

Feasibility study:
An implementation
vehicle for the Inter



vehicle for the International Law Commission's draft principles on the Protection of the environment in relation to armed conflicts

About this study

This study seeks to identify how States and other stakeholders can ensure the successful implementation of the International Law Commission's draft principles on the Protection of the environment in relation to armed conflicts. As the Commission's work will conclude in non-binding principles, further measures will be needed to encourage their dissemination and universalisation. The Conflict and Environment Observatory (CEOBS) has proposed the use of a database as an implementation vehicle, and this study reviews the principles, their potential normative value and how this could be enhanced by complementary activities, together with a range of practical considerations that would need to be addressed should this PERAC Implementation Project (the Project) be adopted.

About the Conflict and Environment Observatory (CEOBS)

CEOBS is a UK charity that was launched in 2018 with the primary goal of increasing awareness and understanding of the environmental and derived humanitarian consequences of armed conflicts and military activities. In this, we seek to challenge the idea of the environment as a 'silent victim of armed conflict'.

We work with international organisations, civil society, academia and communities to: monitor and publicise data on the environmental dimensions of armed conflicts; develop tools to improve data collection and sharing; monitor and scrutinise developments in law and policy that could contribute towards the reduction of humanitarian and environmental harm; and promote environmental mainstreaming in humanitarian disarmament. CEOBS' overarching aim is to ensure that the environmental consequences of armed conflicts and military activities are properly documented and addressed, and that those affected are assisted.

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Introduction

Damage to the environment during and after armed conflicts harms the lives and livelihoods of vulnerable people, degrades critical ecosystems and undermines sustainable development. The norms and laws intended to minimise and remedy this damage are weak and ill-defined, and compliance is poor. In spite of the clear link between environmental damage and human suffering, the environmental consequences of armed conflicts remain under-prioritised in policies and practice.

In many fragile and conflict-affected states, the environmental consequences of conflicts compound problems caused by our changing climate, biodiversity loss, pollution or weak governance. This has been clear in Iraq, and the widespread contamination caused by Islamic State's attacks on oil infrastructure; in biodiverse Colombia, with its spiralling rates of deforestation and habitat loss; and in Afghanistan, where the legacy of decades of conflict-linked environmental degradation have left it intensely vulnerable to climate change. We urgently need a robust framework capable of reducing harm during conflicts, and ensuring that the environment is better prioritised in their wake. Laws capable of protecting the environment before, during and after conflicts are a vital component of this normative framework.

Since 2011, the UN's International Law Commission (ILC) has been studying the Protection of the environment in relation to armed conflicts (PERAC). The proposal that the Commission adopt the topic for study was based on a recommendation in a 2009 UN Environment Programme (UNEP) report that was co-financed by the Government of Finland. The study is currently expected to conclude in 2022 with the

adoption of 28 non-binding legal principles.² These are intended to guide the conduct of States and a range of non-State actors to enhance the protection of the environment throughout the cycle of conflicts.

However, it is unlikely that the PERAC principles will form the basis of a new international instrument, or convention. If the principles are to change the behaviour of States and non-State actors, there is therefore an urgent need for an alternative implementation vehicle that encourages and monitors States' compliance with the principles. The Conflict and Environment Observatory (CEOBS) believes that an online, open access database of State practice and adherence to the PERAC principles would contribute towards their successful universalisation and implementation, particularly when combined with activities to encourage State engagement.

This feasibility study examines the potential and practicalities of the proposed database, how it could be developed, managed and used, and complementary activities to promote PERAC as part of a PERAC Implementation Project (the Project).

^{1.} UNEP, 'Protecting the environment during armed conflict: an inventory and analysis of international law', 2009, available at: www.unenvironment.org/resources/report/protecting-environment-during-armed-conflict-inventory-and-analysis-international

^{2.} ILC, 'Protection of the environment in relation to armed conflicts: Text and titles of the draft principles provisionally adopted by the Drafting Committee on first reading', 6 June 2019, available at http://legal.un.org/docs/?symbol=A/CN.4/L.937

Key findings

This study has examined the feasibility of an online database to encourage the implementation of the International Law Commission's draft principles on the *Protection of the environment in relation to armed conflicts*. It has found that:

- The thematic and temporal scope of the draft principles make them the most valuable suite of norms currently available for enhancing the protection of the environment, and by extension civilians, before, during and after armed conflicts, and in situations of occupation.
- Without a dedicated implementation vehicle, the draft principles will be unlikely to achieve their intended impact, likely remaining solely as a document of academic interest.
- A passive database that simply records State practice would be less effective at influencing the behaviour of States than an active implementation programme with a database at its heart.
- A smaller number of goals and indicators on environmental conduct that are informed by the PERAC principles would be more practical as indicators of State practice than the 28 draft principles themselves.
- These goals should be developed through consultation with independent experts and complemented by recommendations to States to improve their environmental performance.
- The primary focus of the goals and indicators would be to promote conduct that minimises environmental harm, and protects civilians and ecosystems.

- A group of States would need to endorse and promote the PERAC Implementation Project from its early stages to lend it legitimacy, with one or two States coordinating this group with the support of the Project.
- Updates to the database would be ongoing but annual or biennial reporting should be used as an outreach tool.
- The scope of the draft principles provides opportunities to promote PERAC norms across a web of international processes.
- The Project should be launched as soon as is feasible following consideration of the output of the ILC's second reading by the UN General Assembly in 2022.

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1. The PERAC principles and why an implementation is needed

1.1 The context and history of the ILC's PERAC process

The last decade has seen the most significant developments in the legal framework protecting the environment in relation to armed conflicts since the 1970s. In addition to the 28 draft principles (DPs) adopted by the UN International Law Commission (ILC) during its 2019 session,3 the International Committee of the Red Cross (ICRC) published a revised version of its 1994 Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict in September 2020.4 Other legal initiatives have addressed water in conflicts, and the humanitarian consequences of conflict pollution. Specifically, the Geneva List of Principles on the Protection of Water Infrastructure was launched in August 2019,5 while principles outlining standards for victim assistance for those affected by toxic remnants of war were launched in September 2020 (hereafter the Harvard List).6

The environmental dimensions of armed conflicts have also risen up the international agenda, with the passage of relevant resolutions in the UN Environment Assembly (UNEA) in 2016 and 2017,7 and

developing debates on climate and water security,⁸ and environmental damage, in the UN Security Council (UNSC).⁹ This emergent environment, peace and security agenda is also evident in peacekeeping,¹⁰ peacebuilding,¹¹ humanitarian assistance,¹² and mine action,¹³ all of which have seen efforts to mainstream environmental considerations.

This long-overdue progress comes at a critical time. Complex, protracted conflicts, many of which have been exacerbated by environmental change, have become the norm. Legal compliance by both State and non-State actors has often been absent, with examples of humanitarian tragedies and environmental degradation commonplace. Industrial and technological hazards are a growing threat in conflict areas, while a shift to urban warfare has increased environmental risks and communities' vulnerability from damage to infrastructure. A growing understanding of the interactions between conflicts, critical ecosystems and the services they provide to people is also helping to underline the importance of protecting what had earlier been viewed as the "natural environment". It is also evident that, for many fragile States, conflicts pose a major threat to the attainment of the environmental dimensions of the Sustainable Development Goals (2030 Agenda).

^{3.} ILC, 'Protection of the environment in relation to armed conflicts: Text and titles of the draft principles provisionally adopted by the Drafting Committee on first reading', 6 June 2019, available at http://legal.un.org/docs/?symbol=A/CN 4/1, 937

^{4.} ICRC, '2020 Guidelines on the Protection of the Natural Environment in Armed Conflict', available at www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating

^{5.} Geneva List of Principles on the Protection of Water Infrastructure, available at www.genevawaterhub.org/sites/default/files/atoms/files/gva_list_of_principles_protection_water_infra_www.pdf

^{6.} Harvard Law School International Human Rights Clinic and Conflict and Environment Observatory, 'Confronting Conflict Pollution: Principles for Assisting Victims of Toxic Remnants of War' available at http://hrp.law.harvard.edu/wp-content/uploads/2020/09/Confronting-Conflict-Pollution.pdf

^{7.} UNEA, Resolution 2/15, 'Protection of the Environment in Areas Affected by Armed Conflict' (4 August 2016) UNEP/EA.2/Res.15; UNEA, Resolution 3/1, 'Pollution Mitigation and Control in Areas Affected by Armed Conflict or Terrorism' (6 December 2017) UNEP/EA.3/Res.1.

