A Legal Battlefield: the Application of Draft Principles Adopted by International Law Commission and the Protection of Environment during Armed Conflicts

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Abstract

Throughout history, wars have been prevalent, even in times before states were fully developed. Rulers, kings, and sultans engaged in conflicts for various reasons such as expanding territories, increasing wealth, and subjugating people. Despite attempts to eradicate war, it persists, with some justifying it as "a natural law". Wars not only cause great destruction in death, disease, hunger and poverty. They also cause serious damage to nature. Serious problems such as loss of farmland, water scarcity and pollution caused by toxic wastes are emerging. This article will examine the hazardous impact of armed conflicts on the environment, and the international protective measures and conventions in place. The article will also explore the Garabagh conflict and consider the hypothetical approach on the possible retroactive effect of Draft Principles on protection of the environment in relation to armed conflicts (hereinafter referred to as the "draft principles") adopted by International Law Commission in addressing these issues.

Annotasiya

Tarix boyu, dövlətlərin hələ tam inkişaf etmədiyi dövrlərdə belə müharibələr geniş yayılmışdı. Hökmdarlar, padşahlar və sultanlar müxtəlif səbəblərdən: əraziləri genişləndirmək, öz sərvətlərini artırmaq və insanları özlərindən asılı vəziyyətə salmaq üçün münaqişələrə girirdilər. Müharibəni aradan qaldırmaq cəhdlərinə baxmayaraq, bəziləri bunu təbiətin qanunu kimi əsaslandırmağa davam edir. Müharibələr yalnız ölüm, xəstəlik, aclıq və yoxsulluq kimi böyük dağıntılara səbəb olmaqla qalmır, həm də təbiətə ciddi zərərlər yetirir. Əkin sahələrinin itirilməsi, su qıtlığı və zəhərli tullantıların səbəb olduğu çirklənmə kimi ciddi problemlər ortaya çıxır. Bu məqalə silahlı münaqişələrin ətraf mühitə təhlükəli təsirini və qüvvədə olan beynəlxalq mühafizə tədbirləri və konvensiyaları araşdıracaq. Məqalədə həmçinin Qarabağ münaqişəsi tədqiq ediləcək və bu məsələlərin həllində Beynəlxalq Hüquq Komissiyası tərəfindən qəbul edilmiş silahlı münaqişələrlə bağlı ətraf mühitin mühafizəsinə dair Prinsiplər Layihəsinin (bundan sonra "prinsiplər layihəsi" adlanacaq) mümkün geriyə təsirinə dair hipotetik yanaşmaya nəzər yetiriləcəkdir.

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Introduction

The natural environment encompasses the habitats of humans and various other living organisms. This environment consists of several key elements: the lithosphere (the Earth's crust), the atmosphere (the layer of gases surrounding Earth), the hydrosphere (all of Earth's water), and the biosphere (the global sum of all ecosystems). Humans carry out all their activities within these natural components.

Nature and humanity are interconnected in a way that they influence each other continuously. Just as humans live within and interact with nature, natural events and elements impact human social, economic, and other activities. This ongoing interaction between natural events and human activities is known as the nature-human interaction.

The importance of environmental protection during armed conflicts has increasingly gained attention since the 1970s. Today, the environment is recognized as a key civilian asset that deserves the same protections as people and property during times of war. This recognition establishes a legal obligation to prevent environmental damage during armed conflicts. Given the extensive harm that conflicts can cause to the environment, prioritizing this protective responsibility is crucial. This legal duty is supported and sustained by international environmental law.

Many international multilateral agreements seek to safeguard the environment, but their scope and duties vary greatly, spanning the bilateral, regional, and global levels. Although some of these accords apply to armed conflict, some expressly prohibit such circumstances, and some provide ambiguous guidance on the subject. Furthermore, organizations such as the International Committee of the Red Cross (hereinafter referred to as the **"ICRC"**) have an extensive record of tackling environmental issues in war zones. Thus, in 2020, ICRC updated its guidelines on environmental protection within the framework of international humanitarian law. The new set of guidelines, known as the ICRC Guidelines on the Protection of the

Natural Environment in Armed Conflict, builds on the Committee's 1994 guidelines. This updated document includes thirty-two rules and recommendations, each accompanied by a commentary that clarifies their legal foundation and offers guidance for interpretation. Furthermore, draft principles represent a significant recent accomplishment in this subject. These draft principles comprise 27 principles, which aim to safeguard the environment during armed conflicts by setting out guidelines for preventing environmental damage, ensuring accountability, and integrating environmental considerations into military and humanitarian efforts.

This article examines the general issue of environmental protection in wartime, including the challenges and existing frameworks for safeguarding the environment.

One of the focuses of the article is on the environmental and legal violations committed by Armenia during the Garabagh conflict, and it explores the potential retroactive application of the draft principles on environmental protection. This involves evaluating what protections might have been guaranteed if these principles had been established before the conflict.

Finally, the article assesses Armenia's adherence to fundamental international norms related to environmental protection in the context of the Garabagh conflict, using the draft principles as a framework for analysis. Overall, the article offers a thorough investigation into how legal and normative frameworks can address environmental harm during armed conflicts, with a specific focus on Armenia's actions in the Garabagh conflict.

I. The Issue of Environmental Protection During Armed Conflicts

As it has been previously mentioned, armed conflicts have historically led to significant disasters, including loss of life, forced migration, occupations, destruction, and more. In addition to these consequences, armed conflicts have a destructive impact on natural resources. In these conflicts, parties have historically employed military tactics aimed at the destruction of natural resources to defeat their opponents. These tactics either directly targeted natural resources or had indirect effects on them while focusing on the opposing party.

