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### Journal of International Humanitarian Legal Studies

DOI:

[10.1163/18781527-BJA10008](https://doi.org/10.1163/18781527-BJA10008)

Published: 22/06/2020

Peer reviewed version

[Cyswllt i'r cyhoeddiad / Link to publication](#)

*Dyfyniad o'r fersiwn a gyhoeddwyd / Citation for published version (APA):*

Smith, T. (2020). A Framework Convention for the Protection of the Environment in Times of Armed Conflict: A New Direction for the International Law Commission's Draft Principles? *Journal of International Humanitarian Legal Studies*, 11(1), 148-162.  
<https://doi.org/10.1163/18781527-BJA10008>

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# **A Framework Convention for the Protection of the Environment in Times of Armed Conflict: A New Direction for the International Law Commission's Draft Principles?**

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## **Abstract:**

At its seventy-first session in 2019, the International Law Commission (ILC) provisionally adopted twenty-eight draft principles related to the protection of the environment before, during and after armed conflict. This article argues that the ILC ought to consider proposing a framework convention as the final outcome of this project, as this could result in better protection of the environment than draft principles. Framework conventions have featured in international environmental law but they have not yet been used to progressively develop the law of armed conflict. This article argues that the hybrid legal nature of protecting the environment during the conduct of hostilities ought to incorporate solutions from relevant fields of international law. To that end, there are many merits to proposing a framework convention approach in the final outcome of the ILC's programme of work on this issue.

**Keywords:** law of armed conflict; protection of the environment; framework conventions; International Law Commission.

## 1. Introduction

The International Law Commission (ILC) have been discussing the issue of environmental protection in times of armed conflict since 2013.<sup>1</sup> At its seventy-first session in 2019, twenty-eight draft principles related to the protection of the environment before, during and after armed conflict were provisionally adopted by the drafting committee.<sup>2</sup> These principles mark an eagerly awaited milestone in the ILC's work on this issue, but considerable distance remains between the present position of states largely reluctant to develop new international law and propositions that stand a realistic chance of enhancing environmental protection in times of armed conflict. This article examines a way forward that the ILC have not yet considered in depth: the development of a framework convention on the protection of the environment in times of armed conflict, based on the draft principles that the ILC have published.

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<sup>1</sup> International Law Commission, 'Report of the International Law Commission: Sixty-fifth Session' (2013) UN Doc A/68/10, ch IX, 105-107.

<sup>2</sup> International Law Commission, 'Text and Titles of the Draft Principles Provisionally Adopted by the Drafting Committee on First Reading' (6 June 2019) UN Doc A/CN.4/L.937.

Framework conventions are commonplace in international environmental law, where they have been adopted to structure global responses to complex issues such as long-range transboundary air pollution,<sup>3</sup> climate change,<sup>4</sup> and the protection of the ozone layer.<sup>5</sup> Framework conventions would be a novel proposition in the field of international humanitarian law. This article argues that as environmental protection in situations of armed conflict is manifestly a hybrid issue involving both environmental protection and regulation of the conduct of hostilities, a framework convention straddling both fields of law could succeed where other suggested approaches – such as the development of additional conventional treaties<sup>6</sup> or the promulgation of concise guidelines based on existing law<sup>7</sup> – have not. Framework conventions are characterised by the creation of institutional structures that keep parties engaged with a problem over time, in a process of incremental law-making that responds to changing attitudes of what constitutes acceptable behaviour or acceptable consequences. Through a novel and *sui generis* approach for the law of armed conflict, a framework convention for the protection of the environment in armed conflict could, for example, catalyse the adoption of precise understandings of the *widespread, long-term and severe* thresholds of harm, or involve non-state actors in the setting and measuring of these standards, as the majority of armed conflicts in the present day are non-international in character.

The analysis in this article is therefore timely in light of the ILC's programme of work and expected outcomes. But it is also timeless in many ways, as the prospect of developing a framework convention that embraces the objectives and principles of two very different fields of international law is unlikely to overcome, in the near term, states' conservative attitude towards the development of new obligations that enhance environmental protection in armed conflict. Nonetheless, state reluctance in the present day does not make the proposition of a framework convention legally objectionable or unviable. If proposals for law-making at the international level were to always be aligned with the will of states, then very few new approaches would ever be conceived. Though radical at first blush, the proposal in this article suggests a way to incrementally develop over time the standards that states currently accept, so that new and robust common standards of environmental protection can eventually be applied on the battlefield. Where other approaches have failed to achieve these ends thus far, the framework convention approach may well succeed. Though substantial future scholarly attention will most

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<sup>3</sup> Convention on Long-range Transboundary Air Pollution (adopted 13 November 1979, entered into force 16 March 1983) 1302 UNTS 217.