 $[\]textbf{8. See:} www.whatsinblue.org/2018/10/water-peace-and-security-arria-formula-meeting.php$

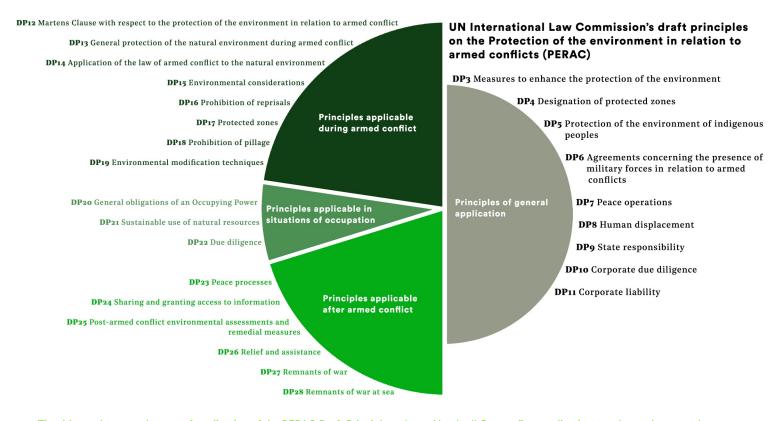
^{9.} UNSC, Arria-formula meeting on the 'Protection of the Environment During Armed Conflict' (7 November 2018); UNSC, Arria-formula meeting on the Protection of the Environment in Armed Conflict (9 December 2019) www.paxforpeace.nl/stay-informed/news/pax-briefs-the-un-security-council-on-conflict-and-environment

^{10.} International Peace Institute, Greening Peacekeeping: The Environmental Impact of UN Peace Operations, 2018, available at: www.ipinst.org/wp-content/uploads/2018/04/1804_Greening-Peacekeeping.pdf

^{11.} See for example, Environmental Law Institute and others, Natural Resource Programming in Post-Conflict Situations, available at: www. environmentalpeacebuilding.org/assets/Documents/LibraryItem_000_Doc_426. pdf

^{12.} See for example, EHA Connect https://ehaconnect.org

^{13.} See for example, CEOBS, environment in humanitarian disarmament programme www.ceobs.org/projects/project-one



The titles and temporal scope of application of the PERAC Draft Principles adopted by the ILC upon first reading in 2019. As can be seen, they are a combination of principles of general application and which can apply at any stage of the cycle of conflicts, and a series of principles applicable at particular phases of the cycle. Nevertheless, the ILC was cognisant that the dividing lines between the different phases are rarely distinct, particularly in contemporary armed conflicts.

Environmental damage in conflicts is not solely a case of poor legal compliance. UNEP's influential 2009 report, and the decision by the ILC to adopt the PERAC topic, represented an acceptance that the legal framework itself was not fit for purpose. The environmental standards in International Humanitarian Law (IHL), which had been developed in the 1970s in the aftermath of the Vietnam War,14 were too permissive and discordant with modern ecological understanding and trends, with high damage thresholds that were poorly defined. Moreover, they primarily applied only during armed conflict. Data from numerous UNEP post-conflict assessments and other sources during the 2000s has demonstrated the importance of environmental protection throughout the cycle of conflicts, particularly where the boundaries between the active and post-conflict phases are ill-defined.

It has also become clear that international human rights law and environmental law can contribute to

enhancing protection, particularly before and after armed conflicts, and during situations of occupation. Similarly, even in the absence of a robust legal framework, States, international organisations and a range of non-State actors have developed practice relevant to PERAC, which could help inform new norms.

The task of the ILC's Special Rapporteurs was to distil this mixture of laws, principles and practice into a series of clearly defined principles. As the scope of conflict and the environment is so broad, a temporal approach was adopted for when different principles would apply. Given the complex nature of contemporary armed conflicts, the principles were to apply in both international and non-international armed conflicts. And because of the expected reluctance of States, a relatively conservative approach was adopted. The PERAC study's output would be non-binding principles, rather than articles that could lead to a new convention. Equally, certain topics were excluded from its scope, including the environmental impact of weapons, and the specific protection that the designation of the environment as cultural property, or parts thereof, could provide.

^{14.} See Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (adopted 10 December 1976, entered into force 5 October 1978) 1108 UNTS 152 (ENMOD Convention); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I), esp arts 35(3) and 55.

1.2 The legal value of the ILC PERAC principles

It is important to draw an important terminological distinction at the outset. The correct term at the time of writing, and until the UN General Assembly (UNGA) has considered the output of the ILC's second reading is 'draft principles'. Only after that – at the time when the implementation vehicle could be in operation – will the correct term be 'principles'. However, given that the second reading of the DPs will not amount to a full reopening of the PERAC topic, we use both terms interchangeably.

The provisions being considered by the ILC have been formulated as draft 'principles' on the premise that they are still a work in progress, since the final form of the text will be revisited prior to their adoption by the ILC in 2022. Quite understandably, the issue of the final outcome has garnered a great deal of discussion in both the ILC and in the Sixth Committee of the UNGA.¹⁵

On the one hand, there are proponents that argue that the provisions should take the form of draft 'articles'. ¹⁶ This view points in the direction of a potential convention. On the other hand, there are supporters of a softer (less hard) law document that takes the form of 'principles' or guidelines. ¹⁷ True, whenever the ILC proposes its work as a basis for a treaty, it is presented in the form of draft articles. Nevertheless, while all draft articles have not been transformed into a treaty (and there has been very little appetite for treaty negotiations in the UN Sixth Committee lately), the reverse is not true.

15. ILC, 'Third report on the protection of the environment in relation to armed conflicts, by Marie G. Jacobsson, Special Rapporteur', UN Doc. A/CN.4/700 (3 June 2016), para 51.

Taking all the above into consideration, the
Commentaries to the PERAC DPs rightly observe that
'principles' do not lack normativity, rather they 'are
cast normatively at a general level of abstraction'.

This is an important proposition as the Commentaries
form an integral part of the ILC's work on PERAC
and shall be read together with the DPs. Principles
provide greater flexibility and States might accept
them more readily than a set of articles. In any event,
States will have the final word in this respect and
an outcome of principles seems likely. The ILC has
produced principles in the past, for example in 2006,
in its work regarding the allocation of loss in the
case of transboundary harm arising from hazardous
activities.¹⁹

More generally, it is noteworthy that the ILC does not aim to merely reflect existing international law in this field, but also to progressively develop it, in line with its mandate. Because of this, it is quite often the case that the final outcome of the ILC's work attracts considerable dispute. In his insightful account of State-empowered entities and their role in international law-making, Sivakumaran posits that 'what seems to be disagreement on the substance of an output is not infrequently a disguised battle about authority and who has the power to make and shape the law.'21

This appositely captures the underlying dynamics in relation to international law-making and it is more than apt for our purposes, given that States have left vacant the jurisgenerative space of environmental protection in relation to armed conflict since the adoption of Additional Protocol I. This is not to say that the ILC's DPs are divested of normative impact.

^{16.} See, for example, before the Sixth Committee of the UNGA: Poland, UNGA Sixth Committee (UN Doc. A/C.6/70/SR.25), 11 November 2015, para 19 (either draft articles or conclusions). Before the ILC: ILC, 'Provisional Summary of the 3264th meeting', UN Doc. A/CN.4/SR.3264, 6 July 2015, (Mr. Murase in favor of draft articles); ILC, 'Provisional Summary of the 3268th meeting', UN Doc. A/CN.4/SR.3268, 10 July 2015 (Ms. Escobar Hernández, in favor of draft articles without dismissing the option of draft principles); ILC, 'Provisional Summary of the 3319th meeting', UN Doc. A/CN.4/SR.3319, 13 July 2016 (Mr. Peter).

