



## ILC DRAFT PRINCIPLES ON THE PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

Date: 25 July 2019

1. Al-Haq welcomes the International Law Commission (**ILC**) adoption of Draft Principles on the Protection of the Environment in Relation to Armed Conflicts (**Draft Principles**) on 8 July 2019. The adoption of the Draft Principles ends the first stage of negotiation over their content in the Drafting Committee and moves into a secondary stage of negotiation at the higher level of the ILC. Importantly, this includes deliberating on the crucial question of the form in which the ILC recommends states adopt these Draft Principles.
2. The current Draft Principles reflect Al-Haq’s advocacy, alongside organisations like the Conflict and Environment Observatory, which sought to ensure the principles specifically covered the use of natural resources during occupations and corporate accountability for the exploitation of the environment in situations of armed conflict.<sup>1</sup> The integration of these issues gives the Principles direct relevance to Al-Haq’s work in the Occupied Palestinian Territory (**OPT**), particularly in its focus area on business and human rights and corporate accountability.
3. In particular, Al-Haq welcomes the laudable inclusion of Corporate Due Diligence in Draft Principle 10 and Corporate Liability in Draft Principle 11, as an important step in recognising that the most egregious environmental harms caused during belligerent occupation, in particular prolonged belligerent occupations such as Israel’s occupation of the OPT, are orchestrated by corporations acting under leases awarded by the Occupying Power, for substantial commercial gain.<sup>2</sup>
4. Importantly, the Draft Principles build on the existing obligations of Occupying Powers set out in international humanitarian law, specifically the Fourth Geneva Convention. While these principles remain central – and must be followed by all states – the existing instruments do not always directly address modern challenges, including prolonged occupations and the exploitation of natural resources as a tool of warfare. The ILC Draft Principles are therefore central in re-stating, and modernising, the toolbox of international humanitarian law. However, civil society must remain engaged in the upcoming final stages of the drafting process to ensure the finally adopted Draft Principles and associated commentary are fit for that purpose.

### *Significance of ILC Draft Principles*

5. The ILC Draft Principles are an important step in ensuring state and corporate accountability for their effects on the environment in the course of armed conflict. The ILC is an international body, established by the United Nations General Assembly (**UNGA**) to

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<sup>1</sup> See, for example, “Al-Haq Presents at Seminar on the Protection of the Environment during Armed Conflict, United Nations, New York” (*Al-Haq*, 18 October 2018), <http://www.alhaq.org/advocacy/targets/united-nations/1312-press-release-al-haq-presents-at-seminar-on-the-protection-of-the-environment-during-armed-conflict-united-nations-new-york>, accessed 20 July 2019.

<sup>2</sup> See “Environmental Rights Case Succeeds in Holding Israel Accountable for Illegal Hazardous Waste Dumping in Palestine” (*Al-Haq*, 25 August 2016), <http://www.alhaq.org/advocacy/topics/housing-land-and-natural-resources/1066-environmental-rights-case-succeeds-in-holding-israel-accountable-for-illegal-hazardous-waste-dumping-in-palestine>, accessed 20 July 2019.



fulfil their obligation under Article 13 of the UN Charter, to “initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification”.<sup>3</sup>

6. To further the development of international law, the ILC prepares draft conventions on subjects which have not yet been fully regulated by international law, or to more precisely formulate rules where there is existing state practice or precedent.<sup>4</sup> Many of these draft “articles” are then subsequently adopted as treaties. However, even those not formalised have occasionally been treated as authoritative by states and decision-makers.<sup>5</sup>
7. The ILC’s process for adopting draft articles is rigorous. After a topic is proposed onto the ILC agenda, a Special Rapporteur is appointed to engage in extensive consultation with states and experts. The Special Rapporteur then takes part in a drafting process, led by a Drafting Committee. Once the Drafting Committee has confirmed a set of draft principles, it reports back to the ILC in plenary, who formally adopts the draft principles. In the case of the current Draft Principles, it has taken six years of consultation and re-drafting since the topic was added to the programme of work for the full set of draft principles to be adopted by the ILC at a first reading.<sup>6</sup>
8. Although the Draft Principles were accepted at first reading by the ILC, there remains an opportunity for further revision following Governments and other institutions submitting feedback on the draft. After that, they will be formally adopted at a second reading and the ILC will make its final recommendation regarding further action to the UN General Assembly.<sup>7</sup> The Government consultation process is expected to take around a year.<sup>8</sup>
9. Nevertheless, the Draft Principles adopted by the ILC are a significant step toward declaring and shaping the content of international law. Draft articles indicate both how international law is progressing and adapting and can reflect existing customary international law.<sup>9</sup> While the process is not complete, the finalisation of the draft at first reading stage is a culmination of the most prolonged drafting and consultation phase. Further, even before they are finally accepted by the ILC at a second reading and by states, they can still have weight at the international and national levels, as a tool for advocacy.