Throughout history, there have been numerous instances where the destruction of agricultural lands, irrigation channels, and natural habitats was employed to eliminate the military and economic capabilities of adversaries. A notable example is the Third Punic War, which occurred between 149-146 BC, during which the Romans salted the lands of the Carthaginians, rendering them infertile.[1] Furthermore, various methods were utilized to inflict irreversible environmental damage, such as destroying forests and vegetation

[1] Laurent R. Hourcle, *Environmental Law of War*, 25 Vermont Law Review 653, 655-656 (2001).

to prevent enemy concealment, burning cultivated lands to annihilate crops, breaching reservoirs and canals to cause flooding, and poisoning water sources. For instance, during the American Civil War (1861-1865), the Northern Army devastated agricultural lands owned by the Confederates by cutting off natural resources and setting them ablaze.[2]

In armed conflicts, essential resources vital for all living beings, such as land, air, water bodies, forests, and seas, become polluted; biodiversity, habitats, and natural resources are destroyed; and the natural balance is disrupted to a degree that adversely affects human existence.[3] To cite a relatively recent example, we can recall the atomic bombs dropped on Hiroshima and Nagasaki: these bombs not only resulted in the deaths of tens of thousands of people at the moment of the attack and in its aftermath, but they also caused catastrophic levels of radioactive contamination.[4]

The environmental damage caused by armed conflicts can be divided into three temporal categories: pre-conflict (these are the damages associated with armed conflict), during the conflict, and post-conflict periods. In the pre-conflict phase, the negative impacts of the arms industry on the environment are predominantly observed. Specifically, the production, testing, and stockpiling of weapons, particularly chemical, biological, and nuclear weapons, generate radioactive and toxic contamination, posing a serious threat to the environment.[5]

During the conflict period, environmental degradation intensifies as warfare directly impacts natural resources and ecosystems. The use of explosive weapons, deforestation for strategic purposes, and contamination of water sources through chemical agents or spills result in severe damage to landscapes, wildlife habitats, and human health.[6] The destruction of infrastructure, including industrial facilities and waste management systems, further exacerbates environmental harm, often leading to long-term ecological and public health crises.[7]

In the post-conflict period, the challenges shift towards recovery and remediation. Environmental damage often persists long after the conflict has ended, requiring extensive cleanup and restoration efforts.[8] Contaminated soil and water, destroyed ecosystems, and hazardous remnants of war

[2] *Ibid*.

[3] Hakan Altintash, *Savashlarin Cevresel Boyutu ve Ekosistem Uzerindeki Geri Donushu Olmayan Etkileri*, 8 Manas Universitesi Sosyal Bilimler Dergisi 131, 143 (2003).

[4] Ahmet Hamdi Topal, *Silahli Chatishmalarda Dogal Chevrenin Korunmasi*, 29 Milletlerarasi Hukuk ve Milletlerarasi Ozel Hukuk Bulteni 211, 215 (2009).

[5] Philippe Sands, Principles of International Environmental Law, 308 (2nd ed. 2003).

[6] *See generally* CEOBS, How does War Damage the Environment (2020), https://ceobs.org/how-does-war-damage-the-environment/ (last visited May 07, 2024).

[7] *Ibid*.

[8] *Ibid*.

demand significant resources and international cooperation to address.[9] Additionally, rebuilding efforts must incorporate sustainable practices to prevent future environmental degradation and mitigate the impact of the conflict's legacy on both human and natural systems.[10]

Armed conflicts and the application of weapons during these conflicts pose a serious threat to the environment. Therefore, in addition to the general international environmental law norms pertaining to the protection of the environment during conflicts, there is a necessity to develop comprehensive international legal norms that define the responsibility of parties for environmental damage incurred specifically during these conflicts, incorporating elements of both international humanitarian law and environmental law. The development and international legal enforcement of these norms is equally important as the establishment of international legal mechanisms that ensure their effectiveness. Efforts in this direction and the attention given to this issue, both practically and academically represent a relatively new trend.

Certainly, the primary factor ensuring the international legal effectiveness of these norms will undoubtedly be the will of the conflict parties, which includes states and other actors. Naturally, the primary interest of the parties involved in the conflict is the destruction of the opposing side's objectives and their defeat. However, in such circumstances, natural objects should not be considered legitimate targets; their significance must be acknowledged not only for the present but also for future generations.

In this regard, the development of effective legal protection and accountability mechanisms for the protection of the environment in armed conflicts is essential. Since the 1970s, the increasing ecological sensitivity and the emergence of globally significant environmental issues have accelerated the process of implementing international regulations concerning the environment. Currently, some efforts have been made in this direction, and international legal norms have come into effect. The international legal instruments for the protection of the environment in armed conflicts can be categorized into three areas: 1) general international environmental law; 2) international humanitarian law; and 3) norms and mechanisms that are inherently characteristic of both international environmental and humanitarian law.

Most of these regulations directed towards environmental protection are framed within an anthropocentric perspective, meaning that the environment has been safeguarded not for its intrinsic value but for its significance to human life. Contrary to this view, there is an ecocentric approach positing that the environment is valuable in itself. According to the ecocentric

[9] *Ibid*.
[10] *Ibid*.

perspective, environmental elements should be preserved even if they are not deemed significant for the continuity of human life.[11]

Additionally, the norms developed under international environmental law, a branch of international law, primarily focus on the protection of the environment during peacetime. However, over time, the international community has recognized the necessity of direct regulations for the protection of the environment during armed conflicts, leading to the development of new provisions within international humanitarian law. In particular, this issue gained global attention as a result of the "Gulf War" that occurred between August 1990 and February 1991. Iraq's burning of Kuwaiti oil wells and the discharge of significant quantities of oil into the sea highlighted the urgency of protecting the environment during armed conflict.[12]

The issue of artificially altering the environment for military or other hostile purposes was brought to the international agenda in the early 1970s. In July 1974, the United States and the Soviet Union engaged in bilateral discussions aimed at addressing the dangers associated with the military use of environmental modification techniques. By August 1975, the United States and the Soviet Union had reached an agreement on the same draft text.

