

ILC'S DRAFT OF "PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICT" -- A NEW SOFT GUIDELINE TO ARMED CONFLICT AND ITS IMPACT ON CHINA

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ABSTRACT

Environment protection is a hot and attractive issue. Most international environment treaties and domestic laws are applicable in peacetime, not in armed conflict. Then the International Law Commission of the United Nations decided to include the topic "Protection of the environment in relation to armed conflicts" in 2013 and adopted the first-reading draft in 2019. This paper reviews three critical questions in the environment protection in relation to armed conflict, which they are the condition of environment becomes a military target, the compensation/restoration environment after armed conflict, and the application time is extended to pre-, in, and post-armed conflict. The non-binding force draft is trying to solve and balance the interest between environment protection and States military actions in armed conflict. This paper also argued the impact of draft from respect of Chinese standpoint, and propose China to take into consideration to compile a field operation in jus in Bello for its military force.

Keywords: Environment Protection in Armed Conflict, Civil and Military Target, Soft Guideline, Temporal Application of the International Convention.

INTRODUCTION

The Context of ILC's Draft of the Environment Protection in Relation to Armed Conflict

Environment protection in armed conflicts is a critical and new topic under international humanitarian law. Since the first United Nations Conference on the Human Environment was held in Stockholm in 1972, the global environment, sustainable development, and the community with a shared future have become the main development themes. This change affected the rules of international humanitarian law. Traditionally, humanitarian law emphasizes on the protection of people suffering of war and the restrictions on means of fighting. The environment, such as a mountain, a forest, or a river, usually is a background, a target or a weapon in the war. Before 1970s, the regulations in international humanitarian law have not shown the ideal of environment protection clearly or directly. The Biological Weapons Convention of 1975 and the Chemical Weapons Convention of 1997 forbid to use biological and chemical weapons in wartime, as well as regulate to manage and use in peacetime. However these two conventions are regarded as military control conventions, the environment protection is not the purpose but an unintended consequence.

The Additional Protocol I of 1977 to the 1949 Geneva Conventions regards the environment as a resource that should be protected for the non-combatants who live on it.⁴ Since the Protocol was proposed by delegations of the Former Czechoslovakia, Hungary, and the Former Democratic Republic of Germany who had been at a Diplomatic Conference convened by the ICRC in 1974-77, giving to concern the severe environmental damage caused by the United States during the Vietnam war, Article 55(2) prohibits the attack against the natural environment only in one condition, that is retaliation. The words, "widespread, long-term and severe" used in

Article 35(3), are described the results of environmental damage. But the environment was not the subject in the protocol, the status of environment was still ambiguous.

The Convention on the Prohibition of Military or any other hostile use of environmental modification technique, which entered into force on October 5, 1978, including China, 78 states parties by the end of February 2020,⁵ is the first convention to restrain military attacks from the view of environmental protection. Article 2 of the Convention prohibits using technologies or weapons which can change the environment widespread, permanently, and severely in armed conflicts. The environment includes biota, lithosphere, hydrosphere, and atmosphere, or outer space through the deliberate manipulation of natural processes. But it is criticised that the threshold of changing the environment is so high that no technology has been considered as the technology that could change the environment except nuclear weapons so far. However this Convention reflects the international community's concern for the protection environment rather than its application in reality.⁶

The purpose of the conventions mentioned above was to degrade the environmental damage in armed conflict. However, the effects between armed conflict and environment are reciprocal. The tribal conflicts and armed secessionist movement in the Darfur region in the west of Sudan were practically caused by the deterioration of the environment, and the armed conflicts have indeed intensified the ethnic and ideological conflicts between the inter-clan hatred.⁷ According to the report of the UN, 40% of the internal armed conflicts in the past 60 years were related to natural resources. Since 1990, there have been at least 18 armed conflicts directly for the natural resource.⁸ In order to prevent irreversible damage to the environment, the United Nations Security Council adopted resolution 1540 (2004) on 12 May 2004, listing nuclear and chemical weapons as weapons of mass destruction and prohibiting their proliferation. At the 63rd session in 2011, the UN International Law Commission proposed to include the topic "protection of the environment in relation to armed conflict" in its working program. It has been officially listed in the working program since 2013. After six years, the commission adopted a draft text containing 28 articles in 2019.

Three Core Legal Issues in the Draft

International Law Commission enlisted the topic "Protection of the Environment concerns Armed Conflicts" on working schedules in 2011.⁹ This topic was adopted as the ILC's official program in 2013,¹⁰ Ms. Mary G. Jacobsson from Sweden was appointed as the first Special Rapporteur,¹¹ then Ms. Earmarked Lehto succeeds in 2017.¹² After six years, ILC adopted the first reading draft with 28 principles with commentaries in 2019. In accordance with the Statute of the ILC, there is still much work to do before the draft is finally submitted to the UN General Assembly for a vote as a formal international convention.

The first reading of the draft is more based on the first Special Rapporteur's legal understanding of the topic. Ms. Jacobsson pointed out the codification was not an attempt to change existing international legislation. The Special Rapporteur suggested that the topic should be studied from a temporal perspective rather than the various areas of international law, such as international environmental law, the law of armed conflict, and international human rights law, to make the topic more manageable and easier to delineate. The temporal phases can address legal measures taken to protect the environment before, during, and after armed conflict (Phase I, Phase II, and Phase III) respectively.¹³ The main work would be on Phase I, the obligations of relevance to a potential armed conflict, and Phase III, the post-conflict measures. The Phase II was proposed to focus on environmental protection in non-international armed conflicts.¹⁴ Ms. Jacobsson's codification plan was endorsed and welcomed by the Working Group, and they recommended that the Special Rapporteur refrains from considering the question of weapons.¹⁵ As for the final outcome, Ms. Jacobsson suggested that the draft articles might be more applicable to the elaboration of a non-binding draft guideline than a draft convention.¹⁶ At least three core legal issues about the topic reached an agreement.