## Content of the Draft Principles

10. The Draft Principles contain 28 specific principles, eight of which were new to this draft. Structurally, the Draft Principles have also now been divided into parts arranged by the type of phase of conflict: those which apply in all circumstances, those which apply during armed conflict, during occupation and post-conflict. This structure highlights the achievement of having rules specific to occupation. The occupation-specific focus was a relatively recent

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<sup>3</sup> United Nations Charter, Article 13; “About the Commission: Origin and background” (*International Law Commission*, 31 July 2017), <http://legal.un.org/ilc/drafting.shtml>, accessed 19 July 2019.

<sup>4</sup> Statute of the ILC (1947), Article 15.

<sup>5</sup> See, for example, International Law Commission (53<sup>rd</sup> session), Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), UN Doc A/56/10.

<sup>6</sup> The item was added to the ILC’s agenda in 2011: “Protection of the environment in relation to armed conflicts” (International Law Commission, 9 July 2019), [http://legal.un.org/ilc/guide/8\\_7.shtml](http://legal.un.org/ilc/guide/8_7.shtml), accessed 22 July 2019. Some of the principles in this Draft had already been accepted by the ILC in previous sessions.

<sup>7</sup> “Organization, programme and methods of work: methods of work” (*International Law Commission*, 11 January 2019), <http://legal.un.org/ilc/methods.shtml#a16>, accessed 22 July 2019.

<sup>8</sup> “Organization, programme and methods of work: methods of work” (*International Law Commission*, 11 January 2019), <http://legal.un.org/ilc/methods.shtml#a16>, accessed 22 July 2019.

<sup>9</sup> Daniëlla Dam-de Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (University of Oxford Press, Oxford, 2015) at 160.



development, the subject of specific in-depth analysis after Dr Marja Lehto took over as Special Rapporteur.<sup>10</sup>

11. For Al-Haq, acknowledging the particular obligations which arise during belligerent occupation is crucial given the ongoing occupation in the OPT and other situations of occupation around the world. The existing laws on occupation (like the Fourth Geneva Convention) were developed in a historical context of primarily short-term occupations, which were temporary in nature. The emphasis was on preserving the *status quo ante bellum* for the return of the existing, ousted Government. As a result, these rules have not always been straightforwardly applied to Israel's ongoing occupation of the OPT, which has permanent elements of de facto annexation and colonisation.<sup>11</sup>
12. Importantly, the Draft Principles are the first formal developments to the law of occupation since the Additional Protocols to the Geneva Conventions in 1977. As such, they are an important advocacy tool for those working on human rights within this context. Given the drafting history, in which occupation and the specific context of Israel has been directly considered,<sup>12</sup> there can be no dispute that they apply to the long-term occupation.
13. Environmental exploitation of the OPT has been a core feature of the Israeli occupation and has been a central issue for Al-Haq's work examining business and human rights, including illegal quarrying in the West Bank, dumping Israeli waste in the OPT, and the exploitation of gas resources off the coast of Gaza.<sup>13</sup> The role of corporations in aiding and abetting the environmental exploitation has been a key issue for Al-Haq and other advocacy groups working in the OPT.
14. As a result, Al-Haq considers that the Draft Principles have the potential to develop new strands of effective advocacy to create obligations on States and third party actors to stop, and reverse, some of the environmental damage caused by the occupation. The exploitation of Palestinian land and natural resources for commercial profit is a core feature of the occupation itself, making accountability for environmental abuses in the OPT an important step toward ending the occupation.

### New developments in the Draft Principles

15. Aside from the overall significance of the ILC approving the Draft Principles at first reading, the eight new principles incorporated into this draft are also individually significant.

<sup>10</sup> "Stress-testing the ILC's draft principles on environmental protection during occupation" (*Al-Haq*, 19 September 2018), <http://www.alhaq.org/advocacy/topics/housing-land-and-natural-resources/1301-stress-testing-the-ilcs-draft-principles-on-environmental-protection-during-occupation>, accessed 20 July 2019.