^{17.} See, for example, before the Sixth Committee of the UNGA: Netherlands, UNGA Sixth Committee (UN Doc. A/C.6/70/SR.24), 10 November 2015, para 28, Singapore, UNGA Sixth Committee (UN Doc. A/C.6/70/SR.23), 9 November 2015, para 124, and United Kingdom of Great Britain and Northern Ireland, UNGA Sixth Committee (UN Doc. A/C.6/70/SR.24), 10 November 2015, para 21. Before the ILC: ILC, 'Provisional Summary of the 3267th meeting', UN Doc. A/CN.4/SR.3267, 9 July 2015 (Mr. Šturma); ILC, 'Provisional Summary of the 3268th meeting' UN Doc. A/CN.4/SR.3268, 10 July 2015 (Mr. Hmoud).

^{18.} ILC, 'Report of the International Law Commission on the Work of its 68th Session' (2 May-10 June and 4 July-12 August 2016) UN Doc. A/71/10, Chapter X 'Protection of the environment in relation to armed conflicts', 321, para 2.

^{19.} For a concise account of the ILC's choice regarding the final form of its activities, see Jacob Katz Cogan, 'The Changing Form of the International Law Commission's Work' in Roberto Virzo and Ivan Ingravallo (eds), *Evolutions in the Law of International Organizations* (Brill/Nijhoff 2015) 275.

^{20.} Statute of the International Law Commission (adopted 21 November 1947 in UNGA Res 174 (II) as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981), art 1(1).

^{21.} Sandesh Sivakumaran, 'Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law' (2017) 55 Colum J Transnat'l L 343, 394.

For one, many of them reflect existing law. Moreover, DPs that promote the progressive development of international law operate as best-practice guidelines that may inform and guide the conduct of States, as well as influence future legal developments.

This latter feature acquires great importance in the absence of an overarching, all-encompassing treaty, as will likely be the case with respect to PERAC. In addition, the ILC's non-binding outputs 'may trigger the reaction of States and thus contribute to the clarification and further development of international law.' In many instances, States have provided their views on the ILC's DPs, and this continuous interaction between the ILC and States during the last seven years has in itself bestowed authority on the PERAC DPs. Lastly, soft law instruments often perform an additional, very significant function in that they elaborate and clarify hard law provisions."

In summary, the ILC's final outputs, including the ILC PERAC DPs, tend to fluctuate between the codification of existing law, and its progressive development. At first, the dividing line between the two may not always be clear, as it will depend on the law-applier's interpretation of the DP at hand. At second, DPs promoting the progressive development of international law will not necessarily hold the same normative value, as some of them will be more firmly grounded in existing law than others.

Nevertheless, two claims could be advanced with greater certainty: i) all DPs carry normative value, even if this is essentially a matter of gradation; and ii) the ILC not only enjoys authority in international law-making, as evidenced by its interaction with States at the UNGA Sixth Committee, but it also constitutes a site of contestation about the authority in international law-making. This is particularly true in areas such as the protection of the environment in relation to armed conflicts, where States have left the law-making space unoccupied for many years, and they

attempt to reclaim it.

All things considered, the inherent, evolutionary potential of the ILC international legal process should be acknowledged, whether it manifests itself by further strengthening existing rules, inviting States' reactions, elaborating vague rules by interpretation, or filling gaps in current law by triggering the generation of new practice.

1.3 The PERAC principles' progressive value

The significance of the PERAC principles is multifaceted. As noted above, the PERAC principles espouse a holistic approach in that they cover the entire conflict cycle, from pre-conflict, to in bello, including situations of occupation, to the period following the cessation of hostilities (post-armed conflict). Their all-encompassing temporal scope, coupled with their unified approach in not distinguishing, in principle, between international and non-international armed conflicts, showcases why they should be considered the legal instrument of reference when it comes to PERAC. In addition, the ILC enjoys great authority within the circles of international law, as it is a State-empowered body, composed of international law experts and vested with the mandate and the authority to codify and progressively develop international law.

For the purposes of the PERAC principles, the ILC has drawn on insights from different branches of international law, such as IHL, international environmental law and international human rights law. This feature further strengthens the holistic character of the PERAC principles, and is a distinctive added value that they bring to the legal regulation of PERAC, as opposed to other relevant international initiatives, which are examined in more detail below.

^{22.} Danae Azaria, 'The International Law Commission's Return to the Law of Sources of International Law' (2019) 13 FIU L Rev 989, 995.

^{23.} Elena Baylis, 'The International Law Commission's Soft Law Influence' (2019) 13 FIU L Rev 1007, 1012.

1.4 Who the PERAC principles address

The ILC forms a subsidiary organ of the UNGA and is composed of 34 experts in international law. Given its mandate, the ILC can be best seen as a state-empowered entity in the making of international law. As such, its work is primarily addressed to States, the primary law-makers, implementers, and enforcers of international law. Its work on PERAC is no exception.

Having said that, the ILC has reinvented itself during the last decade. ²⁵ Accordingly, it has managed to attune its work with the trends in international law and affairs, more generally. This is the reason that the PERAC DPs have also brought within their scope the conduct of secondary international legal subjects, namely international organisations, as well as of other 'relevant actors'. These include non-State armed groups in the context of a non-international armed conflicts, corporations (DPs 10 and 11), and even civil society organisations. All in all, the ILC has cast its net wide as far as the scope of the entities that the DPs are addressed to is concerned and this development, even if complex, showcases the holistic approach of the ILC and its scope for influencing a range of stakeholders.

1.5 State reactions to the ILC's PERAC study

Over the seven years that the ILC has been working on the PERAC principles, States have demonstrated increasing interest in them, as evidenced by the fact that in 2019 more than 50 States engaged with, and offered their perspectives on, the 28 DPs that were adopted on first reading. More importantly, the majority of States that expressed their views at the UNGA Sixth Committee welcomed and endorsed the ILC's work.

Which is not to say that support has been universal. In the early years of the study, a minority of States questioned the need for and relevance of the ILC's PERAC work. However, over time, most positions softened, or translated into objections only to specific principles. The majority of these are linked with long-standing domestic positions or concerns, for example regarding nuclear weapons, State sovereignty over natural resources, non-State armed groups, the role of IHL as *lex specialis* during armed conflicts or occupation law. Crucially for PERAC, the overwhelming majority of States have not questioned the aims of the study as a whole.

1.6 The role and context of a PERAC implementation database

As opposed to the other legal instruments mentioned above, such as the ICRC Guidelines, and the Harvard and Geneva lists, the ILC DPs lack, somehow counterintuitively, an actor or entity monitoring their implementation. For example, it is expected that the ICRC will follow up on its Guidelines, just as it is equally expected that the Geneva Water Hub will keep an eye on the implementation of the Geneva List, and Harvard Human Rights Clinic on the implementation of the Harvard principles. With the latter likely to find an operative role in the implementation of the environmental remediation and victim assistance obligations of the Treaty on the Prohibition of Nuclear Weapons.²⁷

However, the implementation of its outputs falls outside the ILC's mandate. Consequently, the danger of such a ground-breaking instrument falling into disuse looms large. This is precisely the reason that interested parties, including States and civil society organisations, need to step in and ensure that the PERAC principles reach their full potential. Key to this will be ensuring that States and other relevant stakeholders continue to remain engaged with the DPs.

^{24.} Sandesh Sivakumaran, 'Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law' (n 21). 25. Kristina Daugirdas, 'The International Law Commission Reinvents Itself?' 108 *AJIL Unbound* (2014), 79-82.