Environment as the Civilian Status but can be Attacked when it 'becomes' a Military Target

Though Ms. Jacobsson had not focused on Phase II of Principles Applicable During Armed Conflict, the status of the environment was still the core of the topic which would affect the action, the right, and the responsibility to the parties concerning the armed conflict.

This part consists of eight articles, principles 12 to 19, including the distinction, proportionality, military necessity, and preventive measures. In the law of armed conflict, natural elements are vaguely regarded as the civilian targets, for example, the Article 4(2) of the Third Protocol of 1980 Convention on Conventional Weapons regulates that: "It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives." In the draft, the environment, as a whole, is civilian object in a position to be protected. The Principle 13 provides:

General protection of the natural environment during armed conflict

- 1) The natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.
- 2) Care shall be taken to protect the natural environment against widespread, long-term and severe damage.
- 3) No part of the natural environment may be attacked, unless it has become a military objective.

Principle 13(3) clarifies that the natural environment is a civilian object that should be protected and prohibited from attack unless the natural environment becomes a military target. In the rules of armed conflicts, the criteria of people are combatants and non-combatants, and that of objects are military targets and civilian (non-military) targets. It is much difficult to distinguish objects than people on the warfare. According to Paragraph 1 and 2 of Article 52 in Additional Protocol I of 1977, the civilian objects "are all objects which are not military objectives", and military objectives are defined by "their nature, location, purpose or use make an effective contribution to military action" and without military advantage if it was total or partial destructed. Comparing to the definition of military target, there is no positive definition about civilian target. Considering the caution's obligation before attack in Paragraph 3 of Article 52 in Additional Protocol I of 1977, it can be presumed that all objectives are civilian objectives.

In practice, military and civilian targets are not fixed and can be converted under certain conditions. To follow the logic of Article 52 Additional Protocol I of 1977, in Principle 13, the civil object of the environment is more clearly defined at first, the word 'become' is a temporal condition, indicating that the natural environment cannot be attacked before it 'becomes' a military target.

After the environment 'becomes' a military target, the rules of armed conflict must be observed as well. These provisions are regulated in Principle 14 as follows:

Application of the Law of Armed Conflict to the Natural Environment

The law of armed conflict, including the principles and rules on distinction, proportionality, military necessity and precautions in attack, shall be applied to the natural environment, with a view to its protection.

The rules of distinction, proportionality, and military necessity in the Principle 14 are the basic principles and core contents of the law of armed conflict.¹⁷ As one of the basic principles of the law of armed conflict, the principle of distinction is a customary rule, applies to both international and non-international armed conflicts.¹⁸ Principle 14 also reflects the opinion of the International Court of Justice (ICJ). In the advisory opinion of the Legality of Threat or Use of Nuclear Weapons, the Court believed that: "the treaties in question could have intended to deprive a State of the exercise of its right of self-defense under international law because of its obligations to protect the environment. Nonetheless, States must take environment into account when assessing what is necessary and proportionate in the pursuit of legitimate military

objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality."¹⁹

As one of customary international laws, the principle of proportionality calls for being applied in both international and non-international armed conflicts. The parties in armed conflicts shall evaluate the specific direct military interests to the damages caused to any incidental casualties to civilians, injury to civilians, and damage of civilian objects or all of three kinds of losses.²⁰ In addition, the proportionality principle usually means that "if the objectives are sufficiently important, there may be grounds for increasing the degree of risk to the environment."²¹ Therefore, the damage to the environment is considered legally permissible if the condition of proportionality is matched. Comparing to the direct military interest, it is hard to determine if the collateral casualty is in line with proportion. Thus the balance between the proportion and military interest is always a crucial issue.

The customary law status of the principle of military necessity has yet to be determined since the rules of armed conflict are the consequence of the balance between the principles of humanity with the military necessity.²² Additional Protocol I and II of 1977 prohibit targeting property with great significance to the cultural heritage of each nation, except it is required by military necessity.²³ Military necessity is an exception that allows military interests to a certain extent, obviously goes reverse the purpose of the rules of armed conflict. "Military necessity cannot absolve itself from responsibility for violating current rules. The rules of international law must be abided by, even if this will lead to the defeat of the battle or the whole war."²⁴ In the laws of armed conflict, the principle of military necessity does not mean that the law of armed conflict can be violated.

The word of precaution is used to be in international environment conventions, such as the Principle 15 of the Rio Declaration of 1992. The draft introduces the duty of precaution into the rules of armed conflict. The phrase of "precautions in attack" in Principle 14 is interpreted as precaution must be taken in the attack to spare the civilians and civilian objects from harm during military operations, and all feasible precautions must be taken to avoid and minimize incidental loss of civilian life, injury to civilians as well as damage to civilian objects which may occur. This rule is codified in several instruments of the law of armed conflict and is also considered a customary international law in both international and non-international armed conflict. Parties to an armed conflict must take all feasible precautions to avoid and minimize collateral environmental damage.²⁵ This rule reflects the precision of modern warfare and the lower tolerance of casualties.