As a result of this agreement, the international document regulating the use of techniques for altering the environment for hostile purposes is the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, adopted on May 18, 1977 (abbreviated in English as ENMOD). This agreement entered into force on October 5, 1978, following the ratification by 20 states.

The Convention consists of 10 articles and 1 Additional Protocol. By acceding to this agreement, participating states undertake obligations not to engage in military or any other hostile purposes using environmental modification techniques that could result in widespread, long-lasting, or severe effects as a means of destruction, damage, or injury to another participating state.[13]

Environmental modification technique means any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition, or structure of the Earth's biosphere, lithosphere, hydrosphere, atmosphere, or outer space.[14] These techniques of modification include

[11] Jessica Lawrence & Kevin Jon Heller, *The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime*, 20 Georgetown International Environmental Law Review 1, 64-65 (2007).

[12] Huseyn Pazarci, *Uluslararasi Hukuka gore Chevrenin Savash Sirasinda Korunmasi*, 47 Ankara Universitesi SBF Dergisi 103, 103 (1992).

[13] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, art. 1 (1978).

[14] *Id*., art. 2.

seismic activities, creating strong sea waves, disturbing the ecological balance of a specific area, changing atmospheric conditions, and modifying climate conditions, ocean currents, the ozone layer, or the ionosphere. The convention prohibiting the use of these techniques also imposes certain obligations on states.

According to Article IV of the Convention, each participating state bears responsibility and must take necessary legal measures within its jurisdictional authority over territories under its jurisdiction, in accordance with the obligations included in the Convention.[15]

Moreover, Article V of the Convention envisages the establishment of a Consultative Committee, including a Committee of Experts under the chairmanship of the Secretary-General of the United Nations, to provide advice and assist in resolving any problems arising from the application of the objectives and provisions of the Convention.[16]

In addition to the ENMOD, there exist international legal instruments that prohibit the use of certain weapons capable of causing catastrophic damage to the environment, alongside environmental modification.

Of course, nuclear weapons pose the greatest threat to the environment. However, there is no international legal instrument that explicitly prohibits their use in plain text in international law. By comparison, there are clearer international legal norms regulating the use of chemical and biological weapons.

The Additional Protocol to the Hague Convention of 1907, Article 23, and the Geneva Protocol of 1925 on the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare prohibit the use of chemical weapons, which are poisonous substances or gases. Similarly, the Geneva Protocol of 1925 also addresses biological weapons by prohibiting the use of bacteriological methods of warfare. Furthermore, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, dated April 10, 1972, bans the development of such weapons, establishes obligations for their destruction, and thereby prohibits their use.

In conclusion, addressing the environmental impact of armed conflicts is not only a legal and moral responsibility but also a crucial component of achieving sustainable peace and security. Recognizing the intrinsic link between environmental integrity and human well-being can encourage the international community to adopt more sustainable approaches to conflict resolution and recovery. Defining environmental protection as a priority ensures that future generations inherit a healthier planet and a more just world, thereby promoting continuity in conflict-affected regions.

[15] *Id*., art. 4.

[16] *Id*., art. 5.

II. The Possibility of Retroactive Application of the "Draft Principles"

This section provides an overview of the core concepts and fundamental ideas behind the draft principles. Additionally, it examines the possibility of retroactively applying these principles and the consequences that may arise from such an approach.

A. Concept, Importance, and Possibility of Retroactive Application of Draft Principles

Environmental concerns are becoming increasingly substantial, and they are expected to have a greater impact on military operations in the future, perhaps aggravating the repercussions of armed conflicts. As mentioned earlier, warfare can cause significant environmental harm, including the extinction of essential plant and animal species, water pollution, and hazardous spills. Wars and military activities have resulted in enormous, long-term damage not only to human lives and infrastructure but also ecosystems. As a result, survivors may suffer catastrophic repercussions such as reduced agricultural land, water scarcity, and toxic waste. Since the natural world has always been the spatial component of warfare, it has been essential for armies. Efforts to expand geographic control do not mitigate the ongoing harmful impacts on the environment caused by past actions, particularly those of the military over the last several decades.[17]

Today, the change in the quality and quantity of armies and the advanced level of weapon technologies have expanded the battlefields on a continental scale and caused even more devastating and permanent damage to the environment than in previous centuries.[18] For example, poisonous bombs contaminate subterranean water and sicken people, and oil-polluting missiles that strike refineries wipe out forests and ruin the primary living quarters of the opposing side. Environmental protection is not a priority in conflict. However, after peace is restored, it might have severe long-term repercussions that cause new issues. Notable examples of environmental damage caused by armed conflict contain the use of Agent Orange during the Vietnam War, the destruction of oil wells in Kuwait in 1990-91, the discharge of hazardous substances following attacks on industrial sites in Kosovo in 1999, damage to water resources in Lebanon in 2006, and the use of biological or chemical weapons.[19] Environmental harm caused by armed conflict is more

[17] Tarik Ak, *Gunumuzun Savashlarinda Chevre Konusuna Ilishkin Bir Degerlendirme*, 32 Istanbul Aydin Universitesi Dergisi 17, 17 (2016). Available at: https://dergipark.org.tr/tr/download/article-file/581687 (last visited Apr. 17, 2024).
[18] *Id*., 18.
[19] Rigmor Argren, *The Obligation to Prevent Environmental Harm in Relation to Armed Conflict*, 924 International Review of the Red Cross 1208, 1209 (2023). Available at: https://international-review.icrc.org/sites/default/files/reviews-pdf/2023-12/the-obligation-

than just a historical concern. Following the Russian Federation's attack on Ukraine, severe ecological harm was caused in both urban and rural regions.[20]

Since the basic mechanisms of the traditional Law of Armed Conflict were developed during World War II, dangers like climate change were not as important worldwide concerns as they are now. As this topic gets traction in the international legal community, attempts to assess and evaluate legal systems safeguarding the environment in armed conflicts are both necessary and desirable. One of such endeavor is the draft principles, approved by the International Law Commission (hereinafter referred to as the **"ILC"**) in 2022.