^{26.} See our report here: www.ceobs.org/report-2019s-un-general-assembly-debate-on-the-protection-of-the-environment-in-relation-to-armed-conflicts

^{27.} Art. 6, Treaty on the Prohibition of Nuclear Weapons (adopted 7 July 2017, entry into force 22 January 2021) available at https://treaties.un.org/doc/ Treaties/2017/07/20170707%2003-42%20PM/Ch_XXVI_9.pdf

As an implementation vehicle, a PERAC database, through its continued update and the additions to it, could therefore serve as a vehicle enabling and facilitating the dissemination of the PERAC DPs and their uptake, ensuring at the same time the sustained engagement of important actors. And not just a vehicle for improving practice but also as a means of creating and sustaining dialogue with States. This task assumes even greater importance when viewed against the absence of an all-encompassing treaty stipulating binding PERAC obligations covering the entire conflict cycle. In other words, a PERAC database would be instrumental in promoting PERAC norms and thus enhancing environmental protection in relation to armed conflicts.

journey risks abandoning the considerable investment of States, the ILC and other stakeholders. The question of precisely how they should be operationalised is addressed by this study but without determined efforts, the PERAC DPs risk remaining solely of academic interest following their adoption.

1.7 The opportunity cost of not developing a PERAC implementation vehicle

As outlined above, opportunities for promoting the PERAC DPs, and the norms they reflect, are currently limited. While elements of them will be captured by the work of the ICRC, or the piecemeal efforts of organisations addressing some of the DPs through their work, for example on environmental mainstreaming in humanitarian assistance, PERAC's true normative potential lies in operationalising the DPs as a whole.

Considerable momentum has developed over the need to strengthen the PERAC legal framework during the last decade. It is clearly a wish of many States too. With the planet facing the triple crises of climate change, biodiversity loss and pollution, efforts are needed on all levels to help protect and restore the environment, and the environment in areas affected by armed conflicts faces particular challenges.

The ILC has played an important role in mapping and progressively developing PERAC norms, in what could be viewed as the first part of a longer journey to reduce environmental and humanitarian harm. To then not operationalise its outputs for the second part of the

2. Benchmarking conduct

Section 2 reviews the utility of the norms contained in the PERAC principles for benchmarking State conduct when set against other recent and ongoing legal initiatives, the types of evidence that could be used to analyse that conduct, and briefly reviews four examples of implementation databases.

2.1 Are the PERAC draft principles the most useful normative framework?

Given the emergence of various international legal initiatives relating to PERAC, it is important to justify the choice of the ILC DPs as the reference point for the proposed database, and their relationship to other PERAC-related instruments.

The prime candidate to serve as an alternative reference point would be the work of the ICRC, either its 2005 *Study on Customary IHL*, ²⁸ or the recently published 2020 Guidelines on the Protection of the Natural Environment in Armed Conflict.²⁹ Nevertheless, both these initiatives are limited in two respects compared to the PERAC DPs: a) they focus on existing law relating to the protection of the natural environment in armed conflict, whereas the PERAC DPs assume a broader role in that they also entail the adoption of best-practice recommendations, which are inextricably interwoven with the progressive development of international law in this field; b) from a temporal scope of application, the ICRC's work addresses only the phase during armed conflict, which is in line with the ICRC's institutional mandate as the guardian of IHL. In contrast, the ILC DPs cover the whole conflict cycle. Nevertheless, any PERAC database would draw valuable insight and inspiration

Another recent initiative relating to PERAC is the adoption of the *Geneva List of Principles on the Protection of Water Infrastructure* in 2019. As their title suggests they focus on water infrastructure, which forms an important factor in affording protection to the environment as a whole, but nevertheless are limited in their material scope. Having set the protection of the environment as broadly as possible, it becomes evident that the ILC DPs form a better starting point in comparison to the Geneva List.

On a similar note, the 2020 Harvard List, despite its innovative and informative character, is also limited by its scope, prioritising as it does victim assistance. Nevertheless, given that the PERAC DPs already contain DPs on toxic and hazardous remnants of war, and on *Relief and assistance*, the 2020 *Principles for Assisting Victims of Toxic Remnants of War* could help judge State practice on the related DPs.

Finally, it is worth referring to two other potentially relevant instruments, namely the draft Global Pact for the Environment (GPE) and UNEP's Fifth Montevideo Programme for the Development and Periodic Review of Environmental Law (Montevideo Programme V), which commenced in January 2020.³⁰

Regarding the GPE, its most recent publicly available form contained an article on PERAC, but was not ambitious enough, as it merely called on States to respect their existing PERAC obligations without delving into any further detail. Moreover, it is still

from these instruments, particularly as the PERAC DPs applicable during conflict were developed in close coordination with the ICRC. But it is submitted that the PERAC DPs are better-suited to act as the beacon of PERAC.

^{28.} Available at www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf

^{29.} Available at www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating

^{30.} Available at www.unenvironment.org/resources/policy-and-strategy/delivering-people-and-planet-fifth-montevideo-programme-development

unclear what form the GPE will eventually assume, as it may be limited only to a political declaration.

Turning to the Montevideo Programme V, its objective is to promote the development and implementation of the environmental rule of law, to strengthen the related capacity in countries and to contribute to the environmental dimension of the 2030 Agenda. Against this backdrop, the Montevideo Programme V attempts to enhance States' capacity to implement the environmental rule of law and operationalise laws relating to environmental protection, but given its mostly facilitative, capacity-building orientation, it makes sense to engage with this process and explore synergistic opportunities at a later stage, when the PERAC database will already be in place and functioning. Each programme lasts ten years. The scope of Montevideo IV included environmental harm linked to military activities and conflicts,31 and as Montevideo V aims to 'promote the recognition of the mutually reinforcing relationship between environmental law and the three pillars of the Charter of the United Nations' (human rights, peace and security, and development) there is potential crossover with PERAC.

The broad thematic and temporal scope of the ILC's PERAC DPs, and the Commission's standing with States, clearly shows that the DPs have greater potential to inform a series of benchmarks for State conduct. Nevertheless, it's also evident that there is significant potential for mutually reinforcing cross fertilisation and interaction between these various instruments and processes.

2.2 Data sources on State practice on PERAC

It is important to note that legally the concept of 'State practice' points to the direction of customary international law in the light of article 38(1)(b) of

31. Governing Council of the United Nations Environment Programme, Fourth Programme for the Development and Periodic Review of Environmental Law, 2008 https://wedocs.unep.org/bitstream/handle/20.500.11822/9937/MontevideoIV.pdf?sequence=1&isAllowed=y

the ICJ Statute. Nevertheless, for the purposes of the database the instances of 'State practice' are not collected with a view to identifying the formation of relevant customary international law. Instead, the main purpose of the database is to compile material acts, verbal statements and State policies in relation to PERAC, which will enable an assessment of how States are implementing binding and non-binding PERAC norms.

Potential sources of PERAC State practice

- Military manuals.
- International treaty provisions and domestic law implementing acts.
- Unilateral international law acts.
- Domestic law and policy.
- Official statements.
- Instances of material acts.
- Self-reporting.

Sources of State practice that could be used to inform a PERAC database include: military manuals; international treaty provisions to which the States have adhered and the corresponding domestic law implementing acts; unilateral international law acts, such as reservations to international treaties; other domestic law and policy; official state statements before international courts and tribunals and international fora, such as the UNGA Sixth Committee, which detail the legal views of the state; and instances of material acts drawn from official records or media outlets.

The Project could also benefit from developing a system of self-reporting for States, not only to provide subjective information on practice but also as a means of encouraging and embedding an ongoing two-way dialogue with States.

Further depth and, where necessary, verification, could be sourced from remote monitoring of conflicts and military activities. This is the second pillar of CEOBS' work and an area that an increasing number of organisations are engaging in. Remote monitoring is not without its limitations, some of which are dealt with in Section 3.3 below, together with other constraints on data collection.

2.3 Passive versus active implementation databases

Comparable databases exist for the purposes of influencing State behaviour, or to provide the data necessary to underpin implementation activities. The table below compares four different databases. Two managed by the ICRC promote the implementation of IHL, either through affirming its customary status or tracking domestic implementation. Yale and Columbia universities' Environmental Performance Index (EPI) tracks a wide range of indicators but provides only general recommendations for improving performance. Meanwhile the Mine Action Review (MAR) utilises indicators that were specifically developed to encourage the effective implementation of the international agreements on anti-personnel land mines and cluster munitions.