Principle 15 reaffirms the principles of proportionality and military necessity, and Principle 16 and 18 prohibit retaliating and environmental plundering. Principle 19 reaffirms the obligation in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1976 and is the only international treaty to address using means and methods from damaging to the environment in armed conflict.²⁶

Part III of the draft solves two legal issues. Firstly, the whole natural environment is a civilian object under protection, attack, retaliate against, or plunder for parties to armed conflict. Secondly, the environment can be attacked when it 'becomes' a military target, and in military operations, it is subject to customary rules such as the principle of distinction, proportionality, military necessity, and so forth. ILC's draft adopted the ideal of environmental protection into the traditional formula of the rules of the armed conflicts. At least, there is no room for debate about the status of the civil target of the environment, but the status of the environment is not immutable likewise, the remaining question again is the criteria of military object in the field of international humanitarian law.

A New Practice to Guide State's Practice: To Compensate or Restore Environmental Damage after Armed Conflict

The fifth and last part of the draft is about principles after the armed conflict. The core principle of this part is Principle 26, namely Relief and Assistance, provides that:

When, in relation to an armed conflict, the source of environmental damage is unidentified, or reparation is unavailable, States are encouraged to take appropriate measures so that the damage does not remain unrepaired or uncompensated, and may consider establishing special compensation funds or providing other forms of relief or assistance (emphasis added).

Principle 26 is trying to set up a new practice for States to compensate or restore the natural environment after armed conflict, no matter the environmental damage is caused by legal or illegal States' operations. This principle is beyond the question whether the warfare operations are legal or illegal, especially when it is difficult to define the responsible party for the environmental damages. In practice, even if a State committed a violation of international humanitarian law and was held accountable, the victim state generally would not seek compensation for environmental losses because of political reconciliation and peace. After World War II, China and Japan worked together to clean up chemical weapons abandoned by Japan in China together during Japan's invasion after normalizing diplomatic relations.²⁷ The sovereign states parties would rather to seek a peace agreement than charge individual or state's responsibility. "Denying individual rights to claim compensation for damage is reasonable if we presume that avoiding another war is necessary."²⁸ The victims' right to be compensated is sacrificed for peace, and the environmental damage is totally neglected. Even in modern times, it is still hard to take accountability for the responsible party. Lebanese coastal escapes oil spill damage caused by Israel Air Force strikes on oil storage tanks of the Lebanese Jiyeh electronic power in 2006 was not compensated or restored by the responsible party.²⁹

However, there is a new option had been adopted, namely the condolence payment for losses and damages caused to the environment and human rights after the armed conflict. Condolence payments are nominal amounts meant to express sympathy and provide immediate monetary relief to innocent victims.³⁰ For example, the No.665 flight of Iranian Airbus was shot down by the United States Cruiser Vincennes in the Persian Gulf in 1988, President Reagan insisted that the U.S.'s action had not violated the law of armed conflicts. Nevertheless, he promptly offered compensation directly to the families of the victims.³¹ Then, Congress adopted the Foreign Claim Act authorized the military to compensate the foreign nationals harmed by the U. S. military as long as "it did not arise from action by an enemy or result directly or indirectly from any act of the armed forces of the United States in combat, [or] indirectly related to combat ..."³² The practice of Regan's Administration was denied by the Foreign Claim Act. However, it is consistent with the opinion made by ICJ in the advisory opinions of Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory of 2004, that since Israel breached its obligation, it had an obligation to make reparation for the damage caused to all the natural or legal people's concerned.³³

Since the general practice or custom in international law about the obligation or restoration is based on the international wrongful action, in the case of the United States v. Iranian Diplomatic Missions, the ICJ commented that: Firstly, it was necessary to determine the extent of actions that could be attributed to Iran (the fault party). Secondly, it was necessary to determine whether Iran's actions have complied with or contrary to Iran's obligations under treaties that were enforceable to Iran.³⁴ It is also the logic of the 2001 Draft articles on Responsibility of States for Internationally Wrongful Acts, which was codified by ILC either.

Since it is another crucial issue to make the fault party to take responsibility for environmental damage, the standpoint of Principle 26 is to impose a new obligation on all parties to armed conflict, which is to repair or compensate to the environmental damages no matter whether they are responsible for it. Although the draft intention is good, the principle goes too further than current international law and States' practices. Thus the words, 'encourage' and 'may' indicate the nature of Principle 26 is more like a guideline rather than a duty or obligation for States.³⁵ In this respect, Principle 26 is one of the innovation and challenge articles in the draft.

Principle 26 is the core clause of the fifth part and constitutes a complete system with Principles 24, 25, 27, and 28.³⁶ The fifth part of the draft focuses on the reconstruction of the damaged natural environment after armed conflicts both on the earth and sea. Thus the cooperation between parties in an armed conflict, such as exchanging information, restitution, and reparations, are encouraged to ensure the natural environment being restituted and repaired. A new practice was set up to guide State's practice on re-conciliation after armed conflict in the coming future.

The Application of Temporal and Formation of the Draft: A Trend of Development of International Conventions?

Another outstanding distinction of the draft is the application of temporal and its formation, which made the draft as a unique one from other international treaties. Thanks to Ms. Jacobsson, the first Special Rapporteur, her particular research methods and objectives have been created a new formation of international treaties.

