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Protecting the Environment in Armed Conflict
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IRRC

Interview with Marja Lehto

Former International Law Commission Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts*

Dr Marja Lehto is Ambassador for International Legal Affairs at the Ministry for Foreign Affairs of Finland, and Adjunct Professor of International Law at the University of Helsinki. She was a member of the United Nations (UN) International Law Commission (ILC) and served as the Special Rapporteur for the topic "Protection of the Environment in Relation to Armed Conflicts" from 2017 to 2022. Dr Lehto is also a member of the Council of the International Institute of Humanitarian Law since 2019. She has formerly served, inter alia*, as Legal Adviser to the Finnish UN Mission in New York (1995–2000), as Head of the Unit for Public International Law (2000–09), and as Finland's Ambassador to Luxembourg (2009–14). For most of her career, she has worked on issues related to international peace and security, including international criminal justice and international humanitarian law (IHL), and she has published on a broad range of international legal questions related to the law of the sea, international environmental law (IEL), State succession, use of force, armed conflicts, terrorism and cyber security.*

* Interview conducted by Bruno Demeyere, Editor-in-Chief of the *Review*.

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The adoption by the ILC in August 2022 of the Draft Principles on Protection of the Environment in Relation to Armed Conflicts [PERAC Principles] and their commentaries, and the subsequent adoption by the UN General Assembly of a resolution on the topic, was a historical moment for international law on the protection of the environment in armed conflict. In a few words, could you introduce us to the content and purpose of the Principles?

The set of PERAC Principles consists of twenty-seven Principles, a preamble and commentaries, which clarify and codify the international law applicable to the protection of the environment in conflict-affected areas and make recommendations concerning its further development. While many of the Principles reflect general international law, other Principles identify measures that should be taken to prevent, mitigate or remediate environmental harm, based both on existing treaty-based obligations and on practice by States and international organizations.

The purpose of the Principles is, simply put, "to enhance the protection of the environment in relation to armed conflicts". The Principles focus on a problem area that has largely been ignored in international environmental law, and only sporadically addressed from the point of view of IHL, or the "law of armed conflict", which is the term used in the Principles. In this sense, they seek to fill an obvious gap.

One of the important and novel characteristics of the PERAC Principles is that they draw from IHL, international human rights law and IEL. Why was this approach important, including for the promotion of a more coherent reading of the international legal framework? In particular, how does IEL feature in the Principles?

The interplay of different areas of international law is first of all related to the temporal scope of the Principles, which extends from the time before the outbreak of an armed conflict to the aftermath of conflict.

Furthermore, the ILC has recognized that in addition to the law of armed conflict, as *lex specialis* in armed conflict, other relevant rules of international law retain their relevance throughout armed conflict and may have a complementary role in respect of the law of armed conflict. This integrative approach has been an important point of departure for the Commission's work and is most visible in the Principles relative to situations of occupation.

For instance, one of the Principles requires that an Occupying Power, when it is legally permitted to engage in the exploitation of the natural resources of the occupied territory, does so in a manner that ensures their sustainable use and

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minimizes environmental harm. This Principle rephrases the age-old rule of the law of occupation regarding usufruct, taking into account subsequent developments in IEL. Another Principle contains the established principle of prevention of transboundary harm and applies it specifically to situations of occupation. In particular, it mentions that in addition to the territory of third States and areas beyond national jurisdiction, the Principle also protects any area of the occupied State that lies beyond the occupied territory.

What was the ILC's mandate that culminated in the PERAC Principles, and what was the process to fulfil that mandate?

The initiative for the topic came from a 2009 report of the UN Environment Programme [UNEP], based on a conference it had organized together with the International Committee of the Red Cross [ICRC] and the Environmental Law Institute. The report contained a number of recommendations, one of which asked the ILC to "examine the existing international law for protecting the environment during armed conflict and recommend how it could be clarified, codified and expanded".[1]

The Principles and their commentaries are the result of roughly a decade's work in the ILC. This entailed six reports by two successive Special Rapporteurs, Dr Marie Jacobsson of Sweden and myself, and all the ordinary phases in the Commission's work: annual debates in the plenary and drafting committee, adoption of commentaries, and first and second reading. The process was, by the Commission's standards, fairly quick, both with regard to the initiation of the work and its completion. The transition from one Special Rapporteur to another was also smooth, as much of the groundwork had already been laid down when I took over in 2017 and there was no need to revisit the basic assumptions on the basis of which the work had proceeded.

