

PROTECTING THE ENVIRONMENT DURING ARMED CONFLICT

FROM PRINCIPLES TO IMPLEMENTATION

Emma Hakala & Freek van der Vet



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- Conflict-related damage to the environment has become widespread and causes sustained harm to public health, ecosystems, and peacebuilding.
- The International Law Commission (ILC) will finalize its work on new principles for the protection of the environment in relation to armed conflict (the PERAC principles) in 2022. The International Committee of the Red Cross (ICRC) published an updated iteration of its Guidelines on the Protection of the Natural Environment in Armed Conflict in 2020.
- International momentum is gathering for states to implement these frameworks. However, independent mechanisms to monitor the implementation are currently lacking.
- The international community and civil society actors need to ensure transparent monitoring mechanisms that enable stakeholders to pressure states into compliance.



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Images of burning oil fields and bombed industrial plants have made it clear that armed conflict always causes environmental damage. In parts of Eastern Ukraine, for instance, hazardous substances have leaked into rivers and groundwater due to the destruction of vital infrastructure and hazardous industries. In Syria, the breakdown of the oil industry has led to severe pollution that threatens the health of nearby inhabitants and may have rendered some areas unfit to live in. Yet environmental damage has usually had a low policy priority in conflict settings, overshadowed by the urgent need to reduce human suffering.¹ The environment and nature are often seen as property or a resource. So the idea of the environment as a subject with rights remains a radical idea.

However, wartime environmental destruction has long-term implications which, if left unattended, will extend far beyond the end of a conflict. Once toxic substances have leaked into groundwater or a forest has been destroyed, the damage may continue to harm the health, livelihoods, and security of people living in the affected area for decades. Environmental destruction in war has resulted in declines in wildlife, deforestation, birth defects, and the introduction of new pollutants and pathogens. A healthy environment is a precondition for sustainable peace.² Therefore, it is necessary to come up with ways to assess conflict-induced damages and to remediate them.

In recent years, several international processes have contributed momentum to environmental protection in armed conflict. At the United Nations, the International Law Commission (ILC) has worked on new principles for the protection of the environment in relation to armed conflict (the PERAC principles). Meanwhile, the International Committee of the Red Cross (ICRC) published its Guidelines on the Protection of the Natural Environment in Armed Conflict in 2020, updated from an earlier version originally prepared at the request of the United Nations General Assembly in 1994.

In addition, various NGOs are promoting the inclusion of “crimes against the Earth” or “ecocide” in the Rome Statute, enabling the International Criminal Court in The Hague to investigate and prosecute individuals for destroying the environment.

This Briefing Paper has three aims. First, we argue that there are two specific complications with addressing environmental damage during conflict and in peacebuilding. Second, we provide an overview of two recent international developments that aim to strengthen the legal protection of the environment during armed conflict: a) the ILC’s efforts to develop new PERAC principles to protect the environment from the consequences of war and conflict, and b) the ICRC updated military guidelines on the protection of the natural environment in armed conflict. Third, we argue that the implementation of these frameworks remains a challenge, and highlight some of the obstacles that might emerge during this phase.

THE ENVIRONMENT AS A VICTIM OF WAR: TWO PROBLEMS

Along with the tendency to downplay environmental damage as a significant source of harm in conflicts, there are several problems in pinpointing the specific effects of conflict pollution and attributing them to a single source. These problems further complicate the efforts to address conflict-related environmental harm.

These two issues are important because they may hamper our ability to give conflict-related environmental harm the urgency in policymaking it rightly deserves. First, it is hard to know the impact of conflict pollution on public health and ecosystems over a longer period. As with all persistent environmental pollution, environmental monitors have difficulties in assessing the long-term impact on public health. Victims of conflict pollution often cannot identify the specific source of harm or their illness. A recent Harvard study on remedies for victims of conflict pollution assessed that victims often do not know when they were exposed to toxic remnants, with people developing health

1 Aneeka Kellay and Doug Weir, ‘Pollution Politics: Power, Accountability, and Toxic Remnants of War’ (Manchester: Toxic Remnants of War Project, 2014), https://ceobs.org/wp-content/uploads/2018/01/WEB_READY%E2%80%9393TRW_Pollution_Politics_Report.pdf.