<sup>4</sup> United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

<sup>5</sup> Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293.

<sup>6</sup> Glen Plant, *Environmental Protection and the Law of War: A 'Fifth Geneva' Convention on the Protection of the Environment in Armed Conflict* (Belhaven Press 1992).

<sup>7</sup> International Committee of the Red Cross, *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict* (1994). The ICRC are presently revising these guidelines and an update is expected in 2020.

definitely be required to develop a persuasive and palatable draft of such an instrument, the work of the ILC since 2013 is a positive starting point for this new departure.

## 2. Summary of Work at the International Law Commission

The ILC began to consider the issue of environmental protection in relation to armed conflict in 2013 because they considered environmental damage caused during the conduct of hostilities to be particularly disruptive in the long-term to lives and livelihoods and detrimental to the post-conflict existence of communities and ecosystems.<sup>8</sup> As such, the ILC decided to examine the legal shortcomings in relevant fields of international law with a view to ultimately suggesting ways in which a coherent and uniform system of protection could be achieved.<sup>9</sup> The final outcome of the ILC's work was envisaged to be either 'a draft framework convention or a statement of principles and rules.'<sup>10</sup>

Unfortunately, given the decision that the ILC have taken to publish draft principles based largely on existing law instead adopting a stronger position on the need for new law, it would appear that they have drifted away from options with perhaps the greatest chance of enhancing environmental protection, towards politically safer ground. This development was not entirely unexpected, as the Special Rapporteur appointed by the ILC to lead their work on this issue indicated quite early in the process that 'the topic was more suited to the development of non-binding draft guidelines than to a draft convention.'<sup>11</sup> The draft principles that have been proposed were the Special Rapporteur's preferred option at each stage.<sup>12</sup> However these principles do not suggest ways in which greater protection of the environment in times of armed conflict can be achieved, nor do they address ways in which significant gaps in the legal landscape – relating to protection in non-international armed conflict for example – ought to be remedied. Indeed, the Special Rapporteur, before departing office, finally acknowledged that new rules would be necessary,<sup>13</sup> but the structure and focus of the work conducted by the ILC thus far means that the ILC have not chartered a course in this direction.

While the final form of the ILC's work was never prescribed,<sup>14</sup> appropriate alternative options, including that of a framework convention which was in fact mentioned as an option in the early days of

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<sup>8</sup> Marie G Jacobsson, 'Protection of the Environment in Relation to Armed Conflicts' [2011] II(2) Yearbook of the International Law Commission 211, para 1, UN Doc A/CN.4/SER.A/2011/Add.1, Annex V.

<sup>9</sup> Ibid 215 para 31.

<sup>10</sup> Ibid 215 para 33.

<sup>11</sup> International Law Commission, Report of the International Law Commission: Sixty-fifth Session (2013) UN Doc A/68/10, ch IX, 106-107 para 143.

<sup>12</sup> International Law Commission, Provisional Summary Record of the 3264<sup>th</sup> Meeting (6 May 2016) UN Doc A/CN.4/SR.3264, 5.

<sup>13</sup> International Law Commission, Provisional Summary Record of the 3320<sup>th</sup> Meeting (31 May 2017) UN Doc A/CN.4/SR.3320, 12; see also the remarks of Mr Petric, *ibid* 15.

<sup>14</sup> International Law Commission, 'Report of the International Law Commission: Sixty-fifth Session' (2013) UN Doc A/68/10, ch IX, 106-107 para 143.

the programme of work, were never truly debated or considered. At various stages throughout the programme of work, some Commissioners expressed a desire to develop coherent and progressive rules through which a holistic approach to the protection of the environment could be taken.<sup>15</sup> Other Commissioners appeared to have very much supported the softer and more conservative approach of developing non-binding guidelines or principles based on existing law.<sup>16</sup>

Proposing new legal provisions to protect the environment in armed conflict has always been met with resistance. For example, proposals for a ‘Fifth Geneva Convention’ to protect the environment during armed conflict were discussed in the aftermath of the oilrig fires that characterised Iraq’s retreat from Kuwait in 1991.<sup>17</sup> The new treaty was intended to supplement existing international law since the Geneva Conventions of 1949 do not directly prohibit any degree of environmental damage and the two Additional Protocols of 1977 prohibit ‘widespread, long-term and severe’ environmental damage during international armed conflict only.<sup>18</sup> New provisions that could directly prohibit environmental damage in non-international armed conflict would certainly be a welcome development. Although the paucity of treaty-based protections can be supplemented by customary international law, the extent of the