Are any of these models appropriate for PERAC? The EPI can draw on established international datasets on key environmental indicators but, broadly speaking, this would not be possible for the PERAC DPs as the global monitoring architecture to support this is not currently in place. Meanwhile the ICRC databases benefit from a highly developed system of State interactions with the ICRC and its federation of domestic entities, as well as its established role as the guardian of IHL, neither of which could be easy duplicated for PERAC.

The approach taken by the MAR is perhaps most useful for the purposes of PERAC. It promotes implementation of specific components of legally binding obligations, sourced from two instruments that States are obliged to report on (Convention on Cluster Munitions and Anti-Personnel Mine Ban Convention), and validated by data collated by a community of organisations engaged in mine clearance operations. Rather than use the text of the obligations themselves, the MAR developed indicators on progress towards these objectives informed by the experience of mine action operators, who had the clearest understanding of what was needed on the

ground.³² Although States were initially sceptical of their approach, some affected States have subsequently used its findings as an internal benchmarking tool to improve standards. Mine action donors have also used its findings as a means of raising otherwise difficult questions over performance with national authorities, meanwhile national representatives have taken MAR reports back to capital from international meetings to flag "embarrassing" areas where they are underperforming.³³

There are of course notable differences between the implementation of legally binding mine action obligations, supported by a diverse array of mine action operators, from the UN to the country level, and the PERAC principles. However, this kind of active implementation database, and the engagement and outreach activities associated with it, could serve as a useful model.

^{32.} Mine Action Review, Scoring Criteria for States Parties to the Cluster Munition Convention, available at www.mineactionreview.org/documents-and-reports/scoring-criteria-for-states-parties-to-the-cluster-munition-convention; Scoring Criteria for States Parties to the Anti-Personnel Mine Ban Convention, available at: www.mineactionreview.org/documents-and-reports/scoring-criteria-for-states-parties-to-the-anti-personnel-mine-ban-convention

^{33.} Authors' communication with the Mine Action Review, October 2020.

Table comparing initiatives that use databases to monitor, influence or inform State practice.

Platform	Purpose	Data sources	Reporting cycle	Indicators	Coverage	Implementation vehicle?	Parallel processes
Customary IHL Database ICRC https://ihl- databases.icrc. org/customary-ihl/ eng/docs/home	Supporting customary IHL with a static database of the 161 rules of customary IHL identified in a 2005 study and a live database of state practice.	Treaties, other instruments, military manuals, national legislation, national case-law, other national practice, United Nations, other international organisations, international conferences, international and mixed judicial and quasi-judicial bodies, ICRC movement, other. Materials for updates are collected by ICRC delegations, National Red Cross and Red Crescent Societies and other partners around the world.	Ongoing updates.	Rules identified by customary IHL study.	195: 193 UN member states and 2 observers.	Yes, for customary IHL.	Observations of, and engagement with, both State and non-State belligerents, outreach and dissemination to a wide range of stakeholders and at multiple levels, together with inovations such as digital apps https://www.icrc.org/en/document/ihl-digital-app
Environmental Performance Index Yale and Columbia universities https://epi.yale. edu	A data-driven summary of the state of sustainability around the world. Using 32 performance indicators across 11 issue categories, the EPI ranks 180 countries on environmental health and ecosystem vitality. These indicators provide a gauge at a national scale of how close countries are to established environmental policy targets.	International organisations, research institutions, academia, and government agencies. Most data are verified by a third party or produced from a data collection process that can be accessed and audited by a third party to confirm results. Do not generally accept data directly from governments themselves.	Published every 24 months.	Latest EPI has 32 indicators based on recognised environmental priority areas and for which large global datasets are available.	180 countries (2020). "This decision is not a reflection of the environmental performance of those countries; rather, data sparseness makes it impossible to say something meaningful."	No.	ESRI Living Atlas https://www.arcgis.com/apps/dashboards/8dd0d10f07544 331888ecc2a406d1 825. Specific policy recommendations are beyond the scope of their analysis. They make three general policy recommendations: every country should improve data collection on environmental outcomes, support global data systems, and incorporate metrics and rigorous analysis into policymaking processes.
Mine Action Review Norwegian People's Aid www. mineactionreview. org	Mine Action Review conducts the primary research and analysis on landmine and cluster munition remnant contamination, survey, and clearance worldwide, with a view to monitoring and furthering full implementation of the clearance obligations of the Anti-personnel Mine Ban Convention (APMBC) and the Convention on Cluster Munitions (CCM).	Primary research: questionnaires and consultations with States, supported by field visits and interviews with mine action operators and national mine action centres. Reviews data provided by States from formal submissions in connection to the two treaty bodies.	Annual reporting.	Created 7 scoring criteria for both land mines and cluster munitions that were "identified as having a particularly strong impact on the effectiveness and efficiency of a survey and clearance programme."	57 countries and 3 areas (mines), 25 countries and 3 areas (cluster munitions).	Yes, for specific aims of the Mine Ban Treaty and Convention on Cluster Munitions.	Side events at treaty related conferences, implementation workshops for States, engagement with national mine action authorities and mine action operators.
National Implementation of IHL ICRC https://ihl- databases.icrc. org/ihl-nat	Contains laws and case law that implement IHL treaties and other related international instruments, and illustrates possible approaches to incorporating IHL in national legal and administrative frameworks.	Information on national implementation measures is collected by the Advisory Service of the ICRC and provided to it by States. To compile this database the ICRC relies on contributions from a network of experts with a knowledge both of IHL and of their national legal systems.	Ongoing updates.		195: 193 UN member states and 2 observers.	Yes. IHL.	Observations of, and engagement with, both State and non-State belligerents, outreach and dissemination to a wide range of stakeholders and at multiple levels, together with innovations such as digital apps https://www.icrc.org/en/document/ihl-digital-app

3. Use of goals and indicators for reviewing State practice

Section 3 reviews the benefits and challenges in promoting 'governance by indicators', and reviews whether the 28 ILC PERAC principles could be used in their original form, or whether they should instead be used to inform a bespoke set of goals and indicators for use as part of a PERAC implementation vehicle – hereafter referred to as the Project.

key function of a system of PERAC goals and indicators – as a means of creating and sustaining an ongoing dialogue with, and between, States on PERAC. This will require that the process is something that States actively want to contribute to, even though they are under no formal legal obligation to do so. In turn, this would serve to strengthen the normative status of the PERAC principles and their objectives.

3.1 Role of indicators

The ultimate purpose of scoring States on their PERAC conduct is to encourage behaviours that reduce environmental harm in relation to armed conflicts, and its derived humanitarian and ecological consequences. The precise mechanisms of that behavioural change will vary by State, and by military. Some States can be influenced by domestic or international pressure mediated by the media, civil society or parliamentarians. Others may be more resistant to influence but may nevertheless internalise the norms within their policies and practice. Others may be entirely resistant to change over the short to medium term, while some could be influenced by their comparative standing against others - if the process attains a sufficiently high profile. In addition, States affected by conflict-linked environmental degradation have often become champions of PERAC initiatives. It should also be noted that how States conduct themselves can influence the conduct of non-State actors, an increasingly important constituent in PERAC.34

As noted elsewhere in this study, the likely absence of an international PERAC instrument following the conclusion of the ILC's process also highlights another

34. Jonathan Somer, 'Environmental Protection and Non-State Armed Groups: Setting a Place at the Table for the Elephant in the Room', 4 December 2015, available at www.ceobs.org/environmental-protection-and-non-state-armed-groups-setting-a-place-at-the-table-for-the-elephant-in-the-room

3.2 Requirements of goals and indicators

In addition to the broad aims outlined above – encouraging positive behavioural change, creating and sustaining an ongoing dialogue, and strengthening norms – any system of goals and indicators must also meet the following general requirements.

First and foremost, the goals, indicators and Project must have credibility. This is strongly influenced by the choice of benchmarks and how they are developed, by the Project partners and donors involved, and by the willingness of an initial group of States to back the aims of the Project as a whole – ideally from its earliest stages. In connection to this, they must also be viewed by States (as the primary stakeholders) as legitimate.

Secondly, scoring criteria against the indicators must be fair, transparent and their outputs open to review. They must also be easily communicable to all stakeholders, including States, international organisations, academia, civil society, the media and the general public. Finally, they must be capable of measuring changes in conduct over time, and of considering often significant variation in practice and activities between States.