Apart from the process within the Commission, I should mention external contacts, in particular interaction with States, relevant international organizations and other stakeholders, which has been a constant feature of the work on this topic over the years.

How were States involved in the development of the PERAC Principles?

The ILC is a subsidiary organ of the UN General Assembly, and States are provided an opportunity to comment on the Commission's ongoing work annually in the Legal (Sixth) Committee of the General Assembly. In addition, States are regularly invited to send in written comments after the first reading of any topic. The interaction between the Commission and States may occasionally also take other forms, but this institutional dialogue is at its core.

1 UNEP, *Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law*, 2009, available at: https://wedocs.unep.org/20.500.11822/7813.

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In accordance with these established procedures, the Commission has been able to benefit from the regular feedback from States when preparing the PERAC Principles. Moreover, the second reading last year was preceded by a consultation period during which States were invited to send in written comments on the first reading text. This time, and given the nature of the topic, the invitation was also addressed to a number of international and other expert organizations.

Many of the changes made to the Draft Principles and their commentaries in the context of the second reading reflected and responded to the comments received, either in written form or made in the Sixth Committee, in the context of the annual debates since 2014. In the final Sixth Committee debate last year addressing the Draft Principles and commentaries adopted on second reading, nearly seventy States took part, which shows interest and commitment on their part.

Societal understandings of the environment and our environmental responsibilities have changed considerably over time. Today, we also have a better understanding of, and data on, the environmental impacts of armed conflicts. Did this play a role in your work as Special Rapporteur?

The enhanced understanding of the environmental consequences of armed conflict was an important point of departure for the entire work on PERAC and affected how the topic was framed, in particular its temporal scope. Furthermore, in identifying issues that would be particularly relevant for the protection of the environment in conflict-affected areas, the ILC profited from consultations with relevant expert organizations, including UNEP, UNESCO and the ICRC, and from related research.

In my own work as Special Rapporteur, perhaps the most obvious example of how the better understanding of the environmental effects of armed conflict was taken into account concerns the focus given to natural resources. Armed conflicts often create increased opportunities for illegal exploitation of natural resources, and natural resources can also be drivers of conflict.

Altogether, five of the Principles are relevant to the protection of natural resources from environmentally harmful or unsustainable exploitation. They include the prohibition of pillage and clarify that the prohibition is applicable to natural resources whenever they constitute property. In situations of occupation, the prohibition of pillage forms an absolute limit to the exploitation of the natural resources of an occupied territory by the Occupying Power. At the same time, the Principle I mentioned earlier that seeks to protect the natural resources of the occupied territory from excessive and unsustainable use takes into account more long-term environmental degradation linked to harmful occupation practices.

Two further Principles on due diligence and liability of business enterprises are relevant in the context of illegal exploitation of natural resources in conflict-affected areas, given the role that corporations and other business enterprises may have in perpetuating conflict economies and in causing environmental harm. The fifth Principle addresses the inadvertent environmental effects of conflict-induced

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human displacement, which are mainly related to the use of natural resources for food and shelter.

The PERAC Principles focus on environmental protection in different phases before, during and after an armed conflict – why was it important to have this broad temporal scope?

The broad temporal scope of the Principles is one of the distinctive features of the PERAC topic, and the reason why it is entitled "Protection of the Environment in Relation to Armed Conflicts". It reflects the experience of modern conflicts, the majority of which are non-international in nature, often with external intervention in support of one or more of the parties. Such conflicts may not have a clear end or may end only to ignite again.

The temporal scope also derives from the recognition that protection of the environment must be continuous from the time before the conflict throughout the conflict and in post-conflict situations. Preventive measures are likely to be the most effective if they are taken before a conflict breaks out. The environmental effects of armed conflict also continue to be felt in its aftermath, sometimes for decades or longer, and timely action to address them may prevent greater harm and facilitate the transition to a sustainable peace.

The broad temporal scope has directed the ILC to identify environmental problems that are cross-cutting through different phases. In this sense it is important to point out that the scope – before, during, after – does not mean that the Principles can be neatly divided according to these phases. Many of the Principles are in fact of "general applicability". Even where a Principle has been labelled as applicable "in armed conflict" or "after armed conflict", the commentary may clarify that its scope is broader.