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<sup>15</sup> See the comments of Mr Park in International Law Commission, Provisional Summary Record of the 3228th Meeting (22 July 2014) UN Doc A/CN.4/SR.3228, 8; Mr Saboia felt that there was much law-making to be done in International Law Commission, Provisional Summary Record of the 3229th Meeting (3 November 2014) UN Doc A/CN.4/SR.3229, 3; Mr Vazquez-Bermudez in International Law Commission, Provisional Summary Record of the 3230th Meeting (9 October 2014) A/CN.4/SR.3230, 9; Mr Forteau in International Law Commission, Provisional Summary Record of the 3265th Meeting (7 August 2015) UN Doc A/CN.4/SR.3265, 9; Mr Hmoud in International Law Commission, Provisional Summary Record of the 3268th Meeting (11 May 2016) UN Doc A/CN.4/SR.3268, 11 and also in International Law Commission, Provisional Summary Record of the 3319th Meeting (10 August 2016) UN Doc A/CN.4/SR.3319, 5, where he remarked that while principles might be an appropriate outcome for the present programme of work, the ‘the underlying obligations might ultimately warrant giving it the form of a treaty, in which case the possibility of incorporating a dispute settlement clause should be explored’; Ms Escobar Hernandez in International Law Commission, Provisional Summary Record of the 3268th Meeting (11 May 2016) UN Doc A/CN.4/SR.3268, 14; Mr Peter in International Law Commission, Provisional Summary Record of the 3319th Meeting (10 August 2016) UN Doc A/CN.4/SR.3319, 8-9; Mr Kittichaisaree in International Law Commission, Provisional Summary Record of the 3320th Meeting (31 May 2017) UN Doc A/CN.4/SR.3320, 3.

<sup>16</sup> See the comments of Mr Murphy in International Law Commission, Provisional Summary Record of the 3228th Meeting (22 July 2014) UN Doc A/CN.4/SR.3228, 10, and he later called for clarification on the nature and purpose of the principles being drafted in International Law Commission, Provisional Summary Record of the 3264th Meeting (6 May 2016) UN Doc A/CN.4/SR.3264, 8; Sir Michael Wood in International Law Commission, Provisional Summary Record of the 3229th Meeting (3 November 2014) UN Doc A/CN.4/SR.3229, 6; Mr Tladi in International Law Commission, Provisional Summary Record of the 3265th Meeting (7 August 2015) UN Doc A/CN.4/SR.3265, 12; Mr Hassouna in International Law Commission, Provisional Summary Record of the 3266th Meeting (30 May 2016) UN Doc A/CN.4/SR.3266, 5; Mr Candiotti in International Law Commission, Provisional Summary Record of the 3266th Meeting (30 May 2016) UN Doc A/CN.4/SR.3266, 12; Mr Sturma in International Law Commission, Provisional Summary Record of the 3267th Meeting (11 August 2015) UN Doc A/CN.4/SR.3267, 3, and in International Law Commission, Provisional Summary Record of the 3319th Meeting (10 August 2016) UN Doc A/CN.4/SR.3319, 6; Mr Huang in International Law Commission, Provisional Summary Record of the 3268th Meeting (11 May 2016) UN Doc A/CN.4/SR.3268, 18; Mr Vazquez-Bermudez in International Law Commission, Provisional Summary Record of the 3269th Meeting (22 September 2015), UN Doc/ A/CN.4/SR.3269, 6.

<sup>17</sup> Plant (n 6).

<sup>18</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, arts 35(3) and 55(1).

protection that custom can provide to the environment in these circumstances is certainly questionable.<sup>19</sup> Therefore, while the ILC were never expected to develop a *Fifth Geneva Convention* through their present programme of work, they might have been expected to do more than restate existing law in their final outcome documents, as doing so perpetuates the problematic gaps that have existed in international humanitarian law for decades.