The words in the topic, "in relation to.....", have the same meaning as the three phases of the draft emphasized by Ms. Jacobsson, namely: Phase I, the issues associated with potential armed conflict, Phase II, application of the laws of war, Phase III, measures at the post armed conflict.³⁷ At the very beginning, the Special Rapporteur stressed that the topic should be addressed from a temporal perspective, such as before, in the middle, and after the conflicts.³⁸ Consequently, it means that the draft articles would apply both in the time of armed conflict and before or after the armed conflict. It broke the traditional routine that a international convention will be applicable either in peacetime or armed conflict. International humanitarian conventions are applicable only in armed conflict, neither before nor after the armed conflict. Meanwhile, the international environment conventions can be applied in peacetime instead of armed conflict. It is an innovative and creative solution to achieve the purpose of the draft which is to protect environment all the time, the parties in armed conflict have different and respective obligations at different times.

The Special Rapporteur made the above proposals based on the laws since the effects of armed conflict on international treaties were another critical issue in international law. The International Law Commission had addressed the topic of Armed Conflict on International Treaties since 2004, and adopted the first reading draft with 18 articles in 2008.³⁹ In this draft, two issues were illustrated. One is a traditional view that international treaties will be immediately abolished and suspended after the outbreak of armed conflicts.⁴⁰ But in practice, an increasing number of States tend to limit, even deny the negative impact of armed conflicts on treaties⁴¹, and they think the outbreak of armed conflicts does not mean the termination or suspension of the validity of treaties.⁴² The other one is that the "intention" criterion in Article 4 of the first reading draft is established for judging whether treaties are valid in times of armed conflict.⁴³ Does this mean that States have to review or identify the validity of all treaties in armed conflict and update their status with the change of nature and scope of armed conflicts constantly?

Considering the applicable timing of international treaties, the draft can be applied pre-, in, and post-armed conflict. The new temporal mode of the draft is a new example and a better solution which can protect natural environment at all time.

According to the first Special Rapporteur's design, the final form of the draft will be a non-binding guidelines rather than a draft convention.⁴⁴ This was confirmed in the text of the first reading draft adopted by the ILC drafting Committee in 2019.⁴⁵ This unique formation is embodied in two features. They are:

Firstly, the draft integrates the customary rules in IHL⁴⁶ and risk-prevention and precaution rules in international environment law together, such as Principle 14 that combines the principle of military necessity and environmental protection together. The consequence is

that a higher threshold is set up for parties in armed conflict when they execute military operations and achieve military interests.

Secondly, by referring to the shape "framework conventions"⁴⁷ used by some international conventions, such as WHO's guidelines, namely the International Health Regulations 1951 (IHR(1951))⁴⁸, this draft is defined as a guideline, a kind of soft law. The elaborate intention may be to avoid State's responsibility by doing international wrongful acts, and to encourage more States to implement customary rules in IHL to the environmental protection in relation to armed conflicts. Though the international community has a common consensus in morals to protect natural environment even in armed conflict, States would hardly be consent to conclude an international convention with a higher obligation to abide by. Then, a non-binding force draft may be a better solution to provide a guideline for States to refer and apply voluntarily. When as much as more States apply such norms, a new customary rule may naturally be created. As the sources of international law are different from domestic law, in the absence of treaties and ambiguity of customary law, the non-binding norms of soft law may create a chance for the emergence and formation of international treaties and customary law in the future. The features of the draft also may reflect a trend in international law in the future.

The Impact on China

Current Situation and the Issues to be improved

Theoretically, as a civil law State, the international conventions of jus in bello must be converted by Chinese domestic legislation as one of domestic law. However, whether it can be converted depends on the nature or content of the convention. The UN Convention on the Law of the Sea of 1982 was converted to two domestic legislations; they are the Law on Territorial Sea and Contiguous Zone, and the Law on Exclusive Economic Zone and Continental Shelf. The International Covenant on Civil and Political Rights of 1966 was converted as articles in China's Criminal Law and Criminal Procedure Law. Concerning the international conventions of armed conflicts, the four 1949 Geneva Conventions and two Additional Protocols of 1977 have not been converted. It is still ambiguous how and whether China's military force applies international humanitarian law during the armed conflict.⁴⁹

Chinese military organizational institution has followed the Soviet Union's model and been under its influence for a long period. The modernizing of the military force has been significantly fulfilled since the 18th National Congress of the Communist Party of China in 2012. The biggest change in China's military history is that the seven military regions were replaced by five theater commands in 2016. As stated by the speaker of the Ministry of Defense of PRC, that "It is a strategic decision made to achieve the Chinese dream of building a powerful military force. It is a landmark measure for comprehensively implementing the strategy of building a powerful military force. It is a historic progress in building a joint-combat system for our military, and it is of great and far-reaching significance for ensuring that our military force can fight and win wars and effectively safeguard national security."⁵⁰

The military reforms have been focused on three aspects. Firstly, the re-allocation of the military organizations, including the demand system and operation system, such as replacing the seven military regions with five theater commands. Secondly, the equipment innovation focused on navy and informatization technology. Thirdly, rules and regulations to ensure the implementation of the reform.⁵¹ All these measures are highly expected to increase combat ability and efficiency dramatically.⁵²

Still, the question is whether and how the Chinese People's Liberation Army would fulfill the rules of armed conflict in a modern war. Since the combat ability and the military strategy achievement depends on soldiers' operations on the battlefield, it is time to draft the manual regulations about operations on the battlefield based on international conventions of armed conflicts. Thus there are three respects that need to be improved. Firstly, the rules of

international humanitarian law have to be well trained in military force, especially the command combat system. Secondly, the military justice system has to be completed, and a legal advisory professionals system has to be set up. Thirdly, the quality of legal advisors has to be improved.⁵³