The ILC's objective, according to its statute, is *"the promotion of the progressive development of international law and its codification"*.[21] Ambassador Marie Jacobsson and Ambassador Marja Lehto were designated by the ILC as special rapporteurs on environmental protection during armed situations in 2013 and 2017, respectively.[22] Throughout the writing process, the ILC solicited written comments and suggestions, receiving replies from 23 nations, 13 international organizations, and other entities that expressed a variety of concerns regarding the draft principles. Following nearly a decade of effort on this problem, the ILC accepted the draft principles during its 73rd session in 2022.[23]

These draft principles aim to address the significant environmental harm that can result from armed conflicts and to enhance the legal framework governing environmental protection during and after such conflicts.[24]

These draft principles cover a broad temporal scope, addressing

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to-prevent-environmental-harm-in-relation-to-armed-conflict-924.pdf (last visited Apr. 25, 2024).

[20] *Ibid*.

[21] Statute of the International Law Commission, art. 1 (1947). Available at: https://legal.un.org/ilc/texts/instruments/english/statute/statute.pdf (last visited Apr. 31, 2024).

[22] Report of the International Law Commission Seventy-first session (29 April – 7 June and 8 July – 9 August 2019), General Assembly Official Records Seventy-fourth Session Supplement No. 10 (A/74/10), 209 (2019). Available at: https://documents.un.org/doc/undoc/gen/g19/243/93/pdf/g1924393.pdf?token=mqwPeSuBSOc4RAWSZc&fe=true (last visited Apr. 31, 2024).

[23] *See generally* International Law Commission Seventy-third session Geneva, (18 April – 3 June and 4 July – 5 August 2022), A/CN.4/L.968 (2022). Available at: https://documents.un.org/doc/undoc/ltd/g22/348/04/pdf/g2234804.pdf?token=6Oj6FURHckvise70Ka&fe=true (last visited Apr. 31, 2024). *See also* International Law Commission Seventy-third session Geneva, (18 April – 3 June and 4 July – 5 August 2022), A/CN.4/749 (2022). Available at: https://documents.un.org/doc/undoc/gen/n22/232/58/pdf/n2223258.pdf?token=in4Nve5EBEF7FBsz7p&fe=true (last visited Apr. 31, 2024).

[24] ILC, Draft Principles on Protection of the Environment in Relation to Armed Conflicts, principle 2 (2022). Available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/8_7_2022.pdf (last visited Apr. 31, 2024).

environmental protection before, during, and after armed conflicts. They are intended to apply to both international and non-international armed conflicts in order to provide environmental protection.[25]

Conditionally, the measures stated in draft principles can be divided into 2 categories: Environmental protection during armed conflict and after the conflict. The first group entails such principles as precaution, prohibition of certain means and methods, protected zones etc.

Principle of precaution means that parties to a conflict should take specific safeguards, such as assessing environmental risks, minimizing the use of harmful weapons, and avoiding attacks on environmentally sensitive areas, to prevent and reduce environmental harm.[26] These precautions should be implemented both during an armed conflict and in the preparatory stages, to mitigate potential damage in advance.[27]

According to the second principle (prohibition of certain means and methods) specific means and methods of warfare that cause severe environmental damage are prohibited.[28]

The last measure which aims to protect environment during the wartime is to define protected zones. For this reason areas of significant environmental importance should be designated as protected zones and not be targeted during conflicts.[29]

As already known, it is not sufficient only to take during-conflict measures for effective environmental protection. That's why, there are some post-conflict measures in draft principles to prevent the severe and long-lasting effects of war.

Firstly, the States should be accountable for inflicted damage to the environment by them and have obligations like participating in restoration process of environment during and after conflict.[30] There should be an assessment and documentation of environmental damage resulting from conflicts. In order to effectively define the limits of this compensation, there should be an assessment and documentation of environmental damage resulting from conflicts.[31] Moreover, states responsible for environmental damage during conflicts may be required to provide reparations or compensation.[32]

The principles also recognize the role and responsibilities of non-state

[25] *Id*., principle 1.

[26] S*ee more* Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Vol. II, chapter 5, sec. A. Available at: https://ihl-databases.icrc.org/en/customary-ihl/v1/rule15 (last visited May 07, 2024).

[27] *Ibid*.

[28] *Supra* note 24, principle 13.2 (b).

[29] *Id*., principle 4 and principle 18.

[30] *Id*., principle 22 and principle 24.

[31] *Id*., principle 24.