A further problem evident in the ILC's work on this issue has been the difficulty of capturing and considering the perspectives of non-state armed groups or international organisations.<sup>20</sup> While some non-state armed groups may appear to have scant regard for environmental protection,<sup>21</sup> understanding the attitudes of non-state armed groups to environmental protection would be an important element in developing better measures to protect the environment during armed conflict. The ILC have acknowledged the importance of consulting non-state armed groups, yet they have not satisfactorily resolved the question of how to do so in the context of their present work on this issue.<sup>22</sup> One solution to this entrenched problem is to create a framework convention through which non-state actors can be consulted as part of the development of incremental but progressive regulation over time. While traditional conceptualisations of international law place the pen squarely in the hands of state structures, that perception is being slowly eroded.<sup>23</sup> In this changing landscape, past performance is therefore no guarantee of future performance, and acknowledging the non-inclusion of non-state actors in the development of international humanitarian law treaties to date, or even in the ILC's programme of work more recently, does not mean that states will not be compelled to adopt new approaches to international

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<sup>19</sup> See, for example, Rule 45 of the ICRC's Customary IHL Database <[ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule45](http://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule45)> accessed 10 March 2020. See also Tara Smith, 'Critical perspectives on Environmental Protection in Non-International Armed Conflict: Developing the Principles of Distinction, Proportionality and Necessity' (2019) 32(4) *Leiden Journal of International Law* 759-779.

<sup>20</sup> See the comments of Mr Forteau in International Law Commission, Provisional Summary Record of the 3265th Meeting (7 August 2015) UN Doc. A/CN.4/SR.3265, 9; and Mr Hassouna in International Law Commission, Provisional Summary Record of the 3266th Meeting (30 May 2016) UN Doc A/CN.4/SR.3266, 5; and Mr Park in International Law Commission, Provisional Summary Record of the 3266th Meeting (30 May 2016) UN Doc A/CN.4/SR.3266, 7-8, and in International Law Commission, Provisional Summary Record of the 3318th Meeting (17 May 2017) UN Doc. A/CN.4/SR.3318, 11; Mr Kittichaisaree in International Law Commission, Provisional Summary Record of the 3266th Meeting (30 May 2016) UN Doc A/CN.4/SR.3266, 13; Mr Hmoud in International Law Commission, Provisional Summary record of the 3268th Meeting (11 May 2016) UN Doc A/CN.4/SR.3268, 10. However, this view was not universally held: see the views of Mr Sturma in International Law Commission, Provisional Summary Record of the 3267th Meeting (11 August 2015) UN Doc A/CN.4/SR.3267, 3; Mr Jalloh in International Law Commission, Provisional Summary Record of the 3428th Meeting (8 August 2018) UN Doc A/CN.4/SR.3428, 11; Mr Peter in International Law Commission, Summary Record of the 3429th Meeting (3 August 2018) UN Doc A/CN.4/SR.3429, 10; and Marja Lehto, 'Second Report on Protection of the Environment in Relation to Armed Conflicts' (27 March 2019) UN Doc A/CN.4/728, 23-50.

<sup>21</sup> Associated Press, 'Major Saudi Arabia Oil Facilities Hit by Houthi Drone Strikes' (The Guardian, 14 September 2019) <[www.theguardian.com/world/2019/sep/14/major-saudi-arabia-oil-facilities-hit-by-drone-strikes](http://www.theguardian.com/world/2019/sep/14/major-saudi-arabia-oil-facilities-hit-by-drone-strikes)>; Paulin Ngobobo, 'Massacre of Congo's Gorillas' (The Guardian, 1 September 2007) <[www.theguardian.com/environment/2007/sep/01/conservation](http://www.theguardian.com/environment/2007/sep/01/conservation)>.

<sup>22</sup> Indeed, this is something that the ILC have largely failed to do in general to date. See Kristina Daugirdas, 'The International Law Commission Reinvents Itself?' (2014) 108 *AJIL Unbound* 79, 81-82.

<sup>23</sup> See, for example, *Jadhav (India v Pakistan)* (Provisional Measures, Order of 18 May 2017) [2017] ICJ Rep 231, Separate Opinion of Judge Cañado Trindade, 250-251.

law-making in the future, particularly where individuals and non-state groups are *subjects* of international law, not merely *objects*.

### 3. A Framework Convention Approach

Framework conventions are a relatively contemporary innovation in international law<sup>24</sup> and, as such, no standard definition has yet been adopted.<sup>25</sup> They appear predominantly in the field of international environmental law,<sup>26</sup> and while no two framework conventions are identical, they each bear certain traits in common.<sup>27</sup> Framework conventions establish broad aims and objectives<sup>28</sup> and also create an institutional structure<sup>29</sup> through which the realisation of these aims and objectives can be achieved over time. Unlike conventional treaties, framework conventions do not describe or enumerate the full range of obligations, but instead they create a skeleton structure upon which detailed regulation can be regularly constructed by states during Conferences of the Parties.<sup>30</sup>

As the issue before the ILC is a hybrid one relating to both the regulation of armed conflict and the protection of the environment, the merits of proposing a framework convention approach to improving environmental protection in relation to armed conflict certainly warrant further consideration. As Nele Matz-Lück has observed, it can be difficult ‘to make different instruments dealing with aspects of the same larger issue coherent with one another.’<sup>31</sup> As far as the protection of the environment in armed conflict is concerned, there are additional issues involved in reconciling the objectives of two different fields of international law. Both the law of armed conflict and international environmental law have different objectives and underlying principles. Given the diversity of instruments that the ILC have identified as applying to protect the environment before, during and after situations of armed conflict, and the complexity of their relationship, a framework convention may succeed where many other approaches have failed thus far.