Since the draft of ILC is a guideline, it is absolute free will for China to decide whether apply it or not. From the respect of Chinese interests, it is better to adopt and convert it as part of military operation manual. First of all, the military targets will be impacted. The draft specifically requires the duty of communication to design the protected zone⁵⁴ and share the information to facilitate remedial measures after the armed conflict.⁵⁵ China has 55 historical and cultural properties in the World Heritage List,⁵⁶ as much as Italy, is one of the most in the world. Two conventions, namely the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954, hereinafter 1954 Hague Convention)⁵⁷ and Additional Protocol I of 1977⁵⁸, regulate to protect cultural properties through setting up demilitarized zone. The draft of ILC broadens the protection scope to the natural environmental areas. Some of those 55 World Heritage sites are environmental protection areas, such as Sichuan Giant Panda Sanctuaries - Wolong, Mt. Siguniang, and Jiayin Mountains. As the protected areas increases, the military targets to be legally attacked would reduce, the damage and intensity of war would be less either.

Except for the impact on the military targets, the weapon and combat method would be concerned. The degree of environmental damage depends on the efficiency and power of weapons. Of course, some weapons are per se illegal to use in warfare, such as blinding laser weapons⁵⁹ prohibited in all circumstances. However, most weapons are not illegal, so the ways to use them are pretty crucial. For example, some weapons, like napalm bomb, which may cause widespread and long-lasting environmental change, will be regarded as illegal. A total of 17 kinds of weapons were classified in the Department of Defense Law of War Manual of the United States⁶⁰, which is quite instructive for China to edit the manual regulations.

The rules of armed conflict, including the draft of environmental protection in relation to armed conflict, are rules of jus in Bello, they can be used to justify the State's operations in the war. The armed forces need to exercise in the daily drill and implement accordingly in the armed conflict.

Impact on China's Position in International Law

There are two principals will attract China's attention, namely Principles 9 and 26.

Principle 9 regulates State responsibility, that is:

- 1) An internationally wrongful act of a State, in relation to an armed conflict, that causes damage to the environment entails the international responsibility of that State, which is under an obligation to make full reparation for such damage, including damage to the environment in and of itself.
- 2) The present draft principles are without prejudice to the rules on the responsibility of States for internationally wrongful acts.

The illegal international acts in armed conflict will entail not only the State responsibility but also the individual criminal responsibility. Two questions may arise from this article. Does the ICJ or the International Criminal Court (hereinafter refer to "ICC") have jurisdiction over the environmental crime in an armed conflict? Can any belligerent State launch an action for compensation or criminal liability against the other belligerent States, their government officials, or military personnel due to environmental damages?⁶¹

As for China, the consistent standpoint to the two questions would be objection. China's opinion on State responsibility has been expressed when the UN General Assembly adopted the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter 2001 Draft Articles on States' Responsibility). China believed that 2001 Draft Articles on States' Responsibility has been well-structured and generally balanced with comprehensive provisions on State responsibility and detailed explanations in the commentary.⁶² China especially focused

on Article 48, 52, and 54, which concerned the regulations about countermeasures, that it could be taken by not only the injured State but also any State to cease the wrongful act. China recommended deleting Article 48 and 52 for the reason that the right of countermeasure can only be exercised by the injured State, the collective countermeasure may promote the power politics in international relations.⁶³ Since China pursues a non-aligned foreign policy, and China is used to avoid international judicial or arbitration way when facing international dispute no matter China is the victim or default party. Thereof it is not difficult to understand why China persisted "three-not" policy, namely not participation, not recognition and not fulfillment, when Phillippines initiated international arbitration about South China Sea. When China's Embassy in Yugoslavia was bombed by the US air force in 1999, and some cases of rushing or destroying China's Embassies Houses in Germany, Swiss and Austria, and so forth,⁶⁴ most of these cases were settled through diplomatic negotiations, only a few accidents were settled through forum States' legal process. When China was the wrongful party in Heilongjiang river pollution, a boundary river with Russia, China made a formal diplomat apologize and provided aid to Russia to clean up the polluted river through a diplomatic channel.⁶⁵

The same situation China held in the issue of individual criminal responsibility in international law, even China has always supported establishing an independent, just, effective, and universal International Criminal Court. China hoped that ICC should complete the State court system and the international system of criminal and judicial cooperation in punishing the most serious international crimes.⁶⁶ However, China voted "NO" while adopting the Rome Statute finally.

China's position on State responsibility and individual criminal responsibility are confusing and contradictory. But it is not odd since it is exact same as the position on the state immunity, namely that China signed UN Convention on Jurisdictional Immunities of States and Their Properties in 2005, and it still insisted on absolute immunity doctrine. According to China's opinion that: "[t]he issue of state immunity is an important one affecting relations between States. The long-standing divisions of the international community on the issue and the conflicting States' practices have had a negative impact on international exchanges. The international codification on this issue will help balance and regulate the States practices, and will have a positive impact on the maintenance of harmony and stability in international relations."⁶⁷ However the Foreign Affairs Department of PRC had repeated China's official position by issuing three letters to Hong Kong's courts in the case of FG Hemisphere Associates LLC vs. Democratic Republic of the Congo, China Railway Group (Hong Kong) Limited etc.(hereinafter refer to "Case of Democratic Congo")⁶⁸. Though China's position has been regarded as "illogical" by HK Court of Appeal,⁶⁹ till now, the domestic legislation about State immunity has not published yet. Then no matter from the respect of international or domestic level, foreign victim States, individuals, or companies cannot initiate litigation processes against China. But it doesn't mean China denies its responsibility which it should undertake.