[32] *Id*., principle 9.

actors, including multinational corporations and armed groups, in preventing environmental harm during conflicts.[33]

Moreover, the principles emphasize the importance of international cooperation and assistance in addressing environmental damage caused by armed conflicts. This includes cooperation in scientific research, information sharing, and capacity-building efforts.[34]

Furthermore, they highlight the interrelationship between human rights and environmental protection, recognizing that environmental harm can have significant adverse effects on the enjoyment of human rights.[35]

These draft principles are intended to complement existing IHL and International Environmental Law and to fill gaps where specific environmental protections are lacking. They are designed to be a framework for enhancing the protection of the environment in the context of armed conflicts and to promote greater accountability for environmental harm. The ILC's work on draft principles reflects a growing recognition of the need to address the environmental dimensions of armed conflicts and to promote sustainable peace and security.

It is noteworthy that the possibility of retroactive application is not provided for in the draft principles. It should also be recalled that, unless otherwise stated, neither principles nor treaties apply retroactively under international law.[36] Generally, international legal instruments, including the draft principles, are usually prospective in their application. This means that they have to deal with acts or situations arising after their adoption and not those previous to that, unless otherwise indicated.[37] However, the presence of certain circumstances brings up the issue of whether international law can be applied retroactively. Specifically, this involves examining whether legal principles or rules established after a particular event or conflict can be used to address or evaluate actions taken before those laws were enacted. This question arises in situations where new legal standards or guidelines might influence the assessment of past conduct, raising complex issues about the extent to which international law can apply to events that occurred before its establishment or modification. The presence of the following circumstances prompts the question of whether international law can have a retroactive effect.

First of all it is worth noting the issue of state practice and customary law. For these principles to have retroactive effect, they would need to be explicitly

[33] *Id*., principle 9.3 (a).

[34] *Id*., principle 23.

[35] *Id*., Preamble.

[36] *See generally* Joao Grandino Rodas, *The Doctrine of Non-Retroactivity of International Treaties*, 68 Revista da Faculdade de Direito da Universidade de São Paulo 341, 345 (1973). Available at: https://core.ac.uk/download/pdf/268355415.pdf (last visited Apr. 04, 2024).

[37] *Id*., 342.

agreed upon by states, either through a treaty or through consistent state practice and opinio juris — the belief that such practice is legally required. If a significant number of states begin to apply these principles consistently in their actions, it could lead to the development of customary international law, which is generally binding on all states. However, customary law does not automatically have retroactive effect. For retroactivity to apply, there would need to be explicit agreement by the states, as customary law usually applies going forward and not backward. Achieving this would require a high level of consensus among states, which is rare.[38]

Another challenge is national law. Thus, any country that decides to incorporate the draft principles into its national law has the flexibility to determine whether and how to apply these principles retroactively. This decision is made at the national level and does not constitute an international mandate. Consequently, while the principles may not be applied retroactively to international armed conflicts, they could be applied retroactively in the context of internal armed conflicts, depending on the country's legal choices. This distinction is important to note, as the application of retroactivity can differ based on the nature of the conflict and national decisions.

Transitional justice mechanisms are also a matter of debate. Truth and reconciliation commissions, special tribunals or reparation programs may be appropriate to deal with environmental damage from past armed conflicts in certain situations. Transitional justice mechanisms can be based on the draft principles, even though they themselves cannot be applied retroactively.

In other words, the draft principles were established to guide future action toward better environmental protection in connection with armed conflicts. No inherent retroactive effect exists, and any such application would have to be provided for through specific agreements or decisions at the national or international level. Since international law does not allow for the retroactive application of principles, this article will propose a hypothetical approach.

It must also be noted that, the draft principles are not legally binding on their own; they are intended as guidelines or frameworks. The ILC draft principles often serve as a basis for future treaties, conventions, or legal norms, but they require further action by states or international bodies to become legally binding.[39] For the draft principles to enter into force, they would typically need to be adopted and ratified by states or incorporated into international agreements. The process involves negotiation, endorsement, and often the creation of a treaty or binding resolution based on those principles as per mentioned above.

[38] *Id*., 344-347.

[39] *See more* Interview with Marja Lehto (2023), https://international-review.icrc.org/articles/interview-with-marja-lehto-924 (last visited May 7, 2024).

B. If These Draft Principles Were Adopted before the Start of the Garabagh Conflict, What Would Be the Protection Guarantee?

Had the draft principles been adopted and formed a part of binding international law prior to the commencement of armed hostilities in the Garabagh conflict, it would have been able to provide a framework within which better protection of the environment during and after the conflict could be ensured. Some of the protective assurances they would provide will be discussed in this paragraph.

First one are the precautionary measures. Parties to a conflict shall take constant care to avoid or minimize damage to the environment. This will include selecting means and methods of warfare such that, in the process of planning and deciding on an attack, they cause less potential for widespread environmental damage.[40] It has already been known that, during the Garabagh conflict, there were significant damages to forests and agricultural lands, some of which were caused by fires, bombs resulting from the conflict. If this principle had been in place and adhered to, both parties would have been required to take constant care to avoid or minimize environmental damage. For instance, the parties could have avoided using incendiary weapons or explosive devices in or near forested or agricultural areas to prevent damage. Moreover, military planning could have been prioritized avoiding areas with significant vegetation cover or areas of high environmental value, focusing instead on targets that would minimize the potential for widespread environmental damage.

Also, certain means and methods of warfare effectively causing severe damage to the environment shall be prohibited. It implies that weapons or methods of warfare that are known to cause wide-ranging and long-term damage to the environment already exist.[41] In the Garabagh conflict, the use of cluster munitions was reported, which can have a long-term impact on the environment due to unexploded ordnance that contaminates the land. These munitions can destroy vegetation and pose ongoing risks to wildlife and humans long after the conflict ends. This principle would restrict the use of weapons and methods of warfare that cause severe and long-term environmental damage.