Without prejudice to other examples of framework conventions, parallels between current approaches to environmental protection in armed conflict and global responses to climate change illustrate the

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<sup>24</sup> UN Economic Commission for Europe, Committee on Housing and Land Management, Seventy-Second Session (Geneva, 3-4 October 2011), Informal Notice 5 ‘Framework Convention Concept: Note by the Secretariat’ <[www.unece.org/fileadmin/DAM/hlm/sessions/docs2011/informal.notice.5.pdf](http://www.unece.org/fileadmin/DAM/hlm/sessions/docs2011/informal.notice.5.pdf)>.

<sup>25</sup> Daniel Bodansky, ‘The Framework Convention/Protocol Approach’, Framework Convention on Tobacco Control Technical Briefing Series Paper 1 (World Health Organisation (1999) Doc WHO/NCD/TFI/99.1 <[apps.who.int/iris/bitstream/handle/10665/65355/WHO\\_NCD\\_TFI\\_99.1.pdf](http://apps.who.int/iris/bitstream/handle/10665/65355/WHO_NCD_TFI_99.1.pdf)>, 15.

<sup>26</sup> Nele Matz-Lück, ‘Framework Conventions as a Regulatory Tool’ (2009) 1(3) Goettingen Journal of International Law 439, 440.

<sup>27</sup> *Ibid* 441.

<sup>28</sup> *Ibid* 440.

<sup>29</sup> *Ibid* 440.

<sup>30</sup> Jutta Brunnée, ‘COPing with Consent: Law-Making Under Multilateral Environmental Agreements’ (2002) 15(1) Leiden Journal of International Law 1, 4.

<sup>31</sup> Matz-Lück (n 26) 447.

potential role that a framework convention might play in this regard. After the birth of the concept of sustainable development in the Brundtland Report<sup>32</sup> in 1988, developed and developing states held significantly different views on the form that global responses to climate change ought to take, to the point that consensus on exact obligations would likely have been impossible at the time.<sup>33</sup> To circumvent the stalemate, the UN General Assembly<sup>34</sup> asked states to negotiate not a conventional treaty but a framework convention through which subsequent decisions could be made by states over time to implement common aims and objectives, and thus the approach in the UN Framework Convention on Climate Change, opened for signature in 1992, was agreed.

Although the success to date of the United Nations Framework Convention on Climate Change (UNFCCC) system can be debated, the merits of a framework convention approach to environmental protection remain valid. Framework conventions allow states to commit to broad aims and objectives and, in the context of enhancing environmental protection in armed conflict states, retain a substantial degree of control over the pace and manner in which agreed common aims and objectives ought to be realised. As Matz-Lück observes ‘[a]lthough the deferral of questions to later regulation may seem to evade the difficult process of finding solutions to acknowledged problems, such tactical procedure may create some room for further negotiation, additional evidence, political persuasion, institution-building ... and practice.’<sup>35</sup> A framework convention approach may therefore be a solution to the entrenched problem of developing meaningful and effective environmental protection in armed conflict. Yet, apart from the suggestion made by the Special Rapporteur in 2011, it is not a solution that the ILC have meaningfully considered.

### 3.1 Advantages to a Framework Convention

There are clear advantages<sup>36</sup> to the incremental approach to law-making<sup>36</sup> that characterises a framework convention. States may agree broadly on aims and objectives – as, for example, they do on the issue of climate change – even though there may be significant disagreement at the outset as to how those aims and objectives ought to be realised. The mechanisms inherent in a framework convention – regular negotiations on specific objectives in the treaty – keep an issue live on states’ agendas and this, over time, can result in political consensus being reached on issues over which there may have been insurmountable resistance in the past. Indeed, as Bodansky observes, framework conventions can ‘begin to address a problem without waiting for a consensus to emerge on appropriate response measures.’<sup>37</sup>

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<sup>32</sup> Ibid 440-441.

<sup>33</sup> See Daniel Bodansky, ‘The United Nations Framework Convention on Climate Change: A Commentary’ (1993) 18(2) *Yale Journal of International Law* 451, 474-481.