For instance, the Principle concerning the removal or rendering harmless of toxic or other hazardous remnants of war is located in a section that contains Principles applicable after armed conflict. In the context of the second reading, the phrase "after an armed conflict" was removed of the text of the Principle and replaced by the words "as soon as possible", which indicate a time frame that is not related to a formal end of an armed conflict. As for the Principles relative to situations of occupation, it is specifically mentioned in the commentary that all the other Principles, *mutatis mutandis*, are applicable in situations of occupation, given the variety of different situations of occupation.

What, in your opinion, are the opportunities in the coming decade when it comes to international law governing environmental protection during armed conflicts, also taking into consideration the gravity of the biodiversity and climate crisis?

There is no denying that armed conflicts can generate severe environmental effects and may also exacerbate global environmental challenges. This has been widely recognized, including in the final UN General Assembly debate on the PERAC

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Principles. At the same time, some States were concerned about the possibility of new legal obligations being imposed on them.

In the past, important legal developments for reducing wartime environmental harm have taken place after particularly shocking events. The ENMOD Convention and the two environmental articles in Additional Protocol I to the Geneva Conventions [AP I] were adopted in the aftermath of the Vietnam War, and the UN Compensation Commission was established after the invasion and occupation of Kuwait by Iraq. It may be that the ongoing armed conflict in Ukraine, which has made environmental devastation more visible than in many other conflicts, will trigger new legal developments either regarding substantive law or in the way of strengthening mechanisms of accountability.

To mention a few processes that are under way, preliminary discussions have begun concerning the adoption of ecocide as a new international crime. Moreover, the Parliamentary Assembly of the Council of Europe has made a proposal for a feasibility study regarding a new regional legal instrument for the protection of the environment and the human rights to life and to a healthy environment in armed conflicts and occupation.[2] Finally, interesting proceedings are pending in international courts and tribunals. I should add that some of the critical issues concerning international responsibility for environmental damage in armed conflict have already been clarified by the International Court of Justice and are reflected in the PERAC Principles.

What do you hope the PERAC Principles will achieve at the diplomatic and international levels?

I believe that the process in which the Principles have been adopted, including the annual debates in the Sixth Committee, has already contributed to sensitizing States to the environmental impact of conflicts and to the international obligations that apply even in situations of armed conflict. It is no more credible to argue, for instance, that as long as widespread, long-term and severe damage is not inflicted on the environment, no other rules are to be observed, or that nothing could be said about the environmental obligations of an Occupying Power because the Hague Regulations of 1907 do not mention the concept of the environment.

Regarding the diplomatic level, there has been very little appetite in recent decades for negotiating a new treaty on environmental issues related to armed conflict, or reopening the existing conventions for this purpose. This is why recent legal developments have taken another form and largely rely on the interpretation of the existing rights and obligations of States. It can be hoped that the combined efforts of the ILC and the ICRC, which issued its updated *Guidelines on the Protection of the Natural Environment in Armed Conflict* [ICRC Guidelines] in 2020, will result in States having a clearer view of both their

2 Parliamentary Assembly of the Council of Europe, Recommendation 2246, 25 January 2023.

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obligations and the opportunities for improving the protection of the environment in and in relation to armed conflicts.

What can and should States do to promote and implement the PERAC Principles?

Given that the Principles and their commentaries have been prepared very much in consultation with States and international organizations, it can be hoped that these actors will find the final outcome useful and will take steps to consult it and implement it in their practice.

While not all States have recent experience of being involved in an armed conflict, or experience of being an Occupying Power, they may have connections to conflict-affected areas, either as home States of business enterprises that operate in such areas, troop-contributing States to peace operations, donors in humanitarian assistance, or otherwise. There may also be an armed conflict in the region, which may entail trans-boundary environmental effects in third States.

The UN General Assembly has encouraged the widest possible dissemination of the Principles and their commentaries. At the domestic level, this would mean making sure that all relevant actors within the State receive the information, including but not limited to armed forces. Some of the Principles ask States specifically to take legislative or other measures to improve the protection of the environment in conflict. The dissemination effort should therefore be inclusive, including relevant authorities, members of parliament, academics and civil society organizations.