Do the 28 ILC DPs meet all of these requirements? Having been developed by the ILC with the backing of States they are lacking in neither credibility nor legitimacy, but can 28 principles, not all of which are relevant to the conduct of all States, be translated directly into goals and indicators for the purposes of a database developed to promote implementation of the aims of PERAC?

3.3 Challenges and risks in developing and using goals and indicators

While the idea of ranking States against each other based on their conduct, and using that to create and sustain a normative dialogue on PERAC, is a simple one in principle, it will pose significant challenges in practice. We explore some of the risks inherent in any indicator-based approach below.

A common and general criticism levied against such initiatives based on measurements, scoring systems, and indicators is that global governance takes place at a locus beyond the State concerned, or more eloquently put, it amounts to 'governance by indicators'. There may be a number of States that might object to an approach like this based on experiences of an institution in the Global North, be it a State, NGO, international or regional organisation, creating the standards or indicators, and then judging the acceptability of their conduct based on them. There are certainly many States that may be initially uncomfortable with having their conduct ranked by Western civil society, or against indicators that they object to.

This underscores the observation that not all States are equal. And nor are they equal military actors, whether in terms of the scale of their armed forces, the number of conflicts or operations that they have been or are involved in, or the nature and disposition of their armed forces. For example, would it be possible to directly compare the PERAC practice of Finland with the United States based on the PERAC principles alone?

Also problematic is the degree of variation in transparency and openness between different States and their militaries. While some are relatively open about their policies, with some States having detailed environmental policies on particular issues, there are many that are not, and for some there may be a significant gulf between their declarative policies and their conduct in practice. This can go both ways, for example where States have sought to avoid establishing precedent for post-conflict remediation by publicly rejecting the existence of obligations, while still undertaking some remedial activities.35 In concert with this, language and philosophical barriers will also be present, for example Russian practice suggests that its military leadership takes a more fatalistic approach to damage during conflicts than some other States - a view that favours remediation over prevention.36

Given the breadth of policies and conduct relevant to PERAC, objectively weighing their positive or negative impact on the environment can be challenging. States in quite different circumstances may approach a particular environmental goal in different ways, or may interpret the same obligations differently. This is made all the more difficult by the challenges of monitoring environmental change in conflict areas. Organisations like CEOBS use a range of methodologies to independently and remotely monitor environmental incidents and trends, including remote sensing and open source intelligence. This is necessary because where it may exist, conflicts typically reduce the capacity of States to undertake environmental monitoring, while the existence of a conflict can heavily politicise environmental data, or encourage its manipulation.37

However, remote data collection has its limits without 'groundtruthing' and, while methodologies to address

^{35.} See UK practice on draft principle 27, Remnants of war, in: CEOBS, The United Kingdom's practice on the protection of the environment in relation to armed conflicts, 2019, available at: www.ceobs.org/report-the-united-kingdoms-practice-on-the-protection-of-the-environment-in-relation-to-armed-conflicts/#6

^{36.} See CEOBS, 'How Russia approaches the environment, peace and security' https://ceobs.org/report-how-russia-approaches-the-environment-peace-and-security

^{37.} Doug Weir, Nickolai Denisov 'The weaponisation of environmental information in the era of fake news', May 16th 2019, available at: www.ceobs.org/the-weaponisation-of-environmental-information-in-the-era-of-fake-news

this have been proposed, they remain in their infancy.³⁸ And, while some acts in conflicts, for example the bombing of a hazardous industrial site, may be highly visible, there are many forms of harm that are less so, or which cumulatively lead to significant damage even where individual acts are comparatively insignificant in isolation. It is therefore likely that efforts to promote PERAC implementation will require parallel and complementary measures to encourage environmental data collection in conflict contexts. This is one of the reasons why legal monitoring and conflict monitoring are two core pillars of CEOBS' work.

The politicisation of environmental harm in conflicts, and the sensitivity of some States and their militaries to criticism over their conduct, will necessitate that the process is viewed as neutral, robust and independent. Reporting on particular States should be subject to internal and external peer review, and States should have a right to reply. However, due to the requirement that the scoring system be transparent, any information that affects a country's ranking will need to be in the public domain. To reach its full potential as a normative tool, the Project will need States as engaged stakeholders, but at the same time balance remaining independent of, and avoiding capture by them. A further complication will be the sensitivity of some States to particular PERAC themes, such as indigenous peoples. It has been apparent during the UNGA Sixth Committee debates that domestic sensitivities over some topics could hamper implementation and support for the principles as a whole, even for States that are otherwise sympathetic to their aims.

Our interactions with States on PERAC during the ILC's process thus far suggests that government engagement will not be straightforward. Most States do not have a clearly designated focal point or individual responsible for PERAC, and the scope of the principles can mean that policies are the responsibility of different sections within ministries, or between different ministries. Others, like the UK, may have expert staff

38. Weir, D., McQuillan, D. & Francis, R.A. Civilian science: the potential of participatory environmental monitoring in areas affected by armed conflicts. *Environ Monit Assess* 191, 618 (2019) https://doi.org/10.1007/s10661-019-7773-9

engaged on them within the foreign ministry, while ultimate control over PERAC policy rests with the defence ministry. Again, because many of the PERAC principles do not reflect clear obligations stemming from a specific instrument to which States are party, governmental responsibilities in different States will vary widely. This will place a greater onus on the Project itself, and on those governments supporting it, to make and sustain the connections and interactions with States necessary for its success.

The scope of the PERAC principles themselves presents perhaps the most fundamental challenge – how do you fairly compare practice between States based on 28 or more principles? Particularly where a number of them are written in general terms, or may be of far more relevance to some States than to others. For example, how do you determine the conduct of States during situations of occupations if they have never been an occupying power? Or, while some of the principles are based on clear legal obligations, there are many that are not – how should you interpret particular examples of practice in relation to them in the absence of clearly defined boundaries of conduct?

When CEOBS reviewed the UK's PERAC practice,39 we faced a number of challenges in this regard. For example, on the UK's implementation of DP 25 on Postarmed conflict environmental assessments and remedial *measures*. Since 1999, post-conflict environmental assessments have become the norm during recovery. These are typically implemented by international organisations such as UNEP, the UN Development Programme (UNDP) and the World Bank. The UK has contributed to many of these indirectly through its funding for these organisations but as these funds are not earmarked specifically for assessments it is difficult to precisely determine its financial contribution. One exception to this was the UK's cooperation with UNEP, through its Department for International Development, in the context of the postarmed conflict environmental assessment conducted

^{39.} CEOBS, 'The United Kingdom's practice on the protection of the environment in relation to armed conflicts', 2019, available at: www.ceobs.org/report-the-united-kingdoms-practice-on-the-protection-of-the-environment-in-relation-to-armed-conflicts/#6

in the Democratic Republic of Congo.⁴⁰ Does this represent positive implementation, and how does it compare to other States? Is it more or less than we would expect? And are formal assessments led by international organisations the only relevant or usable indicator, or should internal assessments undertaken by States in the context of humanitarian response planning also be taken into account?

So, even for an outwardly straightforward indicator, thought would be required on whether and how to interpret practice. It seems unlikely that any Project would get this completely right from the outset and, given the increasing prominence and development of the environment in the peace and security discourse, it seems inevitable that changes or refinements will be required after a period of operation. This would also be an opportunity for the Project to integrate lessons learned and to improve. A final challenge will therefore be whether the benchmarking system can be flexible enough to take into account changing circumstances, and be modified without unfairly distorting its findings as they relate to positive or negative trends in the conduct of particular States.

3.4 Developing PERAC goals and indicators

In light of the difficulties that using the draft PERAC principles in their original form could present, it may be more practical to develop a suite of goals and indicators *informed* by the principles and their commentaries, and reflecting their objectives. This would also be an opportunity to reduce their total number, thus making them easier to communicate, and easier for States to be compared against each other. As argued above, the primary consideration should be on measures taken that result in a reduction of environmental and, by extension, humanitarian harm, with a particular focus on positive actions that States can take, and which can be reported on, documented and scrutinised.