<sup>34</sup> UNGA Res 45/212 (21 December 1990) UN Doc A/RES/45/212.

<sup>35</sup> Matz-Lück (n 26) 451.

<sup>36</sup> Bodansky (n 25).

<sup>37</sup> Ibid.

The absence of specificity in the framework convention can, for a contentious issue like the protection of the environment in armed conflict, facilitate wider rates of ratification amongst states due to the fact that by signing up to a framework convention, states are not committing to specific obligations directly and immediately – they can contribute to the development of detailed obligations over time.<sup>38</sup>

A framework convention establishes, through its institutions, a forum in which further discussion, dialogue and negotiation can take place, involving states that are keen to develop the law as well as states that prefer the *status quo*.<sup>39</sup> For example, within the context of negotiations under the UNFCCC, states failed to agree on a legally binding instrument to succeed the 1997 Kyoto Protocol during the 15th Conference of the Parties in Copenhagen in 2009. Had those negotiations taken place outside the institutional structure created by a framework convention, it is likely that states would have had neither the opportunity nor the incentive to return to the negotiating table to develop the Paris Agreement, which was adopted at the 21st Conference of Parties in 2015. In the context of enhancing environmental protection in armed conflict, *ad hoc* or time limited efforts such as the ILCs present work on the issue or the ICRC's previous and future attempt to formulate guidelines, do not keep states engaged in the long-term. Resolving difficult and complex issues, such as clarifying the exact thresholds of environmental harm that would amount to *long-term, widespread, or severe* environmental damage in international armed conflict, might be achieved through a framework convention and its institutions. In that kind of environment, states can discuss common understandings and adopt common standards that can be changed and modified over time.

Furthermore, a framework convention on the protection of the environment in armed conflict could create a more inclusive and representative forum for the involvement of different stakeholders and non-traditional subjects of international law.<sup>40</sup> As the law of armed conflict creates obligations that directly bind both states and non-state actors, the institutional structure of a framework convention could be used to develop innovative and constructive ways to engage all relevant parties in the development of new standards of conduct.<sup>41</sup> Given the novelty of this proposition in both the law of armed conflict and international environmental law, this article understandably cannot and should not be prescriptive in setting out the exact means of achieving the result of joint law-making between states and non-state actors. Indeed, designing such a system may very well be an issue which any future framework convention identifies as a strategic objective, as it is an issue which could very well be resolved incrementally and over time.

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<sup>38</sup> Ibid.

<sup>39</sup> Matz-Lück (n 26) 445.

<sup>40</sup> Ibid 440.

<sup>41</sup> For a wider perspective on the role of civil society in the shaping of international humanitarian law, see Brian Rappert and others, 'The Roles of Civil Society in the Development of Standards Around New Weapons and Other Technologies of Warfare' (2012) 94(886) *International Review of the Red Cross* 765.

### 3.2 Agreeing Detail Over Time

Framework conventions allow complex and contentious issues to be broken up so that they can be addressed incrementally over time. As Matz-Lück has observed, compromises during the negotiation of conventional international treaties ‘can lead to shortcomings concerning substantive regulation’.<sup>42</sup> This indeed occurred during the Diplomatic Conference in which the Additional Protocols were negotiated, as provisions in Additional Protocol II, mirroring those in Additional Protocol I to protect the environment, were dropped at the eleventh hour so that consensus could be reached.<sup>43</sup> States may continue to treat international and non-international armed conflict differently under a framework convention if they so wish, but over time standards of conduct and thresholds of harm may also converge through ongoing dialogue and negotiation.

The temporal space that framework conventions create to facilitate improved understanding of an issue, particularly where there may be scientific uncertainty or evolving scientific evidence,<sup>44</sup> could also be valuable in this regard. Under the UNFCCC, the Subsidiary Body for Scientific and Technological Advice<sup>45</sup> was established to advise the Conference of Parties regarding ongoing scientific developments so that new frontiers of knowledge could be taken into account in decisions that are made regarding the Convention’s implementation. In the context of environmental damage in armed conflict, the United Nations Environment Programme’s (UNEP) Post-Conflict and Disaster Management Branch has prepared numerous post-conflict environmental impact assessments. While UNEP’s work is non-adversarial, deliberately avoiding conclusions that draw inferences about liability, UNEP’s experience in conducting these assessments could inform the way in which enhanced protection is developed over time by states within the structure of a framework convention. Understanding how long-term, widespread or severe harm manifests in reality could be crucial to developing more nuanced thresholds of harm for different ecosystems and this, in turn, could inform and assist military planners when designing and implementing engagement strategies.