<sup>11</sup> See discussion in Yutaka Arai, *The Law of Occupation: continuity and change of international humanitarian law, and its interaction with international human rights law* (Martinus Nijhoff Publishers, Boston, 2009); Hanne Cuyckens *Revisiting the Law of Occupation* (Brill, Boston, 2018) and Gregory H. Fox "Transformative occupation and the unilateralist impulse" (2012) 94 Int'l Rev Red Cross 237, for example.

<sup>12</sup> See International Law Commission (70<sup>th</sup> session) "First report on protection of the environment in relation to armed conflicts by Marja Lehto, Special Rapporteur" (30 April 2018), UN Doc A/CN.4/720.

<sup>13</sup> Susan Power *Annexing Energy - Exploiting and Preventing the Development of Oil and Gas in the OPT* (Al-Haq, August 2015); Dr Benjamin Pontin, Vito De Lucia, and Dr Jesus Gamero Rus *Environmental Injustice In Occupied Palestinian Territory - Problems and Prospects* (Al-Haq, 2015); "Al-Haq Sends Submission to Special Rapporteur on Discrimination in the Context of Natural Resource Extraction in the Occupied Palestinian Territory" (*Al-Haq*, 31 January 2019) <http://www.alhaq.org/advocacy/targets/united-nations/1352-al-haq-sends-submission-to-special-rapporteur-on-discrimination-in-the-context-of-natural-resource-extraction-in-the-occupied-palestinian-territory>, accessed 22 July 2019.



### **DP 8 and 9**

16. Draft Principle 8 (**DP8**) is a recommendation for states, along with “international organisations and other relevant actors” to take appropriate measures to prevent and mitigate environmental degradation in areas where persons displaced by armed conflict are located. This principle stems directly from concerns about the environmental stress caused by displacement, particularly when groups of people are congregated in small areas, as is common in refugee camps.<sup>14</sup>
17. DP8 is directly relevant to the Al-Haq’s work, given the long-term nature of many Palestinians in refugee camps in the West Bank. The environmental damage in these camps, particularly as it relates to sewage and access to fresh water, can have direct impacts on the human rights of those living there.<sup>15</sup> Al-Haq therefore welcomes work toward mitigating this environmental degradation as recognition of one of the various pernicious effects of displacement. DP8 may also have relevance to other continued displacement of Palestinians in the OPT, including from occupied East Jerusalem and Area C.<sup>16</sup>
18. The recommendation was amended by the Drafting Committee to extend beyond states. The Chair noted that the commentary will clarify it also extends to non-governmental organizations and development agencies, likely reflecting the fact environmental management of these camps is primarily undertaken by international bodies like the UN High Commissioner for Refugees.<sup>17</sup> However, the recommendation for burden-sharing to mitigate the environmental consequences of displacement must nevertheless be read in light of Draft Principle 9 (**DP9**), which places responsibility for damage to the environment squarely with states.
19. DP9 provides that states shall have international responsibility for an “internationally wrongful act of a State, in relation to an armed conflict, that causes damage to the environment”, including reparations. This covers only responsibility, and not liability for such acts, and reflects “a general obligation of states”,<sup>18</sup> which accrues under international humanitarian law, international human rights law and international environmental law.<sup>19</sup> The Special Rapporteur’s assessment of international responsibility for environmental damage specifically drew on the 2004 ICJ advisory opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, which recognised the need for Israeli compensation for harm caused, including environmental damage, and noted the uneven implementation of calls for reparation for environmental damage more broadly.<sup>20</sup> While DP9 therefore reasserts existing law, it sets out a clear framework for responsibility accruing and reinforces these core obligations.

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<sup>14</sup> International Law Commission (71<sup>st</sup> session), “Second report on protection of the environment in relation to armed conflicts by Marja Lehto, Special Rapporteur” (27 March 2019), UN Doc A/CN.4/728, citing comments of the United Nations High Commissioner for Refugees at 43.

<sup>15</sup> Dr Benjamin Pontin, Vito De Lucia, and Dr Jesus Gamero Rus *Environmental Injustice in Occupied Palestinian Territory - Problems and Prospects* (Al-Haq, 2015), chapter 6.

<sup>16</sup> “World Report: Israel and Palestine Events of 2018” (*Human Rights Watch*), <https://www.hrw.org/world-report/2019/country-chapters/israel/palestine>, accessed 22 July 2019.