Several States have organized discussion and awareness-raising events around the Principles. Dissemination could also include making known and sharing of good practices, as was recently done in the context of the meeting of State experts organized by Switzerland and the ICRC.

Let's zoom in on a specific example: Principle 4 states that "States should designate, by agreement or otherwise, areas of environmental importance as protected zones in the event of an armed conflict, including where those areas are of cultural importance". Why is this Principle important, and how might it be used in future?

There is very little question of the beneficial impact of designating environmentally important or vulnerable areas so as to protect them from hostilities. Principle 4 is the latest addition to a series of proposals to this effect, including one discussed in the negotiations of AP I, the International Union for Conservation of Nature draft convention, the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, and more recent proposals, including in the updated ICRC Guidelines, which call for designating areas of particular importance or fragility as demilitarized zones.

Principle 4 on protected zones urges States to designate areas of environmental importance as protected zones preferably in time of peace but

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with a view to protecting them in armed conflict. What this means in practice is that particular weight should be given to areas that are susceptible to the adverse consequences of hostilities. The threshold for the designation of "environmental importance" is not unreasonably high, and an area can be designated as a protected zone in different ways. Principle 4 is closely related to Principle 18, which deals with the protection of the zone in armed conflict and provides that a zone which is designated by agreement shall be protected against any attack, except insofar as it contains a military objective. Principle 18 also does not affect the protections that may be afforded to the zone by virtue of other treaties such as multilateral environmental agreements.

Whether a zone will remain protected in armed conflict will also depend on the agreement concerning its establishment. Ideally, such an agreement should contain measures of active protection. The commentary to the PERAC Principles recommends that designation of an environmentally important area as a protected zone in conflict should be accompanied by measures which reduce the likelihood that the zone would be affected by military operations.

What role does civil society have to play in carrying the PERAC Principles forward?

Civil society has already played a role during the preparation of the Principles. In the context of the consultation period that preceded the second reading of the Principles, six organizations – Al-Haq, Amnesty International, the Conflict and Environment Observatory, Geneva Water Hub, the International Human Rights Clinic of Harvard Law School, and the London Zoological Society – prepared a joint civil society submission to the ILC. Some of these organizations also contributed to discussions and events around the Principles.

Relevant civil society organizations, which often have considerable expertise on different aspects of the PERAC theme, also contribute in many ways to the promotion of the legal framework for PERAC and awareness-raising on the environmental challenges in armed conflict.

During your mandate as Special Rapporteur, what were some of the main issues that States raised during consultations concerning the protection of environment during armed conflicts that you observed?

While the scope of the topic is broad, there have been recurrent arguments about an issue or provision falling out of its scope. For instance, when the Draft Principle on the protection of the environment of indigenous peoples was put forward in 2016, there were many comments that failed to see its connection to the topic. In the context of the second reading, there were calls to broaden the scope of this Principle to cover minorities, local populations or other groups with a special relationship to the environment. The ILC held that it was justified to retain the original focus of the provision on indigenous peoples because of the crucial role

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that these peoples, lands and territories play in the conservation of biological diversity.

That there is no general distinction between international and non-international armed conflicts is an aspect that has generated quite a lot of debate in the discussions on the PERAC Principles at the General Assembly over the years, even though it only has relevance with regard to the Principles applicable during armed conflict. Some of the Principles applicable during armed conflict, and those applicable in situations of occupation, moreover, only apply to international armed conflicts.

Most of the twenty-seven Principles are unaffected by the classification of armed conflicts. Several of these Principles use notions that include non-State armed groups and take into account, *inter alia*, that it has been a common phenomenon in recent conflicts for non-State armed groups to exercise control over territories and people. In addition, some Principles are of practical importance for non-international armed conflicts, and I should underline that this is not a question of applicability but a question of relevance.

A third issue concerns the capacity of the Principles to create new obligations for States. What I can say in this regard is that the Principles are a product of an independent expert body, the ILC, and as such are of course not binding. At the same time, however, several of the Principles reflect existing obligations of States, whether customary or treaty-based, and give greater clarity as to how they are to be understood in the context of armed conflicts and environmental protection.

The PERAC Principles clarify obligations of parties to armed conflicts, including non-State armed groups, but they also look at the role of non-belligerent States and international organizations. Considering the environmental damage we witness during contemporary armed conflicts, how can the PERAC Principles be used to influence parties to armed conflict, and also other actors, to enhance environmental protection in today's armed conflicts?