Over time, framework conventions may become ‘parent’ treaties to a system of treaty-based regulation, as has happened, for example, under the UNFCCC and Vienna Convention on the Protection of the Ozone Layer. As Matz-Lück observes ‘[a]ll frameworks share the procedural possibility to address an issue in a comprehensive manner by codifying consensus on the general objectives and basic principles while allowing for parallel or later legal agreement on specific issues under or aided by the institutional roof of the parent convention.’<sup>46</sup> In the context of ozone layer protection and climate change ‘the drafters

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<sup>42</sup> Matz-Lück (n 26) 447.

<sup>43</sup> Sylvie Junod, ‘Additional Protocol II: Scope and History’ (1983) 33 *American University Law Review* 29, 34.

<sup>44</sup> Bodansky (n 25).

<sup>45</sup> United Nations Framework Convention on Climate Change (n 2) art 9.

<sup>46</sup> Matz-Lück (n 26) 449.

first agreed upon the general principles, objectives and institutions but left specific targets and timetables for later regulation. Sometimes such an approach is not only politically feasible but allows for further research and scientific evidence and advice on the means to achieve the objectives of the convention.<sup>47</sup> A framework convention on the protection of the environment in armed conflict could, therefore, not only provide a forum for standard-setting but it could also, over time, pave the way for the development of new treaty-based regulation. Through the existence of the ‘parent’ framework convention, the pressure to crystallise standards of conduct or thresholds of harm at one particular moment in time would be removed.

#### 4. Developing a Framework Convention from the International Law Commission’s Draft Principles

The draft principles that the ILC have published, based as they are on existing international law, could form the basis of common aims and objectives amongst states regarding the protection of the environment during armed conflict. Framework conventions do not have to bear the title ‘Framework Convention’ to be regarded as such, though doing so demonstrates a clear intention by states to adhere to common aims and objectives and to establish an institutional structure through which more detailed regulation can be developed over time.<sup>48</sup> The main treaties that apply to armed conflicts – the four Geneva Convention of 1949 and their two Additional Protocols of 1977 - do not create an institutional structure through which additional regulations can be adopted to give effect to the obligations in those treaties. However, a framework convention based on these laws could facilitate the incremental development of existing law in a way that responds to the changing nature of armed conflict without creating new international legal obligations *per se* at the outset. By developing a framework convention based on existing international law, which the ILC have identified in its draft principles, the negotiation of more specific details over time would ultimately relate to laws that states are already bound to uphold.

Proposing draft principles, as the ILC have done, may be amenable to states but it is likely to do little to progressively develop the law related to environmental protection in times of armed conflict. The draft principles that have been published perpetuate an endemic problem in the legal regulation of environmental damage caused during armed conflict, rather than provide a solution to it. On the other hand, by using the ILC’s draft principles related to the *jus in bello* as foundational aims and objectives of a framework convention on the protection of the environment in armed conflict, the ILC could challenge criticisms of their contemporary tendency to publish state-friendly outcomes or to achieve the progressive realisation of international law through ‘managerialism among experts who are beyond

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<sup>47</sup> Ibid 450.

<sup>48</sup> Ibid 441.

democratic control'.<sup>49</sup> Developing a draft framework convention and sending it to the General Assembly with a request that a diplomatic conference be convened would be the realistic next step to take if protecting the environment better during armed conflict is really what the ILC wishes to achieve.<sup>50</sup>

Draft principles have only been proposed by the ILC on a handful of occasions in the past, and on each occasion, they 'appear intended to influence the development of international or national law, but not to codify it into specific rules'.<sup>51</sup> It has been observed that the ILC has changed the way that it works so that it now responds to the demands of states<sup>52</sup> rather than to the needs of the ultimate beneficiaries of international law, the people.<sup>53</sup> To remain relevant and to challenge the criticism that the ILC's outputs 'betray no aspiration to form the basis for multilateral treaties',<sup>54</sup> the ILC ought to recommend to the UN General Assembly a way forward that progressively develops law through the mechanisms and institutions established by a framework convention. This would better classify the work that needs to be done as involving both codification and progressive development, in a forum of states rather than a forum of experts. Rather than responding to, or being influenced by, the realpolitik of international politics, the ILC could present a solution to environmental protection in armed conflict to states in a new and novel way. The General Assembly may not agree to such an approach in the short-term,<sup>55</sup> but international politics at the UN should not cause the ILC to refrain from, at the very least, proposing ambitious solutions such as this.<sup>56</sup> Absence of General Assembly acquiescence to ILC recommendations should not be interpreted as a failure on the ILC's part, but instead as a reflection of the attitudes of states and nothing more.<sup>57</sup> Indeed, if the ILC succumb to the will of states on difficult issues such as this one,<sup>58</sup> and if they cannot propose innovative suggestions for the progressive development of international law, then the utility of the institution ought to be seriously called into question. It may take

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<sup>49</sup> Yota Negishi, 'The International Law Commission Celebrating Its 70th Anniversary: *Dresser le bilan pour l'avenir 'à venir'* (2018) 7(8) ESIL Reflections <esil-sedi.eu/esil-reflection-the-international-law-commission/>.