2 Daniëlla Dam-de Jong, ‘Building a Sustainable Peace: How Peace Processes Shape and Are Shaped by the International Legal Framework for the Governance of Natural Resources’, Review of European, Comparative & International Environmental Law 29, no. 1 (2020): 21–32, <https://doi.org/10.1111/reel.12307>.

problems many years after initial exposure.³ When Iraqi forces set fire to oil fields in the Gulf War in 1991, for instance, the possible long-term health damage from the resulting toxic fumes was discussed, but ensuing monitoring projects have not been able to sufficiently determine the cause and extent of the harm.⁴ Even in cases where a link has been established, scientific data is not always persuasive enough to lead to policy outcomes. For instance, in the Vietnam conflict where the herbicide Agent Orange affected gene expression, the companies that made the toxins and the US government have never fully acknowledged the damage, although they did set up some remediation programmes in Vietnam and for US veterans. Victims are still trying to seek remediation through litigation half a century after the conflict, for instance in an ongoing case in France.

A second problem that arises is that damage mostly occurs indirectly, especially if a conflict lasts for a longer time. In Vietnam, the US army wilfully used herbicides to destroy farmlands and forests, but in the conflicts in Eastern Ukraine and Syria, damaged infrastructure and disruptions to heavy industries cause most of the environmental harm. For example, in Syria, the destruction and abandonment of oil refineries has led to the emergence of informal, makeshift oil industry sites. As these lack the proper facilities to safeguard the production process and treat harmful substances, vast amounts of harmful substances have leaked into the surrounding environment and rivers have been polluted by oil spills. Likewise, the collapse of waste management in Syria threatens human health, contaminates groundwater, and causes air pollution through increased waste burning. In the conflict in Eastern Ukraine, in Europe's most heavily industrialized zone, abandoned coal mines started to flood. As many of the mine shafts are connected and mine water contains harmful toxins, floods will threaten to pollute water supplies.⁵ Toxic waste storage facilities (Tailings Storage Facilities, TSFs), some of which are in disrepair and close to the conflict zone, also run the risk of being damaged by the fighting. The spills from these TSFs could lead to trans-boundary pollution.⁶

Both problems are linked to the lack of urgency regarding the efforts to mitigate environmental problems

in general. Environmental damage in conflict is often not recognized unless it causes a direct, devastating and clearly observable threat to humans. Yet, as they tend to be slow-onset, the ensuing environmental problems may sometimes be left to develop and accumulate for decades, unobserved, and unpunished. Therefore, even when the evidence is at hand, it does not necessarily lead to accountability.

A NEW NORMATIVE FRAMEWORK FOR THE PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT

Potential ways to establish accountability for environmental damage in conflicts through international law have been discussed recurrently for decades. For instance, in the aftermath of the Vietnam War, the ENMOD convention (the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, effective since 1978) aimed at curbing the use of herbicides and weather-altering military strategies, the effects of which would be “widespread, long-lasting, and severe”. As a result of this high threshold and limited scope that focuses on the active phase of a conflict, the ENMOD convention has had little impact. Yet during the past decade, steps towards new legal frameworks have taken on a more elaborate form. The PERAC principles prepared by the ILC and the updated guidelines of the ICRC outline two respective ways to address the issue. Although they originate from different angles, they can be seen to provide complementary rather than opposing or alternative frameworks.