Another issue is protected zones. Locations of significant environmental value could be declared out of bounds for military operations as protected

[40] *Supra* note 24, principle 14; *see also* ILC, Draft Principles on Protection of the Environment in Relation to Armed Conflicts, with Commentaries (hereinafter referred to as the "Commentaries") (2022). Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/8_7_2022.pdf (last visited Apr. 04, 2024).

[41] *Id*., principle 13.2 (b); *See also generally* Commentaries, *supra* note 40.

zones. This would contribute to the protection of the ecologically sensitive areas from damage during the course of the conflict.[42] Moreover, Azerbaijan's Ministry of Ecology and Natural Resources reports that mining during the occupation severely harmed forests, which are rich in biodiversity and home to endangered species like the Caucasian leopard and brown bear.[43] Over 7,000 hectares (17,000 acres) of protected forests were damaged, including reserves meant to protect unique ecosystems such as the oriental plane forest in the Basitchay River valley.[44] Some ancient trees, around 2,000 years old, were also cut down, impacting both biodiversity and cultural heritage. A recent UN Environment Programme report highlighted significant damage to farmland and water systems in Azerbaijan.[45] It found that coal mining and quarrying in Chardaghli occurred without proper environmental safeguards, increasing risks of chemical pollution and land instability. Additionally, landmines have caused fatalities among livestock and wildlife, ignited fires, and led to soil and water contamination from heavy metals and explosive residues.[46]

One of the main things concerning the post-conflict period is restoration and remediation. States would be required to restore and rehabilitate environments damaged during conflicts. This includes addressing pollution, rehabilitating ecosystems, and restoring natural resources. For instance, in Garabagh conflict, concrete obligations could involve identifying and marking the locations of mines placed during the conflict, participating in their removal, and ensuring that affected areas are not further damaged. These measures should be approached as proactive proposals to avoid further destruction and facilitate cooperation in the restoration process, rather than focusing on past actions.[47]

Assessment and documentation have to be mentioned as well. It would be essential to identify and document environmental damage done by the war. This would give insight into the kind of damage that has occurred and hence formulate remediation plans effectively.[48]

Since war is fraught with damage and losses, compensation is, in fact, inevitable. States liable for environmental damage during the war can be made liable and asked to pay a reparation or compensation. This could also be some form of financial compensation towards ecological restoration or

[42] *Id*., principles 4, 18; *See also generally* Commentaries, *supra* note 40.
[43] Azerbaijan Sues Armenia for Wartime Environmental Damage (2023), https://www.theguardian.com/environment/2023/jan/26/azerbaijan-sues-armenia-for-wartime-environmental-damage-bern-convention-biodiversity-aoe (last visited May 07, 2024).
[44] *Ibid*.
[45] *Ibid*.
[46] *Ibid*.
[47] *Supra* note 24, principle 22 and principle 24; *See also generally* Commentaries, *supra* note 40.
[48] *Id*., principle 24; *See also generally* Commentaries, *supra* note 40.

towards the communities that have been adversely affected by environmental damage.[49]

Moreover, these principles would provide for international cooperation and urge states to work together in addressing environmental damages caused by the conflict. This may include sharing relevant expertise, resources, and information towards environmental protection and restoration.[50]

Of course, human rights are at the center of all this. Recognizing that human rights and protection of the environment are interrelated, the principles would ensure that environmental damage does not have negative effects on the realization of such human rights, including protection against health and livelihood impacts on communities.[51]

The principles would also extend to non-state actors, including the armed groups and multinational enterprises, as parties to the conflict, and holding them liable for prevention and redress measures for environmental harm.[52]

If these principles had been established before the Garabagh conflict, there would now be a comprehensive framework for protecting the environment during military activities and promoting accountability for environmental damage. This would include measures aimed at mitigating the ecological consequences of the conflict and supporting post-conflict recovery efforts.

III. Compliance by the Republic of Armenia with Jus Cogens Norms Regarding the Protection of the Environment in the Garabagh Conflict: An Overview in the Light of the "Draft Principles"

In international law, jus cogens norms are norms that international legal subjects must universally comply with. Whether states are parties to a specific international legal instrument concerning these norms is immaterial.

Jus cogens norms are principles of international law derived from its general principles, strengthened by the "spirit" of international customary norms, and violation of which is considered a breach of international law. Therefore, the validity of these norms and the responsibility of subjects under them are not contingent upon their codification in any particular international legal instrument.

The starting point for understanding the nature of jus cogens norms is international legal theory. This is because the elements that determine its binding nature (emerging from the nature of general principles, strengthened by the "spirit" of customary norms, and violation of which constitutes an impermissible breach of international law) can be discerned through doctrinal

[49] *Id*., principle 9; *See also generally* Commentaries, *supra* note 40.
[50] *Id*., principle 23; *See also generally* Commentaries, *supra* note 40.
[51] *Id*., Preamble; *See also generally* Commentaries, *supra* note 40.
[52] *Id*., 9.3 (a); *See also generally* Commentaries, *supra* note 40.

research.

In international legal doctrine, three concepts have been formulated regarding this: natural law theory, positivism, and concepts of international public order.

Adherents of the natural law approach perceive jus cogens norms as having an imperative character based on ethical and universally accepted principles, thereby placing these norms and the idea of superior, immutable laws above other norms and state will. In this view, jus cogens norms are seen as fundamental moral imperatives that transcend state agreements and hold inherent authority.[53]

In contrast, representatives of the positivist school, particularly proponents of classical positivism and normativism such as H. Kelsen, P. Hübner, and K. Schwarzenberger, argue that any international legal norm, including jus cogens norms, derives its legal force solely from the consent of states. According to this perspective, jus cogens norms do not exist independently of state agreements and are instead a product of the formal consent and recognition by the international community.