<sup>50</sup> See the remarks of Murphy with regard to the approach taken by the ILC in relation to, for example, the 1958 Law of the Sea, and the 1969 Convention on the Law of Treaties. Murphy observes that the ILC has only proposed draft conventions on two occasions. See Sean D Murphy, 'Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC's Work Product' in Maurizio Ragazzi (ed), *Responsibility of International Organisations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff 2013) 33.

<sup>51</sup> Ibid 37.

<sup>52</sup> 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* (Martinus Nijhoff 2015) 275-290.

<sup>53</sup> See Negishi's comment on the remarks of the President of the General Assembly on the occasion of the ILC's 70<sup>th</sup> Anniversary in Negishi (n 49).

<sup>54</sup> Daugirdas (n 22) 79.

<sup>55</sup> Murphy (n 50) 33.

<sup>56</sup> For empirical evidence of the ILC becoming increasingly more influenced by the views of states, see Laurence R Helfer and Timothy Meyer, 'The Evolution of Codification: A Principal-Agent Theory of the International Law Commission's Influence' in Curtis A Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016) 305-331.

<sup>57</sup> See discussion on perceptions of failure in the ILC's work in Daugirdas (n 22) 79-80.

<sup>58</sup> As the ILC appear to have done on previous occasions, as observed by Murphy (n 50) 34.

time for states to become amenable to viable suggestions such as this one, but that should not prevent the ILC, or other scholars and organisations once the work of the ILC has concluded, from making strong proposals that depart from traditional conceptualisations of international law so that the end goal of improving environmental protection in armed conflict can be achieved.

## 5. Conclusion

Framework conventions have been adopted in the field of international environmental law and they have been suggested to a limited extent for issues outside the field of environmental protection, such as the right to development<sup>59</sup> and the international regulation of tobacco.<sup>60</sup> Yet despite the innovation that they represent, framework conventions have not been widely adopted outside the field of international environmental law.<sup>61</sup> As a hybrid issue involving the protection of the environment and the law of armed conflict, adopting a framework convention to regulate environmental harm in armed conflict is a strong proposition. There are many advantages to adopting a framework convention approach to resolve contentious issues such as this. Establishing institutions that can encourage states to agree to detail over time is one such advantage. The work of the ILC to date could be used as a starting point for the development of common aims and objectives around which enhanced protection of the environment in armed conflict could be negotiated over time. The framework convention mechanism is therefore one which the ILC ought to strongly consider before concluding their work on the protection of the environment in relation to armed conflict.

Nonetheless, the proposition has merits beyond the work of the ILC. Should they choose to proceed to adopt principles on the protection of the environment in armed conflict as the final outcome of the programme of work, these principles can be used to develop aims and objectives that might form the basis of a framework convention in the future. The ILC's draft principles on the *jus in bello* adhere closely to the contours of existing law. By framing the aims and objectives of a future framework convention along these lines, states might be persuaded to come to the negotiating table as signing and ratifying a framework convention that does not appear to create any new obligations at the outset might be an attractive proposition. In time, and through the institutional structure created by the framework convention – a structure which may be adapted to facilitate non-state actor participation – perhaps the reluctance of states to address the issue of environmental protection in armed conflict will change in favour of embracing this radical, but viable, new departure. Ultimately, achieving greater protection for the environment in armed conflict is going to be a difficult destination to reach, whatever path is chosen.

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<sup>59</sup> Koen de Feyter, 'Towards a Framework Convention on the Rights to Development' International Policy Analysis – Dialogue on Globalization (Friedrich-Ebert-Stiftung, April 2013) <library.fes.de/pdf-files/bueros/genf/09892.pdf>.

<sup>60</sup> Bodansky (n 25).

<sup>61</sup> Matz-Lück (n 24) 440 footnote 1.

This article shines a light on a route heretofore unconsidered and so, while substantial additional scholarship will no doubt be needed to navigate the way along this new route, there is nothing to lose in taking, as this article does, some first tentative steps into uncharted territory for the laws of armed conflict.