<sup>17</sup> International Law Commission (71<sup>st</sup> session), “Statement of the Chair of the Drafting Committee Mr. Claudio Grossman Guiloff” (8 July 2019), [http://legal.un.org/ilc/guide/8\\_7.shtml](http://legal.un.org/ilc/guide/8_7.shtml), accessed 22 July 2019, at 4.

<sup>18</sup> Above n 17, at 5

<sup>19</sup> “Second report on protection of the environment”, above n 14, [105] – [115].

<sup>20</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 136.



### ***DP10 and 11***

20. Draft Principles 10 and 11 (**DP10** and **DP11**, both in the section on principles of general application) address the role of corporations. These principles reflect the growing business and human rights movement and the acknowledgement of the important role businesses can play alongside state actors in contributing to environmental exploitation during and after armed conflict. They provide, respectively, for states to take legislative and other measures to ensure corporate due diligence when entering areas of armed conflict or post armed-conflict; and to take measures which ensure those corporations, and subsidiaries acting under de facto control, can be held liable for their impact on the environment.
21. Both principles are phrased as recommendations (“States should ...”), so do not provide a route for legally enforceable remedies for state failure to hold businesses to account for their actions relating to the environment in situations of conflict. Similarly, some of the language was watered down from initial drafts, even despite the recommendatory status.<sup>21</sup> Nevertheless, they are important in advancing the norms set out in the United Nations Guiding Principles on Business and Human Rights (**UNGPs**), particularly principle 25 which requires states to grant access to an effective remedy for those affected by business’ abuse of human rights.<sup>22</sup>
22. DP10 and 11 refer only to the *state’s* obligations to ensure that businesses undertake due diligence and have liability for their behaviour in situations of conflict. There is no attempt to directly engage with businesses as obligation-holders independent of the state. This reflects the current discourse on business and human rights, particularly the soft law obligations in the UNGPs. Depending on the progress of the United Nations open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, currently working on a binding treaty which may yet treat business enterprises as having independent obligations toward human rights, there may yet be room to expand on these DPs.
23. However, beyond simply re-emphasising the UNGPs, DP10 and 11 advance them by encouraging states to create actual liability on companies for their actions. This progresses beyond the responsibility paradigm, as set out in the UNGPs, whereby businesses consider how they should best address their responsibility for a given human rights abuse.<sup>23</sup> In this sense, as well as reflecting existing norms, DP 10 and 11 push forward the business and human rights discourse. Importantly, the obligation on states to hold corporations liable extends to parent companies within the state’s jurisdiction where the environmental harm is caused by a subsidiary acting under the corporation’s effective control.
24. The Chairman’s commentary on the Draft Principles indicates that there was debate about the extent to which liability for subsidiaries should be referred to, based on concerns it was creating extra-territorial liability for companies. It was determined the restrictions on subsidiary liability would be added into the accompanying commentary, which will be considered at second reading. There is, therefore, real potential for the commentary to be developed in a way which undermines the real protections provided in the Draft

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<sup>21</sup> The Special Rapporteur’s initial proposals for these principles referred to the state taking all “necessary.. measures to ensure”, replaced with taking all “appropriate ... measures aimed at ensuring”, which has lesser normative value: Viktorija Jakjmovska and Ezéchiél Amani “Protecting the Environment in Non-International Armed Conflicts: Are We There Yet?” (*EJIL: Talk!*, 16 July 2019), <https://www.ejiltalk.org/protecting-the-environment-in-non-international-armed-conflicts-are-we-there-yet/>, accessed 20 July 2019.

<sup>22</sup> “UN lawyers approve 28 legal principles to reduce the environmental impact of war” (*Conflict and Environment Observatory*, 16 July 2019), <https://ceobs.org/un-lawyers-approve-28-legal-principles-to-reduce-the-environmental-impact-of-war/>, accessed 22 July 2019.

<sup>23</sup> United Nations Guiding Principles on Business and Human Rights (2011), Principle 23.



Principles, underscoring the urgency for civil society to maintain engagement with the drafting process.