The concept of international public order incorporates jus cogens norms as foundational pillars of international law. This approach emphasizes that these norms represent ethical and legal obligations that are universally recognized and must be observed by all states, regardless of individual state consent. It reflects the notion that jus cogens norms underpin the international legal system and guide the conduct of states and international organizations in a manner consistent with the highest principles of international order. These principles encompass fundamental values such as human rights, the prohibition of war crimes, and the non-permissibility of torture, thereby ensuring the universal character of international law. [54]

We believe that a deeper understanding of the essence of jus cogens norms and the enhancement of their practical application are more effectively addressed through the international public order approach. In this regard, we will attempt to analyze a document containing principled norms, such as draft principles, through the lens of the international public order approach.

We can investigate a number of jus cogens norms that allow for the retrospective application of the draft principles:

"For example, states, international organizations, and other relevant stakeholders should undertake appropriate measures to prevent, mitigate, and remedy environmental damage in areas where refugees and displaced persons settle or transit during armed conflict, while also providing assistance and support to these individuals and local communities". (Article 8)

[53] Oliver Dörr & Kirsten Schmalenbach, Vienna Convention on the Law of Treaties. A Commentary, 908 (1st ed. 2012).

[54] Oleg Tiunov, Printsip Soblyudeniya Mezhdunarodnykh Obyazatelstv, 131-133 (1979).

This norm emphasizes obligations that states must fulfill regardless of their status in the conflict, relating to the protection of human rights and the environment in a connected manner.

International public order encompasses norms that are crucial for the functioning of the international community and the protection of global common interests. Environmental damage, particularly in contexts of armed conflict where refugees and displaced persons are involved, poses significant risks not only to the individuals affected but also to regional and global stability. Ensuring environmental protection in such contexts supports international public order by preventing crises that could exacerbate conflicts and lead to further human suffering.

"In the context of armed conflict, a state's action contrary to international law, causing harm to the environment, entails international responsibility for that state, obligating it to provide full compensation for such damage, including damage inflicted on the environment". (Article 9)

Each state bears responsibility for the damage caused by its actions contrary to international law. Similarly, the principle that parties are accountable for environmental damage during armed conflicts is a legal concept widely accepted by the international community, regardless of whether it is explicitly stipulated in any particular international normative act.

As an example of this *1997 Case on the Dam on the Danube River (International Court of Justice),*[55] *Pulp Mills on the River Uruguay Case (Argentina v. Uruguay),*[56] *Whaling in the Antarctic Case (Australia v. Japan).*[57]

"In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience". (Principle 12)

"1. The environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.

2. Subject to applicable international law:

[55] *See generally* International Court of Justice, Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment (1997). Available at: https://www.icj-cij.org/sites/default/files/case-related/92/092-19970925-JUD-01-00-EN.pdf (last visited May 12, 2024).

[56] *See generally* S. Maljean-Dubois & Yann Kerbrat, *La Cour Internationale de Justice Face aux Enjeux de Protection de L'environnement : Réflexions Critiques sur L'arrêt du 20 avril 2010. Réflexions Critiques sur L'arrêt du 20 avril 2010, Usines de Pâte à Papier sur le Fleuve _Uruguay (Argentine c. Uruguay)*, 115 Revue Générale de Droit International Public 39 (2011).

[57] *See generally* İnternational Court of Justice, Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment (2014). Available at: https://www.icj-cij.org/sites/default/files/case-related/148/148-20140331-JUD-01-00-EN.pdf (last visited May 12, 2024).

(a) care shall be taken to protect the environment against widespread, long-term and severe damage;

(b) the use of methods and means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the environment is prohibited. (Principle 13)

"In accordance with their international obligations, States shall not engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State". (Principle 17)

The norm that requires the protection and conservation of the environment, even in the absence of specific international agreements, is a jus cogens norm because it embodies universally accepted principles derived from established customs, humanism, and public conscience, reflecting the global community's commitment to preserving the environment as a fundamental value. Additionally, its prohibition of actions causing extensive, long-term, or severe environmental damage, particularly in armed conflict, underscores its binding nature on all states, highlighting its status as a peremptory norm that transcends individual state consent.

This provision also derives from the Convention on the Use of Environmental Modification Techniques for Military and Other Hostile Purposes.

As it appears, the draft principles establish the fundamental principles for the protection of the environment during armed conflicts. Based on these principles, there is a prospect for the adoption of various international legal instruments that contain more detailed regulations.

Currently, despite the absence of specific detailed regulatory frameworks in this area, it is evident that both jus cogens norms and the draft principles discussed above imply serious violations of environmental rights in the areas occupied by the Republic of Armenia during the Azerbaijan-Armenia-Garabagh conflict.

These violations include the destruction of biodiversity, deliberate forest fires, contamination of water sources, exploitation of mineral resources, suppression of radiation leaks, and so on.

There is a Resolution 60/285 titled "The situation in the occupied territories of Azerbaijan" adopted by the UN General Assembly on September 7, 2006, addressing the damage caused to the environment by fires in Azerbaijan's formerly occupied territories.

This Resolution expresses serious concern about extensive ecological damage occurring in the affected territories. Considering that at the time of the Resolution's adoption, Armenia was effectively in control of these territories, the responsibility for the fires and all resulting environmental damage squarely falls on Armenia.

After the adoption of the Resolution, an OSCE mission assessed the ecological situation in the region over a 10-day evaluation trip. The mission provided assessments on the ecological and economic damage caused by the fires, as well as the risks posed to human health and safety as a result of the fires.