Principle 26 is another critical issue to some States including China, since this principle promoted a new state practice after the armed conflict. It is the background of ILC drafting the topic,⁷⁰ since the interests of protection the environment in the armed conflict reflected the fears engendered during and after the 1990-1 Gulf war in the Middle East ablaze.⁷¹ Iraq was forced to compensate billions because it breached the Charter of United Nations and rules of jus ad bellum by the invasion of Kuwait.⁷² The loss, damage, and injury of States, individuals, or companies would be evaluated by the UN Compensation Committee set up by resolution of the UN Security Council.⁷³ Among the compensation, Iraq paid over US\$ 5.26 billion for environmental damages, remediation, restoration, and nearly US\$ 85 billion had been sought for environmental damage in all the 168 claims.⁷⁴ All the compensation cases are based on the resolution of the UN Security Council and the rules of the UN Compensation Committee instead of international law per se.⁷⁵ However, it cannot be denied that modern war had many more negative effects on the environment. No matter in the Kosovo War of 1999,⁷⁶ Africa, Afghanistan, Iraq, or Libya,⁷⁷ the environment was damaged, and people were struggled to live.

International humanitarian law is not sufficient to provide a legal basis for environmental restoration and compensation to the victim parties in the armed conflict.

However, States' actions will abide by or be justified by either international treaties or custom international law. According to ILC's draft on the Identification of customary international law, a rule must be satisfied with a general practice accepted as law (opinion juris).⁷⁸ As a soft guideline, it requires States' solid and voluntary willingness to implement the guideline.

CONCLUSION

In armed conflict, environmental protection is quite different from that in peacetime. Comparing with environmental protection, military interests always prevail. Therefore, the draft of ILC does not provide a complete and comprehensive guidance in protecting the environment in armed conflicts, such as how a neutral party protects the environment, and no interpretation of the term "extensive, long-term and serious damage."⁷⁹ The draft is oriented to emphasize the impact of armed conflict on the environment and the importance of protection, prevention, and restoration. The most impressive one is the Principle 26 since it proposes a new practice of ecological restoration after armed conflict as a duty with irrelevance with the State's responsibility. From this point of view, the draft is more ambitious and enlightened.

The draft of ILC was submitted to the UN Secretary-General after International Law Commission adopted the first reading draft in 2019. The Secretary-General transferred the draft to all the governments and international organizations, such as the United Nations Environment Programme (UNEP), the International Committee of the Red Cross, and Environmental Law Society, to collect the comments and opinions before December 1, 2020.⁸⁰ The International Law Commission would be reviewed and voted for the final version in 2021 when the annual meeting of the Commission is held.

The year of 2020 means so much to the world, so does the year of 2021. The international events, such as Covid-19, travel-ban, wildfires in Australia and US, Japan declares to dump nuclear wastewater, and so forth, have shown that environmental change makes our lives abnormal deeply. All States and governments have to consider the impact of their policy's, laws, and actions on the environment. International law is expected to create a way to achieve a better and safer world.

ENDNOTES

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- 2) In the early morning of June 9 1938, the Huayuankou Dam on the Huanghe River located to the north of Zhenzhou was digged out by Chinese Kuomintang troops, the flood of Huanghe River submerged the Longhai Railway Road, which forced Japan troops not to attack Zhenzhou at that moment.
- 3) Wenqi Zhu, *Modern International Criminal Law*, the Commercial Press, 2015, p206.
- 4) Nicholas G. Alexander, "Airstrikes and Environmental Damage: Can the United States be Held Liable for Operation Allied Force", *Colorado Journal of International Environmental Law and Policy*, Volume 11, No. 2, Summer 2000, p. 471-498.
- 5) See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII1&chapter=26&clang=_en.
- 6) Philippe Antoine, "International humanitarian law and the protection of the environment in time of armed conflict", *International Review of the Red Cross*, No. 291, 1992, p. 517-537.
- 7) Guofeng Wang, Human rights risk Avoidance in Overseas Investment: Reflections on the Darfur Issue, *Journal of Henan University of Economics and Law University*, No.6 of 2019. Haina Fu and Hengkun Jiang, The responsibility to protect and the Essence of State sovereignty -- on the Darfur Conflict and its Solution, *Journal of International Relations University*, No.2 of 2012. Hongwu Liu and Meng Wang, The International Criminal Court and the Darfur issue of Sudan", *Journal of Zhejiang Normal University (Social Science Edition)*, No.6 of 2008.
- 8) United Nations Interagency Framework Team for Preventive Action, "Renewable Resources and Conflict, Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflicts (2012)".