It is a further aspect of the broad scope of the Principles that they do not only focus on the obligations of the warring parties. Many of the Principles address States in general, relevant international organizations or other relevant actors, which may include civil society organizations.

Some measures are in fact most effective if they are taken by other States than those involved in the conflict. Reference can in this regard be made to the two Principles on due diligence by business enterprises and liability of business enterprises. These provisions ask States to take appropriate measures with a view to ensuring that business enterprises operating in conflict-affected areas exercise environmental due diligence and can be held liable when they or their subsidiaries cause environmental harm.

While these Principles address both home and host States of business enterprises, the former may often be in a better position to provide adequate and

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effective procedures and remedies for the victims of environmental harm. The ILC recalls in this regard that the collapse of State and local institutions is a common consequence of armed conflict, and one that undermines law enforcement and protection of rights as well as integrity of justice also in the aftermath of conflict.

Similarly, the Principles seeking to reduce the environmental footprint of peace operations, and military presence, or to minimize the environmental impact of conflict-induced human displacement are addressed primarily to States not involved in the conflict, international organizations or other relevant actors, as the case may be.

Reference could also be made to the Principles dealing with sharing of and granting access to environmental information, post-conflict environmental assessments and remedial measures as well as relief and assistance. These Principles are addressed not only to the parties or former parties to conflict but also to other States or international organizations that are in a position to provide information or remedy.

There have been criticisms about the ability of existing international obligations, including under IHL, to ensure protection of the environment in armed conflicts. What is your view on this, in light of recent developments related to the international legal framework?

I would think that much of this criticism is related to the absence of further treaty developments since the adoption of AP I. At the same time, the attitude towards the existing treaty law providing direct protection to the environment – the two environmental articles in AP I – has been somewhat ambivalent, given that the threshold of "widespread, long-term and severe" is seen as impractically high. That being said, it is clear that these provisions have value in that they set an absolute limit to wartime environmental damage.

Recent developments, in particular the publication in 2020 of the updated ICRC Guidelines, have provided cogent arguments to counter this kind of criticism. The Guidelines are a major work that systematically goes through the relevant rules of IHL and reveals the capacity of many provisions originally designed for the protection of civilians to also provide general or indirect protection to the environment.

A large part of the protection that these rules provide to the environment is dependent on the understanding of the environment as inherently civilian. As a consequence of the civilian nature of the environment, the principles of distinction, proportionality and precaution apply to the environment. This is also the case for many of the specific rules of IHL. The understanding of the environment as inherently civilian in nature, which the PERAC Principles share, gets support from current scientific knowledge as well as from the legal and political recognition of the interrelationship between the health and survival of humans and the environment in which they live.

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How do the ICRC Guidelines and the PERAC Principles complement each other, including in the "during" armed conflict phase?

The ILC's work on the PERAC topic has proceeded in parallel with the updating of the ICRC Guidelines. Both projects were initiated by the same UNEP report to respond to the need for a more coherent legal framework for the protection of the environment in and in relation to armed conflicts. They share the same fundamental aim of clarifying and strengthening the international law applicable to conflict-related environmental harm, but differ in scope and approach.

The first difference is that, like the original 1994 version, the new ICRC Guidelines deal with situations of armed conflict whereas the PERAC Principles also cover the pre- and post-conflict phases. Second, the principal focus of the ICRC Guidelines is on IHL while the ILC work has also taken into account other areas of international law, in particular IEL and international human rights law. A third difference is that the ICRC Guidelines are presented as a restatement of law as it stands, while the PERAC Principles, in accordance with the ILC's mandate, consist of progressive development and codification of international law. It is mainly because of these differences that the two documents are complementary with each other.

Regarding the "during" phase, the ICRC Guidelines, with their focus on armed conflict, contain a much more comprehensive list of relevant IHL provisions than the PERAC Principles. To the extent that the two documents overlap, however, they are largely consistent with each other. In addition, the analysis contained in the respective commentaries contributes to their complementarity. In this regard, as far as the "during" phase is concerned, reference could be made to the extensive and in-depth commentary in the ICRC Guidelines regarding the triple threshold of "widespread, long-term and severe", on the one hand, and the commentaries to the PERAC Principles applicable in situations of occupation, on the other.

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