25. Nevertheless, these provisions provide strong support for Al-Haq's consistent calls for states to take responsibility for the actions of corporations and other business entities in the OPT, particularly in contributing to the illegal settlements in the West Bank and in East Jerusalem. DP10 and 11 reflect the need for states to take responsibility for the human rights impacts of their corporations, particularly where those corporations act in a way which undermines third state obligations not to support the breach of peremptory norms by Israel.<sup>24</sup>

### ***Draft Principle 12***

26. DP12 inserts a 'Martens Clause' into the Draft Principles, a 'coverall' preamble clause found in other international treaties which provides that, for cases not covered by international agreements, international law "derived from established custom, from the principles of humanity, and from the dictates of public conscience" still applies. In this case, DP12 provides that those baseline international law protections are applied to the environment.
27. This provision is beneficial from an advocacy perspective, since as has been noted elsewhere, it opens up the possibility of bringing international human rights law into discussions about environmental protection in armed conflict.<sup>25</sup> It also, like Martens Clauses in other treaties generally, can be read as reinforcing that, just because something is not prohibited by the Draft Principles, it is not necessarily automatically allowed.<sup>26</sup> It provides an entry point for other legal rules and values to be applied to environmental challenges during armed conflict.
28. The opening for advocacy provided in DP12 is reinforced by the fact the ILC specifically adopted DP12 on the understanding its inclusion was not to be taken as meaning the ILC had "a position on the various possible interpretations regarding the legal consequences of the Martens Clause".<sup>27</sup> There is therefore considerable room for Palestinian NGOs to test the scope of this clause and its application within the Israeli occupation.

### ***Draft Principles 18 and 19***

29. Draft Principle 18 (**DP18**) is particularly important to the OPT, as it restates the prohibition on pillage of natural resources. External actors like businesses have been identified as playing a particularly egregious role in exploiting natural resources in conflict affected areas. This is through violating non-binding business and human rights responsibilities, but also carrying out conduct which may amount to the war crime of pillage. Al-Haq and other human rights

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<sup>24</sup> See Valentina Azarova "Business and Human Rights in Occupied Territory" The UN Database of Business Active in Israel's Settlements" (2018) 3 Business and Human Rights Journal 187.

<sup>25</sup> "UN lawyers approve 28 legal principles to reduce the environmental impact of war" (*Conflict and Environment Observatory*, 16 July 2019), above n 22.

<sup>26</sup> Rupert Ticehurst "The Martens Clause and the Laws of Armed Conflict" (*International Committee of the Red Cross*, 30 April 1997), <https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm>, accessed 22 July 2019.

<sup>27</sup> ILC, "Statement of the Chair of the Drafting Committee", above n 17, at 14.



organisations have identified various incidents of potential pillage taking place in the OPT by Israeli and foreign-owned companies.<sup>28</sup>

30. Although the prohibition on pillage is contained in numerous international treaties and covenants, the precise definition of pillage is not clearly understood. DP18 offers an opportunity to clarify the definition in the accompanying commentary, which will constitute an authoritative contemporary analysis. The Chair of the Drafting Committee has already signalled the commentary will “also refer to the broader context of illegal exploitation of natural resources which underscores the application of the prohibition of pillage to natural resources”.<sup>29</sup> Other comments from the Drafting Committee indicate appreciation for the need to go beyond traditional ideas of theft of private property to reflect the perils of theft of public natural resources and to ensure that pillage was understood as being applicable during occupation.<sup>30</sup> These are crucial outcomes of Al-Haq’s advocacy and recommendations to the UN Special Rapporteur on the Protection of the Environment During Armed Conflict.

### ***Draft Principle 26***

31. Draft Principle 26 (**DP26**) was initially conceived of as part of a wider provision about state responsibility (now above as DP9) and became a standalone provision at the Drafting Committee stage.<sup>31</sup> DP26 is linked to Draft Principle 25 on post-armed conflict environmental assessment and remediation measures and encourages states to take measures to compensate or otherwise repair environmental damage even where the source of damage is unidentified or formal reparation unavailable.
32. Given consistent state attempts to avoid taking responsibility for environmental damage, including Israel’s (lack of) response to the ICJ findings on its liability for the construction of an Annexation Wall in the OPT,<sup>32</sup> this provision is important in seeking support from third party states. While DP26 only encourages (without requiring) states to act to create special compensation funds or provide other relief or assistance, it remains important to the OPT. Much of Al-Haq’s work pertains to reminding States of their third-party obligations under Common Article 1 of the Geneva Conventions, to respect and ensure respect for the Geneva Conventions, including through not recognising as lawful, breaches of international humanitarian law. Critically, the relief and assistance obligations on third party states recognised in DP26 draws on a framework of international support for the victims of human rights breaches.