The Report highlights the severe impact of the fires on vegetation and soil structure:

"Most striking is the visible effect of post-fire soil denudation. As was pointed out in the report by the Azerbaijani authorities, the destruction of the humus layers, exposing the soil to the mechanical affects of rain and wind erosion as well as to the effects of trampling by cattle will certainly lead to a loss of fertility and an overall loss of topsoil".[58]

It is noted that the long-term impact of the fires on biodiversity can be detrimental. While it is recognized that some insect and reptile species thrive in post-fire environments (due to the creation of open habitats through fire), the loss of extensive areas of shrubs, grasses, and tree cover is evaluated as a significant blow to plant diversity, and consequently, the loss of fauna diversity. There is also a risk of fires penetrating into fire-sensitive broadleaf forests in mountainous areas - a phenomenon observed by the Mission in Garabagh.

Paragraph "F" of this Report, which is called "Environmental damage", contains satellite images showing the partial destruction of forest areas in the occupied territories during the occupation.[59]

In addition, information has been provided regarding the detrimental effects of these fires on the economy, human life and health, atmosphere, and climate change.

When it comes to the application of accountability measures regarding these violations, it can be noted that the International Court of Justice has considered several cases concerning states' ecological damage to the environment during armed conflicts.

For example, in the case of Colombia vs. Nicaragua, the International Court of Justice determined that Colombia had violated its obligations under international law by causing environmental damage to the environment. The Court emphasized the necessity of environmental protection in international disputes. It held Colombia responsible for remedying the damage and implementing appropriate measures. This decision contributed to the

[58] UN General Assembly, The situation in the occupied territories of Azerbaijan, Report, A/61/696 (2007). Available at: https://gfmc.online/globalnetworks/seeurope/N0720860-OSCE-UNGA-ENG.pdf (last visited May 12, 2024).

[59] "Azercosmos" OJSCo, Illegal Activities in the Territories of Azerbaijan under Armenia's Occupation: Evidence from Satellite Imagery, §F (2019). Available at: https://mfa.gov.az/files/shares/Azercosmos.pdf (last visited May 10, 2024).

development of broader principles concerning environmental protection in international disputes.

The Court demanded that Colombia take specific steps to remedy the environmental damage it caused. This included implementing appropriate measures to restore the ecosystem of the water basins.[60]

The Court also addressed claims against Bosnia and Herzegovina regarding violations of international law, including damage inflicted on the environment during wartime against Serbia and Montenegro. The Court determined the environmental damage caused by Serbia but did not issue a decision on specific responsibilities of the states.[61]

As a result, there are relatively few examples in international legal practice where states (and non-state actors) have been held accountable for environmental damage during conflicts. This is naturally tied to broader challenges in the enforcement of sanctions under international legal norms.

Especially considering that there are not many normative legal acts in international law that comprehensively cover the responsibility of conflict parties for environmental damage during armed conflicts, encompassing both international humanitarian law and environmental law in a complex manner. Therefore, we can only discuss at a foundational level the basic principles determined by international law and their prospects for future development.

Because the current efforts in this field are at the level of establishing the foundations of normative legal framework. The draft principles are a clear example of this. It should be noted that this document itself has not yet entered into legal force.

Nevertheless, we believe that the absence of a normative legal framework containing detailed regulations and mechanisms at a sufficient level is not a valid excuse for states to evade their responsibilities for environmental damage caused during armed conflicts.

Indeed, filling this gap in the field can be achieved through the application of jus cogens norms in international law.

Conclusion

The protection of the environment during armed conflicts has emerged as a critical issue in international law, with the recent draft principles approved by the ILC in 2022 representing a significant development in this field. These draft principles aim to address the severe and often long-lasting environmental damage inflicted during conflicts by setting out

[60] Territorial and Maritime Dispute (Nicaragua v. Colombia) (2002), Overview of the Case, https://www.icj-cij.org/case/124 (last visited May 12, 2024).

[61] *See* International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, § 13(r). Available at: https://www.icj-cij.org/sites/default/files/case-related/91/091-19960711-JUD-01-00-EN.pdf (last visited May 13, 2024).

comprehensive guidelines for precautionary measures, prohibitions on harmful methods, and post-conflict remediation and compensation.

The concept of jus cogens norms, which are universally binding principles of international law, further underscores the imperative nature of environmental protection. These norms include fundamental obligations that transcend specific agreements and apply universally, irrespective of state consent. They provide a foundation for holding states accountable for violations, even in the absence of detailed legal frameworks.

During the Garabagh conflict, significant environmental damage was reported, including destruction of biodiversity, forest fires, and water contamination. The available evidence, including satellite imagery and reports by the UN General Assembly and OSCE, highlights the severe impact of these actions on the environment. The responsibility for these violations can be linked to jus cogens norms, which obligate states to avoid causing extensive, long-term harm to the environment during armed conflicts.

While the draft principles themselves do not have retroactive application, jus cogens norms can be invoked to address past environmental damage. The principles outlined in the draft principles and the general obligations under international law suggest that Armenia may be held accountable for its environmental impact during the Garabagh conflict. This accountability would be grounded in the universal acceptance of environmental protection as a fundamental principle of international law.

The cases reviewed, such as those adjudicated by the International Court of Justice, underscore the growing recognition of environmental harm in international disputes and the need for remedial measures. Despite the lack of comprehensive normative frameworks addressing this issue, the application of jus cogens norms offers a pathway for ensuring accountability and addressing the legacy of environmental damage caused by conflicts.

In conclusion, the draft principles represent a crucial step toward enhancing environmental protection in armed conflicts. However, the application of jus cogens norms provides an immediate and universal basis for holding states accountable for past environmental violations. Moving forward, there is a need for continued development of international legal frameworks and national laws to ensure robust protection of the environment and effective remedies for harm caused during armed conflicts.