Established in 1947, the International Law Commission (ILC) makes recommendations and initiates studies to encourage the codification and “progressive development” of international law as laid out under Article 13(1) (a) of the Charter of the United Nations. The ILC started working on preparing a new set of principles on the Protection of the Environment in Relation to Armed Conflict (the so-called PERAC principles) after the 2009 UN Environmental Programme (UNEP) Conference in Nairobi. At the end of the conference, the organizers – UNEP, the Environmental Law Institute, and the International Committee of the Red Cross report – published the report “Protecting the environment during armed conflict: An Inventory and Analysis of International Law” in which they called upon the ILC to start working on a set of principles to strengthen the legal protection of

3 HLSIHR and CEOBS, ‘Confronting Conflict Pollution: Principles for Assisting Victims of Toxic Remnants of War’ (Harvard Law School International Human Rights Clinic, 2020), https://ceobs.org/wp-content/uploads/2020/09/Harvard_CEOBS_Confronting_Conflict_Pollution_2020.pdf.

4 CEOBS, ‘What the Environmental Legacy of the Gulf War Should Teach Us’, CEOBS (blog), 18 March 2016, <https://ceobs.org/what-the-environmental-legacy-of-the-gulf-war-should-teach-us/>.

5 OSCE, ‘Environmental Assessment and Recovery Priorities for Eastern Ukraine’ (OSCE, 2017), <https://www.osce.org/project-coordinator-in-ukraine/362566>.

6 Iryna Nikolaieva, Hanna Lenko, and Oleksandr Lobodzynskyi, ‘Donbas Tailings Storage Facilities’ (Kyiv: OSCE & Ministry of Energy and Environmental Protection of Ukraine, 2019), https://media.voog.com/0000/0036/1658/files/SUMMARY_Donbas%20TSFs_OSCE_published_eng.pdf.



US Helicopter spraying chemical defoliants in the Mekong Delta during the Vietnam War. Source: Brian B. Grigsby / U.S. Department of Defense

the environment during war and conflict.⁷ The ILC began its work in 2013 and in 2019, in its seventy-first session, adopted 28 draft principles on the Protection of the Environment in Relation to Armed Conflict (PERAC) in its first reading.⁸ After the adoption of the draft principles, civil society actors, states and other IOs can submit comments to the ILC. States have until June 2021 to submit their written comments. The ILC is expected to adopt the final version of these principles in 2021 and submit them to the UN General Assembly.

Even though they are non-binding, the PERAC draft principles are significant on account of their holistic nature: instead of focusing on the conflict phase only, they seek to enhance environmental protection during the entire conflict cycle at a time when frozen or prolonged conflicts have become more common. The ILC developed principles that are applicable to the pre-conflict phase, during occupation, and in the aftermath of the conflict. It also formulated principles which are more broadly applicable throughout the conflict cycle, such as draft principles 10 and 11 on corporate due diligence and accountability respectively, and draft principle 8 on

human displacement. The ILC draws on international environmental law, international humanitarian law, and human rights law. Under its mandate, the ILC codifies existing international law but, depending on the draft principle, also pushes for the progressive development of international law regarding protection of the environment during armed conflict.⁹

The International Committee of the Red Cross first published its Guidelines on the Protection of the Natural Environment in Armed Conflict in 1994 at the request of the General Assembly of the UN. Due to fast development not only in the international legal framework but also in the means of warfare, however, an updated and reiterated version was published in 2020. The Guidelines are based on international humanitarian law (IHL), presenting an outline of the existing IHL rules and recommendations that bestow protection on the environment in conflict. They also provide commentary to support their application. Thus, rather than provide new rules or regulations, the ICRC Guidelines aim to promote the implementation of existing ones. These include, among others, due regard for the natural environment in military operations and the prohibition of widespread, long-term, and severe environmental damage.

7 UNEP, 'Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law' (Nairobi: United Nations Environment Programme, 2009), https://wedocs.unep.org/bitstream/handle/20.500.11822/7813/-Protecting%20the%20Environment%20During%20Armed%20Conflict_An%20Inventory%20and%20Analysis%20of%20International%20Law-2009891.pdf?sequence=3&%3BisAllowed=.

8 ILC, 'Protection of the Environment in Relation to Armed Conflicts: Text and Titles of the Draft Principles Provisionally Adopted by the Drafting Committee on First Reading' (Geneva: International Law Commission, 2019), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G19/153/11/PDF/G1915311.pdf?OpenElement>.