40. The UK has subsequently funded Sudan's First State of Environment and Outlook Report 2020, available at www.unenvironment.org/resources/report/sudan-first-state-environment-outlook-report-2020

An advantage of this approach is that the goals and indicators could also be informed by the three other PERAC-related legal initiatives: the ICRC's revised guidelines, the Geneva List and the Harvard List. For example, could implementation of the ICRC Guidelines be a goal for the *in bello* phase, with indicators based on recommendations on specific measures that States could take domestically as implementation steps? Goals and their associated recommendations could also look to integrate agreed language from resolutions of the UN Environment Assembly and other relevant instruments, where this is not already done by the text or commentaries of the ILC DPs.

One further advantage is that they could focus on the specific implementing measures necessary for States to achieve the goals enshrined in the DPs. For example, DP 8 on *Human displacement* calls for States and other stakeholders to take appropriate measures to 'prevent and mitigate environmental degradation in areas where persons displaced by armed conflict are located'. Indicators relevant to this objective could help create specificity, for example whether host States undertake environmental impact assessments before displacement camps are established, and whether humanitarian donors attach appropriate environmental standards and reporting to their funding.

The primary risk of an approach based on novel goals and indicators informed by the ILC DPs is one of perceived legitimacy. The ILC DPs are the product of a formal intergovernmental process and, while support for them is not universal, they do have a robust normative foundation. Goals and indicators based on them, but not identical to them, would lack this. To counter this risk, it would be imperative for a group of States to endorse the goals and indicators at an early stage in the Project, and to commit to promoting them.

A hypothetical goal and its indicators is shown overleaf, together with some of the challenges that scoring them might entail.

Example goal and indicators

Goal 1: States must respect and ensure respect for the international humanitarian law (IHL) rules protecting the natural environment, in addition, States should take further measures, as appropriate, to enhance the protection of the environment during armed conflict.

1.1 National implementation

The State acts in accordance with its obligations to adopt domestic legislation and other measures at the national level to ensure that the IHL rules protecting the natural environment in armed conflict are put into practice.

1.2 Instructing armed forces

The State provides instruction in the IHL rules protecting the natural environment to its armed forces.

1.3 Teaching IHL

The State encourages the teaching of IHL rules protecting the natural environment to the civilian population.

1.4 Legal advice to the armed forces

The State makes legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of IHL rules protecting the natural environment.

1.5 Weapons reviews

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, the State determines whether its employment would, in some or all circumstances, be prohibited by applicable international law protecting the natural environment, and is transparent in its reporting of its findings.

1.6 Repression of war crimes

1.6.1. The State will investigate war crimes concerning the natural environment, allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They will also investigate other war crimes that concern the natural environment, over which they have jurisdiction, including those, and, if appropriate, prosecute the suspects.

1.6.2. The State acknowledges that commanders and other superiors are criminally responsible for war crimes that concern the natural environment, committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.

1.6.3. The State acknowledges that individuals are criminally responsible for war crimes they commit that concern the natural environment.

Discussion

This example of a goal and indicators is informed by part IV of the ICRC's 2020 guidelines, the section most focused on implementation. This goal immediately creates the question of whether the goals and indicators should merely be reflective of the status quo, or be more progressive. Should they deal with the letter of the law, or its spirit, and should they also be oriented towards additional, voluntary and positive measures?

In this instance, the addition to this goal of language drawn from the ILC's DP3 would build on the general obligation present in the guidelines: 'In addition, the State should take further measures, as appropriate, to enhance the protection of the environment during armed conflict'. It is notable here that many of the IHL indicators below are included in the ILC's commentaries to DP3, including the war crimes indicator.

One problem with these indicators would be the difficulty of scoring States' compliance with them. For example, the UK has implemented the rules of IHL that are binding upon it, instructs its armed forces, teaches IHL, and conducts weapons reviews, even if not transparently.

But the UK possesses nuclear weapons and has objected to certain environmental provisions in Additional Protocol I. How would it score in comparison to a State in the Global South that does not have the resources and the institutions to comply with most of these indicators? Or even a NATO member that hasn't done as much as the UK has in terms of IHL dissemination and instruction, but which isn't a nuclear power, even if it relies on nuclear armed States, including the UK, for its security?

Thought would therefore be needed over scoring. The system must be as universally applicable as possible, and capable of equitably navigating national particularities, for example whether a State is bound or not by a specific rule because, for example, it hasn't ratified Additional Protocol I or because it has entered reservations.

Another question here is the extent to which these indicators would capture State conduct during conflicts, and the extent to which that is knowable, without being party to the decision-making process. For example, in the precautionary measures that may or may not have been taken in the targeting of an environmentally hazardous object, and the precise proportionality calculation applied in any given case.

These questions, and many others, would be addressed by the external experts during the preparation of the goals. This example, based on existing IHL obligations, illustrates that developing a fair system that encourages positive practice is possible but it will not be straightforward.

Table featuring a hypothetical PERAC goal and its indicators informed by the ICRC's 2020 *Guidelines on the Protection of the Natural Environment in Armed Conflict*.

The development of goals and indicators could be undertaken by a representative panel of experts, of different nationalities, comprising PERAC legal specialists, military lawyers and environmental practitioners with relevant expertise; ideally these would identify around 10 positive goals. These should be meaningful, achievable, transparent and readily communicable, and each could contain a series of implementation steps (indicators) to signpost and encourage progression over time. States should be invited to respond to the draft goals and indicators through a consultation process, this would help to increase their legitimacy, encourage early buy-in and initiate a conversation that will be vital for the overall success of the Project.

A proportion of this panel of experts – at least five members - could then be invited to take up an advisory role on the Project, providing an independent peer review process for national reports. In addition to assessing conduct against the set of agreed goals and indicators, States should also be provided with practical recommendations for action to improve their practice in respect to each goal.

4. Operational considerations

This section addresses a number of practical considerations including which States the database should prioritise for inclusion, the role of States in promoting the Project, and our initial thoughts on how the profile of the Project, and the normative value of the DPs, could be increased.

4.1 Which States should the **Project prioritise?**

To provide a first indication of the overall feasibility of our approach we have thus far reviewed the PERAC practice of the UK,⁴¹ and Canada.⁴² The UK is a significant military power with multiple operations abroad, and a track record in recent and ongoing armed conflicts. The UK has also regularly made its views known during the ILC process. On the other

hand, Canada has not commented during the ILC process, is a lesser military power but is nevertheless engaged in overseas operations and has notable interests in the extractives industries of relevance to DPs 10 and 11. These two analyses should be viewed as scoping studies, in which we have aimed to assess the utility of the DPs as benchmarks in their original form, and understand the availability and sources of data on practice.

Beyond these two, there are a number of different ways to prioritise which States to review. These include: those States that engaged with the ILC process (c.50); annual defence spending; annual defence spending per capita; defence spending as a percentage of GDP; total active armed forces; military power ranking; or involvement in armed conflicts. As shown below, different measures yield varying results.

How should PERAC reviews for different States be prioritised? Table ranking States by three different military criteria.

Ranked by defence s	spending (US\$bn 2019)*	Ranked by security I	Military power ranking**	
United States	684.6	Oman	11.7	United States
China	181.1	Afghanistan	10.2	Russia
Saudi Arabia	78.4	Saudi Arabia	10.1	China
Russia	61.6	Iraq	9.1	India
India	60.5	Algeria	6.0	Japan
United Kingdom	54.8	Israel	5.8	South Korea
France	52.3	Armenia	4.8	France
Japan	48.6	Kuwait	4.7	United Kingdom
Germany	48.5	Jordan	4.6	Egypt
South Korea	39.8	Mali	4.1	Brazil
Brazil	27.5	Trinidad and Tobago	4	Turkey
Italy	27.1	Bahrain	3.9	Italy
Australia	25.5	Cambodia	3.9	Germany
Israel	22.6	Iran	3.8	Iran
Iraq	20.5	Azerbaijan	3.8	Pakistan

^{41.} CEOBS, 'The United Kingdom's practice on the protection of the environment in relation to armed conflicts', 2019, available at: www.ceobs.org/report-the-united-kingdoms-practice-on-the-protection-of-the-environment-in-relation-to-armed-conflicts

** Source: GlobalFirepower https://www.globalfirepower.com/countries-listing.asp

^{42.} CEOBS, 'Canada's practice on the protection of the environment in relation to armed conflicts', 2020, available at: https://ceobs.org/canadas-practice-on-the-protection-of-the-environment-in-relation-to-armed-conflicts

Importantly, the majority of these measures would be likely to prioritise States that may be unsympathetic or hostile to the aims of the Project. In this respect, it would also be valuable to actively choose to review a group of States more likely to engage with it, and champion its objectives. In doing so, this would help to boost the legitimacy and profile of the Project, and provide insights into how the Project might engage with other States. A number of these may wish to become State Friends of PERAC (see 4.2 below). This could also help demonstrate the neutrality of the Project.