- Referred from Marja Lehto, *Armed Conflicts and the Environment: The International Law Commission's New Draft Principles*, RECIEL, 2020;00:1–9.
- 9) A/66/10, Annex V.
 - 10) A/68/10, para. 19.
 - 11) A/68/10, para. 19.
 - 12) A/72/10, para. 22.
 - 13) A/68/10, para. 135.
 - 14) A/68/10, para. 136.
 - 15) A/68/10, para. 138.
 - 16) A/68/10, para. 143.
 - 17) Wenqi Zhu, *the International Humanitarian Law*, the Commercial Press, 2018, pp131-176.
 - 18) See Article 48, Article 51(2) and Article 52(2) of the 1977 First Additional Protocol; Article 13(2) of 1977 Second Additional Protocol.
 - 19) *The Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, para. 30.
 - 20) Jean-Marie Henkerts, *Research on Customary International Humanitarian Law: the Contribution to the Understanding and Observance of the Rule of Law in Armed Conflict*, the International Review of the Red Cross, edited by ICRC, December 2015, pp.455-462.
 - 21) Yoram Dinstein, *Protection of the environment in international armed conflict*, Max Planck Yearbook of United Nations Law, Vol. 5 (2001), pp. 523–549.
 - 22) Wenqi Zhu, *the International Humanitarian Law*, the Commercial Press, 2018, p154.
 - 23) Article 53 of the First Additional Protocol of 1977; Article 16 of the Second Additional Protocol of 1977.
 - 24) Wenqi Zhu, *the International Humanitarian Law*, the Commercial Press, 2018, p158.
 - 25) See A/74/10, paras 10-11 of commentary to Principle 14, p256.
 - 26) See A/74/10, para. 6 of commentary to Principle 19, p265.
 - 27) Liguang Yan, *A study on the Chinese Communist Party's Settlement of Japan's War of Aggression against China after the Founding of New China*, Jilin University, 2019, p.129.
 - 28) Hiromitsu and N. Yoshiko, *Court Cases, Citizen Groups, and the Unresolved Issues of War: Updates and Brief Commentary*, Center for Research and Documentation on Japan's War Responsibility, 1999, p.2, online at www.jca.ax.apc.org/JWRC/center/english/Courcas.htm. Referred from Michael G. Palmer, *Compensation for Vietnam's Agent Orange Victims*, *The International Journal of Human Rights*, (2004)8(1), pp.1–15.
 - 29) Cymie R. Payne, *Developments in the Law of Environmental Reparations: A Case Study of the UN Compensation Commission*, in C. Stahn, J. Iverson, and J.S. Easterday (eds.), *Environmental Protection and Transitions from Conflict to Peace*, Oxford University Press, 2017, pp. 329-366.
 - 30) Michael Reisman, *Compensating Collateral Damage in Elective International Conflict*, *Intercultural Human Rights Law Review*, vol. 8 (2013), pp. 1–18.
 - 31) See Statement by Assistant to the President for Press Relations Fitzwater on United States Policy Regarding the Accidental Attack on an Iranian Jetliner over the Persian Gulf (July 11, 1988), reprinted in 2 PUB. PAPERS: RONALD REAGAN, 1988-89, at 934-35 (1991), Referred from Michael Reisman, *Compensating Collateral Damage in Elective International Conflict*, *Intercultural Human Rights Law Review*, vol. 8 (2013), pp. 1–18.
 - 32) Michael Reisman, *Compensating Collateral Damage in Elective International Conflict*, *Intercultural Human Rights Law Review*, vol. 8 (2013), pp. 1–18.
 - 33) Summary 2004/2, *Summary of the Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, p. 13.
 - 34) *Case concerning United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, p. 3, at p. 29, para. 56.
 - 35) A/74/10, commentary (1) to Principle 26, p.289.
 - 36) Principle 24 Sharing and granting access to information; Principle 25 Post-armed conflict environmental assessments and remedial measures; Principle 27 Remnants of war; Principle 28 Remnants of war at sea. Details can be seen in A/74/10.
 - 37) A/68/10, para. 135.
 - 38) A/68/10, para. 135.
 - 39) A/63/10, para. 14.
 - 40) Tieya Wang, *International Law*, Beijing Law Press, 1995, pp. 628-629.

- 41) Xinyu Leng, "The Impact of Armed Conflict on Treaties -- the New Progress of the ILC's Codification Under this Topic", *Journal of Shandong Police College*, No.3 of 2007.
- 42) A/63/10, para. 14.
- 43) Article 4 of Effects of armed conflicts on treaties reads as follows:
The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict the susceptibility to termination or suspension of treaties in case of an armed conflict is determined in accordance with the intention of the parties at the time the treaty was concluded.
The intention of the parties to a treaty relating to its susceptibility to termination or suspension shall be determined in accordance: with the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and the nature and extent of the armed conflict in question.
- 44) A/68/10, para. 143.
- 45) A /CN.4/L.937.
- 46) Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules*, Cambridge University Press, 2006, page XV.
- 47) Xiangqian Gong, *A Study in Soft Law in International Law: A Case of WHO's Soft Law*, *Social Scientist*, No.2 of 2006.
- 48) World Health Organization, *States Parties to the International Health Regulations (2005)*, https://www.who.int/ihr/legal_issues/states_parties/en/, accessed 5 August 2020.
- 49) Chief edited by Yongzhen Wang, Jian Zhou, *The Military Law*, the Law Press, September 2014, pp. 61-64.
- 50) See the website of Ministry of National Defense of China, A transcript of the special press conference held by the Ministry of National Defense on Feb. 1st, 2016, at http://www.mod.gov.cn/info/2016_02/01/content_4642553.htm, Feb. 1st, 2016.
- 51) The newly updated Regulations on Military Training of the People's Liberation Army of China (Trail Implementation) (in Chinese: 《中国人民解放军军事训练条例 (试行)》) was put into practice since Jan. 1, 2018. The law is basic management about the military training program, planning, statistics, reports, inspection and evaluation, rating system etc., which is to expand and complete military training security, safety management, supervision, rewards and punishment system, such as supporting system, to establish and complete the military training mechanism, to promote and operate the army military training as a whole.
- 52) (U.S.) Ian Morris, *War: From Ape to Robert, Civilization's Conflict and Evolution*, Lifu Luan translated into Chinese, CITIC Publishing Group, August 2015, p.53.
- 53) Wen Sun, *The Study on the Education and Training on the Law of War for Chinese People's Liberation Army*, compiled in *International Humanitarian Law in China: Dissemination, Practice and Development*, chief edited by Baige Zhao, People's Publishing House, April 2012, p.48.
- 54) Principle 4 Designation of protected zones
States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.
- 55) Principle 24 Sharing and granting access to information
To facilitate remedial measures after an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under international law.
Nothing in the present draft principle obliges a State or international organization to share or grant access to information vital to its national defense or security. Nevertheless, that State or international organization shall cooperate in good faith with a view to providing as much information as possible under the circumstances.
- 56) Details list please refer to the website of UNESCO at <http://whc.unesco.org/en/list/>.
- 57) China accessed the Convention for the Protection of Cultural Property in the event of Armed Conflict on Jan. 5, 2000. There are 133 States parties in the convention.
- 58) Article 60 of Additional Protocol I of 1977 to four Geneva Conventions of 1949 states to set up demilitarized zone. China ratified on Sept. 14, 1983.
- 59) Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995.
- 60) Details please refer to VI-Weapon of Department of Defense Law of War Manual, 2015.
- 61) These two questions are referred to Nicholas G. Alexander, "Airstrikes and Environmental Damage: Can the United States be Held Liable for Operation Allied Force", *Colorado Journal of International*

