with those relevant organisations to facilitate those remedial measures.

## 7. *Conclusions*

The Special Rapporteur is to be congratulated on her impressive work so far. There is now clear support in the Commission for new Draft Principles on the topic, at the very least, and some clear principles emerging, particularly in relation to the post-conflict section. The temporal dimension has really allowed the subject to be analysed afresh from a new perspective and has been pivotal in guiding states towards the notion that environmental protection is necessary even before armed conflict. Other areas of law have certainly been present in the Special Rapporteur's analysis in preparation for the Draft Principles, but seem to generate weaker obligations than the remnants provisions which are solidly based in arms control treaties. It is a shame that Ambassador Jacobsson will not be continuing in her role, and we can only hope that her successor is as enthusiastic for the topic as she has been.