### **Ongoing issues in the Draft Principles**

33. Overall, many of the new Draft Principles are directly relevant to Al-Haq’s work and reflect the careful consideration of occupation-specific issues by the Special Rapporteur and Drafting Committee. The establishment of a comprehensive assessment of the international legal obligations around the treatment of the environment in armed conflicts will be a key advocacy tool for Al-Haq’s work in the OPT and are welcomed.

<sup>28</sup> *Occupation Inc: How Settlement Businesses Contribute to Israel’s Violations of Palestinian Rights* (Human Rights Watch, 2016), <https://www.hrw.org/report/2016/01/19/occupation-inc/how-settlement-businesses-contribute-israels-violations-palestinian>, accessed 15 July 2019.

<sup>29</sup> ILC, “Statement of the Chair of the Drafting Committee”, above n 17, at 15.

<sup>30</sup> International Law Commission (71<sup>st</sup> session), “Provisional Summary record of the 3469<sup>th</sup> meeting” (8 July 2019), UN Doc A/CN.4/SR.3469 at 3-4.

<sup>31</sup> ILC, “Statement of the Chair of the Drafting Committee”, above n 17, at 7.

<sup>32</sup> Discussed above at paragraph 19.



34. Nevertheless, there are some problematic aspects to the Draft Principles which remain of concern, and questions about the development of the Draft Principles moving forward. A principal concern is that the Principles have not been adapted to respond to civil society concerns about the language on occupation and the rights of an Occupying Power in the last draft. As noted by Al-Haq and others previously,<sup>33</sup> some of the language in the provisions on occupation is problematically vague, and at worst, undermines existing protections against Occupying Powers making changes to occupied territory.
35. Specifically, DP20 and DP21 could both be read to grant additional latitude for Occupying Powers to use natural resources from an occupied state or territory, or to change existing laws within the state which relate to environmental protection. Both provisions also still refer to the acting for the benefit of the “population of the occupied territory”, rather than the narrower “protected population”. In the case of Israel and the OPT, this opens up the problem of including Israeli settlers illegally transferred into the OPT within the “population of the occupied territory”. This wording could allow Israel to purport to exercise the limited powers of an occupier on behalf of those settlers, rather than just the occupied people.
36. It is unfortunate that Al-Haq’s suggested changes have not been made to reduce some of these ambiguities in the text. Notably, these proposals had the support of numerous State Parties.<sup>34</sup> The changes proposed are aimed only at bringing the Draft Principles in line with existing restrictions on Occupying Powers found in the Fourth Geneva Convention, Hague Regulations and accepted customary international law as to the boundaries of an Occupying Power’s authority.
37. Moving forward, the next developments in finalising the Draft Principles at second reading will be crucial. Governments will now respond to the first reading of the draft, and there is opportunity for the ILC to alter the existing draft based on those comments. It is imperative for civil society to remain engaged and considered during this final part of the process. As analysis of the newly introduced principles above suggests, the text of the accompanying commentary will be very important in ensuring the strength and effectiveness of the Draft Principles. Much of the Drafting Committee Chair’s statement on the Draft Principles when submitted to the ILC referred to the need for certain aspects of each principle to be clarified or explained further in the commentary. Given the authoritative nature of the commentary, how it is developed will be centrally important.
38. Finally, a crucial question is how these Draft Principles are received – specifically, whether they are taken up by states as a prelude to a treaty in this area or seen as merely guidance. The ILC initially expressed hesitancy over whether its work on this topic was creating a new regime without a strong foundation in state practice.<sup>35</sup> The ILC will make a recommendation to the UN General Assembly as to how the Draft Principles should be implemented after the second reading. Again, it is crucial that these are given legal effectiveness and treated seriously by all states. It is necessary for the ILC to be bold in its commitment to the Draft Principles and for civil society to maintain their pressure on the ILC to ensure the 6 years of drafting grants meaningful protection to the environment, as a victim of armed conflict.

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<sup>33</sup> “Stress-testing the ILC’s draft principles on environmental protection during occupation” (Al-Haq, 19 September 2018), above n 10.

<sup>34</sup> “Analysis of the latest stage of the International Law Commission’s study on the Protection of the environment in relation to armed conflicts” (*Conflict and Environment Observatory*, 14 November 2018), <https://ceobs.org/states-welcome-principles-on-environmental-protection-in-occupation-during-un-debate/>

<sup>35</sup> Donald McRae, “The Work of the International Law Commission, 2007-2011: Progress and Prospects” (2012) 106 Am J Int’l L 322 at 337.