- Environmental Law and Policy*, Volume 11, No. 2, Summer 2000, p. 471-498.
- 62) Chief edited by Jielong Duan, *International Law in China: Cases and Practice*, Law Press of China, March 2011, p.57.
 - 63) Chief edited by Jielong Duan, *International Law in China: Cases and Practice*, Law Press of China, March 2011, p.58.
 - 64) Chief edited by Jielong Duan, *International Law in China: Cases and Practice*, Law Press of China, March 2011, pp.60-66.
 - 65) See <https://baike.baidu.com/item/2005%E5%B9%B4%E6%9D%BE%E8%8A%B1%E6%B1%9F%E6%B0%B4%E6%B1%A1%E6%9F%93%E4%BA%8B%E4%BB%B6/18450217?fr=aladdin>, accessed at Sept. 3rd, 2020.
 - 66) Chief edited by Jielong Duan, *International Law in China: Cases and Practice*, Law Press of China, March 2011, page 374.
 - 67) Chief edited by Jielong Duan, *International Law in China: Cases and Practice*, Law Press of China, March 2011, pp 9-10.
 - 68) The three letters were submitted respectively to Hong Kong's courts, firstly the Court of First Instance, and the Court of Appeal and the Court of Final Appeal in turn. Details please refer to paragraph 5 of the Judgment of the Court of First Instance, No. 928 of 2008; paragraph 91 of the Judgement of the Court of Appeal, Civil Appeal No. 373 of 2008 & No. 43 of 2009; the paragraph 47 of the Judgment of the Court of Final Appeal, Final Appeal NOS 5, 6 & 7 of 2010 (Civil).
 - 69) Please refer to paragraph 195 of the Judgement of the Court of Appeal, Civil Appeal No. 373 of 2008 & No. 43 of 2009.
 - 70) A66/10, para. 17 of Annex E.
 - 71) Antoine Bouvier, *Recent Studies on the Protection of the Environment in time of Armed Conflict*, *International Review of the Red Cross*, Volume 32, Issue 291, December 1992, pp. 554 - 566. DOI: 10.1017/S0020860400071163, Published online: 13 January 2010.
 - 72) UN Security Council Resolution 660(1990), 8 Feb. 1990, and SC Resolution661(1990), 6 August 1990(sanction).
 - 73) UN Security Council Resolution 686(1991), 2 March 1991, and SC UN Security Council Resolution 686(1991), 2 March 1991, and SC Resolution687(1991), 3 April 1991.
 - 74) Cymie R. Payne, *Developments in the Law of Environmental Reparations: A Case Study of the UN Compensation Commission*, in C. Stahn, J. Iverson, and J.S. Easterday (eds.), *Environmental Protection and Transitions from Conflict to Peace*, Oxford University Press, 2017, pp. 329-366.
 - 75) *Yearbook of the International Law Commission* 2011, para. 10 of Annex E: Protection of the environment in relation to armed conflict, p.212. Refer to <https://legal.un.org/ilc/reports/2011/english/annex.pdf>.
 - 76) *See* United States: Department of Defense Report to Congress on the Conduct of the Persian Gulf War-Appendix on the Role of the Law of War (Apr. 10, 1992), *reprinted in* 31 I.L.M. 612, 636-637 (1992). Quoted in Nicholas G. Alexander, *Airstrikes and Environmental Damage: Can the United States Be Held Liable for Operation Allied Force?* *Colorado Journal of International Environmental Law and Policy*, 11(2), Summer 2000, pp. 471-498.
 - 77) *See* Disasters and Conflicts Program of United Nations Environment Program at https://www.un.org/en/events/environmentconflictday/pdf/UNEP_conflict_and_disaster_brochure.pdf, and refer to Development Assistance Committee of Organization for Economic Cooperation and Development at <http://www.oecd.org/dac/>.
 - 78) Conclusion 2 of A/73/10 of ILC.
 - 79) Article 2 of 1976 the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Technique regulates that "As used in Article I, the term "environmental modification technique" refers to any technique for changing -- through the deliberate manipulation of natural process -- the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.
The words of extensive, long-term and serious are understood respectively as follows: ... Details see Report of the Commission on Disarmament, Official Records of the General Assembly, thirty-first Session, Supplement No. 27 (A/31/27), Vol. I, pp. 91-92.
 - 80) A/74/10, para.17.