The final selection of priority States would need to wait until the goals and indicators are agreed, for example if the goals primarily focused on harm during conflicts or in the post-conflict phase then it would necessitate a greater focus on States currently or recently party to active armed conflicts. Nevertheless, there are obvious contenders such as the US, France, Israel, Russia and Saudi Arabia that will invariably feature among the priority States and upon which work could begin at an early stage.

A decision may also need to be taken on what would constitute a representative sample of State reviews prior to the launch of the database. The total number of States that could be subject to ongoing review will depend on the financial resources and capacity of the Project, and on the annual or biennial rate of change in data. The latter of which may vary due to factors such as the degree of engagement or domestic implementation, or involvement in a conflict that reveals a range of environmentally harmful behaviours.

4.2 State Friends of PERAC

The Project will need early buy-in from a group of States committed to its aims. This would include public backing for the goals and indicators once they are finalised in order to provide legitimacy. Other activities for these "Friends of PERAC" include pledging to work towards the implementation of a suite of PERAC goals domestically, sharing best

practice on implementation with other States, and promoting PERAC and its objectives in relevant international processes and fora. The Project would support these Friends through the provision of legal advice, data on implementation, institutional continuity and any coordination function deemed necessary by States.

We have identified 18 States that are potentially supportive of the PERAC principles, based on their positions at the UNGA Sixth Committee. In late 2019 we held initial talks with legal advisors from six of them and, although there was interest, none wished to take the lead on developing a Friends group. Since then, further potential candidates have emerged based on interventions during debates on the environmental dimensions of conflicts in the UN Security Council and elsewhere. Nevertheless, it seems likely that for the Friends group to succeed one, or ideally two States would need to commit to a leadership role and make the political investment necessary to make the group viable.

The benefits to the wider Project would be significant, indeed without the clear backing of States the initiative as a whole may struggle to gain traction. In this respect the Friends group should be viewed as an essential component of the Project.

4.3 Reporting and visibility

As this extension of the PERAC process would not be tied to the schedule of a meeting of States parties, as would be the case if it were connected to a formal instrument such as a convention, it would be freer to define a reporting schedule to publish its results. This could eventually be either annual, or biennial, perhaps coinciding with the UN's Day on Preventing the Exploitation of the Environment Through War and Armed Conflict on November 6th.⁴³

However, given the increasing prominence of the day for reporting by a range of organisations, it may be preferable to publish on an alternative date to avoid the

^{43.} See www.un.org/en/observances/environment-in-war-protection-day

process being drowned out. In our experience, building media interest in one of the many UN international days has also proved difficult in the past, with journalists questioning its news value.

The selected promotional schedule would ultimately be informed by a number of factors: how many States the Project reviews; the review schedule for each State; the research and review capacity of the Project; and the anticipated rate of change in particular behaviours – which in turn will be linked to the chosen goals and indicators. It will likely prove more practical and manageable for the Project's online platform to be updated on an ongoing basis, with the overall changes in a 12 or 24-month period collated and published as a written report. This would allow stakeholders to access up to date information on practice at any time via the online platform, with annual or biennial reporting used primarily as a focus for publicity and outreach.

4.4 Parallel implementation measures

Annual or biennial reporting, launch events, and an online platform, could provide the core functions of the Project but greater impact could be achieved if these are used as a springboard for further implementation measures. One such measure would be training workshops for States and military legal advisors, not only to promote the aims of the Project but also to strengthen the two-way dialogue between the Project and key stakeholders. Further events could be held for legal specialists and academics, to help develop a community that could be called upon to contribute to the Project. Indeed, partnerships with academic institutions could be used to both engage law students in PERAC, and as a source of additional capacity for research and analysis. Working with students of different nationalities could be a valuable means of ensuring that national perspectives are properly reflected in domestic reviews.

An additional implementation measure would be to promote PERAC and the database in the context of other intergovernmental processes. This would help support efforts to raise awareness of them and enhance their normative status. Recent examples of this are efforts that CEOBS and partners have undertaken in 2020 to highlight PERAC in a motion at the (now postponed) World Conservation Congress of the International Union for the Conservation of Nature,⁴⁴ and in the context of the UNGA First Committee and Human Rights Council.⁴⁵ Other potential avenues include meetings in the context of the Convention on Biodiversity, the Global Pact for the Environment and the discourse on business and human rights.

Data from the Project could also inform or encourage new research into not only the conduct of States but, importantly, the environmental conduct of non-State armed groups, which remains under-studied but of vital importance for PERAC.⁴⁶ Collectively these parallel activities would help boost the profile and status of PERAC, and the Project's aims, and in turn help facilitate the engagement of States and other stakeholders with the process.

4.5 Web architecture and online presence

The Project and its reports would need an online home. After reviewing a number of comparable databases, and if the Project took an approach based on a limited number of goals and indicators, rather than the 28 DPs as a whole, the site structure used by the Mine Action Review (www.mineactionreview.org) could provide a suitable template upon which to develop a specific site

^{44.} IUCN, Draft motion: 'Protection of the environment in relation to armed conflict', available at www.iucncongress2020.org/motion/052

^{45.} Statement on behalf of CEOBS, PAX and Zoï Environment Network to the UN General Assembly First Committee, Oct 2020, available at: www.ceobs. org/unga-first-committee-statement-on-the-protection-of-the-environment-in-relation-to-armed-conflicts; UN Human Rights Council, Rights of the child: realizing the rights of the child through a healthy environment, available at: https://undocs.org/A/HRC/45/L.48/Rev.1

^{46.} Jonathan Somer, 'Environmental Protection and Non-State Armed Groups: Setting a Place at the Table for the Elephant in the Room', 4 December 2015, available at https://www.ceobs.org/environmental-protection-and-non-state-armed-groups-setting-a-place-at-the-table-for-the-elephant-in-the-room; Ahmed Al-Dawoody and Sarah Gale, 'Protection of the Environment and Non-State Armed Groups: IHL and Islamic Law Perspectives', 6 November 2020, available at www.armedgroups-ihl-and-islamic-law-perspectives

for the Project. In addition to hosting the database of practice, the site would also need to host its reports, provide context and background to the initiative, as well as a articles, resources, news and events.

To complement the main site, the Project would benefit from a mailing list and social media feeds, with Twitter as a minimum. Further consideration of how to maximise the utility of social media will be required, for example, the creation of LinkedIn groups as a means of engaging with specialists and legal advisors.

4.6 Accessibility

Ideally, data on State practice, or a subset of it, would be available in all six official UN languages, as the ICRC's Customary IHL database is. However, capacity constraints may limit this to the primary language of the State under review, and English. Or English alone. Multilingual integration should be considered in the design of the online platform so that it can be implemented if funding conditions allow.

5. Next steps towards the Project

The following steps should be viewed as priorities towards the ultimate goal of PERAC implementation:

- Encouraging States to submit constructive and progressive views to the ILC ahead of the June 2021 deadline for written comments.
- Ongoing awareness raising and stakeholder engagement on the PERAC DPs until their adoption in 2022.
- The promotion of the PERAC DPs in relevant international fora, events and processes.
- Advocacy to encourage States to Welcome the DPs in the resolution that will consider the output of the ILC's second reading at the UN General Assembly in 2022.
- Launch of the Project as soon after the principles are finalised as is feasible.