9 Doug Weir and Stavros Pantazopoulos, 'Feasibility Study: An Implementation Vehicle for the International Law Commission's Draft Principles on the Protection of the Environment in Relation to Armed Conflicts' (CEOBS, 2020), 8, https://um.fi/documents/35732/0/CEOBS_An-implementation-vehicle-for-the-International-Law-Commission-on-the-Protection-of-the-environment-in-relation-to-armed-conflicts.pdf/197ee9ae-5f1e-2732-4ad9-1099f4b-66b76?t=1614077308636.

The Guidelines highlight the role of the actors that are involved during various phases of conflict. In addition to states, this also refers to non-state actors and other actors that are either party to a conflict or in a position to influence one. The emphasis on the variety of relevant actors is a recognition that measures to control wartime damage cannot be left solely to the conflict parties, who generally do not prioritize environmental concerns. The engagement of other actors may help to promote awareness of the IHL rules and increase pressure on conflict parties to take them into account.

Enforcement is a general problem for the international legal order. Reflecting on the ILC PERAC process, Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts, Dr Marja Lehto, concluded that: “While there is all reason to hope that the consultation process will be as inclusive as possible, the real test of the principles will be their reception by States and other relevant actors after the second reading.”¹⁰ While states have been relatively cooperative during the formulation of the PERAC principles, they are often hesitant or selective in implementing new principles. This especially applies to states that are involved in armed conflict.

OBSTACLES TO IMPLEMENTATION AND MONITORING

As the basis for a legal framework for protecting the environment in armed conflicts is reaching its final stage, the focus moves towards its implementation. The issue has been touched upon but not conclusively resolved during the preparation of both the ICRC Guidelines and the ILC PERAC principles. The Guidelines as such are aimed at assisting implementation by providing recommendations on the adoption of measures to protect the environment in conflict, and the ICRC intends to follow up on the process in practice. Yet it is ultimately up to states and the conflict parties to observe the guidelines. Meanwhile, the PERAC principles do have a strong international standing as they have been developed with the involvement of states – through consultation – but they are non-binding and have no set monitoring system. Both the Guidelines and the Principles therefore prompt an underlying question as to why states would comply with or implement such regulations in the first place. The

frameworks for preventing environmental damage in conflict cannot rely on the benevolence of states – or indeed even on common ground seemingly found in conference rooms during the negotiation process.

The implementation of any convention is always a politicized process. While the PERAC principles are not a convention or treaty, their implementation will depend on the political goodwill of states and the ability of civil society actors to mobilize states to advance domestic implementation, either through naming-and-shaming tactics or by setting up an independent monitoring system. Resolving environmental hazards during conflict depends on political willingness and less on the intrinsic authority of the new legal PERAC principles. Left unchecked, states will take an à la carte approach to implementation: favouring certain principles, whilst disregarding others depending on their own political interests. This will particularly be the case for states that have inflicted environmental damage, as there is a strong incentive to politicize and obstruct data collection on environmental damage.

A related issue is the lack of a clear and mutually recognized monitoring system for implementation. The ILC does not have the mandate to monitor the implementation of its new principles. As the ILC is nearing its finalization of the PERAC principles, states will need to start implementing these in their military and environmental protection practices. So far, there has been no major effort to assess that implementation process. Only the UK-based NGO, the Conflict and Environment Observatory (CEOBS), has carried out two independent assessments of the implementation of the PERAC principles, which assessed the UK’s and Canada’s practices in reports published in 2019 and 2021 respectively. CEOBS found that Canada’s practices in the post-conflict phase aligned with the principles, but that its practices “should take appropriate measures to ensure the environmentally sound conduct of corporations and other business enterprises in areas affected by armed conflicts and in post-conflict situations”, as well as protect the environment in territories affected by conflict where Indigenous people live.¹¹

As more cherry-picking by states is likely, civil society actors and states should invest in the development of an independent monitoring system. In a feasibility study financed by the Finnish Ministry for Foreign Affairs in 2020, CEOBS suggested developing an independent database that would act as both a

10 Marja Lehto, ‘Armed Conflicts and the Environment: The International Law Commission’s New Draft Principles’, *Review of European, Comparative & International Environmental Law* 29, no. 1 (2020): 67–75, <https://doi.org/10.1111/reel.12324>.

11 CEOBS, ‘Canada’s Practice on the Protection of the Environment in Relation to Armed Conflicts’ (Conflict and Environment Observatory, 14 January 2021), https://ceobs.org/wp-content/uploads/2021/01/CEOBS_Canadas_practice_on_PERAC.pdf.

repository for state practices on environmental protection during armed conflict and introduce a system of indicators with which state implementation of PERAC could be measured.¹² This would be the first, and thus far, only initiative that would develop a sustained monitoring mechanism.

Quantitative, evidence-based methods have become the norm in monitoring and measuring state compliance, especially with human rights conventions. Proponents of such measuring systems argue that rankings and indicators would make it easier to identify which states fail to comply. Such scores pressure states into compliance because they allegedly care about their international reputation when compared to other states. Concerns about their reputation drives implementation and compliance.¹³ However, critics argue, first, that such rankings distil complex behaviour into simple scores, not considering that states might as easily disregard the legitimacy of these rankings. A second point of criticism is that the selection of indicators is never free from disputes: over who gives them legitimacy, who has the authority to define them, and why some indicators get prioritized over others.¹⁴ While assessments and indicators might convey scientific neutrality, these rankings are never free from critique. For instance, when UNEP carried out an assessment of the environmental damage of the Kosovo conflict in 1999, the government of the Federal Republic of Yugoslavia questioned its neutrality and transparency, accusing the organization of downplaying the environmental damage caused by the NATO bombings.

While it is self-evident that states are responsible for the implementation process, it is often civil society actors who use their resources to coax states into compliance. For rankings to have their intended impact, responsibility has mostly fallen on the shoulders of civil society actors who need to, first, continuously disseminate these rankings, second, expose the performance of states in international fora, and third, guarantee a transparent process for how indicators are selected and prioritized.

CONCLUSIONS

Although there are obstacles on the way to their implementation, the frameworks for mitigating the environmental damage of conflict have reached a critical juncture. The ILC's process for preparing the PERAC Principles has raised states' awareness of the topic, and the ICRC updated Guidelines show that existing international humanitarian law provides several ways to act upon it. Perhaps most importantly, however, the new initiatives have given rise to a considerable international momentum for strengthening the protection of the environment during and after armed conflict. It is crucial that states and other actors, including civil society, seize the opportunity and proceed with the implementation of the new frameworks.

Individual countries should recognize the ILC's PERAC Principles and continue to engage in their implementation. The PERAC Principles represent the most extensive attempt yet to create a coherent and holistic framework for the protection of the environment in conflicts, duly providing a reference point and a tool for states in case they should suffer from conflict-related environmental damage. However, even countries that do not foresee a direct use for the PERAC Principles stand to benefit from them if they help to hinder large-scale damage, such as massive fires in oil fields or rainforests, which have the potential to contribute to climate change and other global environmental crises.

Independent monitoring is needed to ensure the credibility and applicability of both the PERAC Principles and the ICRC Guidelines. This requires the participation of several actors and should also engage civil society organizations. Only monitoring makes it possible to know whether the new frameworks are being applied in practice, and if they are having any impact. A necessary, if challenging, step is inventing a transparent decision-making process for selecting indicators to enable monitoring. For these mechanisms and indicators to work, we need sustained mobilization of civil society actors who expose the performance of states. /

¹² Weir and Pantazopoulos, 'Feasibility Study'.

¹³ Judith G. Kelley, *Scorecard Diplomacy: Grading States to Influence Their Reputation and Behavior*, Cambridge University Press (Cambridge, New York, 2017), <https://doi.org/10.1017/9781108186100>.

¹⁴ Sally Engle Merry, *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking* (University of Chicago Press, 2016).