International Review of the Red Cross (2023), **105** (924), 1623–1645.
Protecting the Environment in Armed Conflict
doi:10.1017/S1816383123000310

IRRC_

At the frontlines of implementing the right to a healthy environment: Understanding human rights and environmental due diligence in relation to armed conflicts

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Abstract
Potential harm to human rights and the environment, including by corporate actors, is amplified in situations of conflict. This article focuses on applying the right to a healthy environment in relation to armed conflicts and corporate responsibility. In particular, it analyzes and compares due diligence requirements in the European Union Conflict Minerals Regulation and the International Law Commission's Draft Principles on Protection of the Environment in Relation to Armed Conflicts and examines how these align with the right to a healthy environment.

* The author is grateful for the insightful comments received on previous versions of this article, including from the editors and the anonymous peer reviewers.

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Keywords: human rights, environment, right to a healthy environment, due diligence, International Law Commission, EU.

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Introduction

> Peace is a fundamental prerequisite to sustainable development and the full enjoyment of human rights, including the right to a clean, healthy and sustainable environment.[1]

Potential harm to human rights and the environment, including by corporate actors, is amplified in situations of conflict. This article will focus on applying the right to a clean, healthy and sustainable environment (right to a healthy environment) in relation to armed conflicts and corporate responsibility. In particular, the article will analyze and compare due diligence requirements in the EU Conflict Minerals Regulation (EU CMR) and the International Law Commission (ILC) Principles on Protection of the Environment in Relation to Armed Conflicts (ILC Principles/Draft Principles)[2] and examine how these align with the right to a healthy environment.

A number of recent developments have brought these issues to the forefront, making an analysis of the right to a healthy environment in relation to armed conflicts and corporate responsibility particularly timely. In 2021, the United Nations (UN) Human Rights Council (HRC) recognized the right to a healthy environment in its Resolution 48/13; this was followed by UN General Assembly Resolution 76/300, on the same topic, in 2022. Both resolutions address the role of non-State actors and businesses. ILC Principle 10, adopted by the ILC and subsequently taken note of by the UN General Assembly in 2022, focuses on due diligence by business enterprises, referring to the right to a healthy environment in the associated commentary. The EU CMR, which entered into force on 1 January 2021, provides another vehicle for understanding due diligence requirements in relation to armed conflicts and the interconnectedness of human rights, environmental protection and governance.[3] In addition, the importance of ensuring access to remedy and addressing potential harm to human rights and the environment by corporate actors has received increasing attention, including in relation to due diligence initiatives and litigation.

1 UN Special Rapporteur on Human Rights and the Environment, "World Environment Day Statement", 5 June 2022.

2 UNGA Res. 77/104, 7 December 2022. The resolution refers to "principles" and lists these in an Annex to the resolution, whereas the commentary refers to the "draft principles" adopted by the ILC. This article will thus use the terms "Principle(s)" for the final version recognized by the General Assembly and "Draft Principle(s)" when referring to the associated commentary.

3 Regulation (EU) 2017/821 of the European Parliament and of the Council Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas, OJ L 130, 17 May 2017 (EU CMR), pp. 1–20.

The need to better understand the nexus of human rights, the environment and corporations has also been highlighted by scholars.[4] While research has been undertaken on the environment and human rights and the right to a healthy environment generally,[5] this article seeks to contribute to an improved understanding of due diligence and the roles and responsibilities of corporate actors in relation to armed conflicts. In addition, while research exists on the nexus of the environment and human rights, and on the nexus of the environment and conflict,[6] these two areas have seldom been integrated.

To address this gap, this article analyzes due diligence requirements in ILC Principle 10 and the EU CMR in light of the right to a healthy environment and examines the effects on corporate responsibility. It begins by outlining the right to a healthy environment and the impacts of armed conflict on the environment and human rights, followed by a discussion on due diligence requirements in international law, international human rights law and international environmental law, and the tendency toward integrated human rights and environmental due diligence. The article then compares and analyzes the due diligence requirements in ILC Principle 10 and the EU CMR. Finally, the article concludes with a few suggestions and recommendations for further research.

The right to a healthy environment

In July 2022, the UN General Assembly adopted a resolution recognizing the right to a healthy environment.[7] The text was similar to a resolution adopted by the HRC in 2021, recognizing the right to a healthy environment and inviting the General Assembly to consider the matter.[8] The two resolutions refer to the role of businesses, with both recalling the UN Guiding Principles on Business and Human Rights (UNGPs), which "underscore the responsibility of all business

4 See e.g. Elisa Morgera, *Corporate Environmental Accountability in International Law*, 2nd ed., Oxford University Press, Oxford, 2020, p. 289; Stephen Turner, "Business Practices, Human Rights and the Environment", in James R. May and Erin Daly (eds), *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography*, Chap. VII of *Elgar Encyclopedia of Environmental Law*, Edward Elgar, Cheltenham, 2019, p. 384; Natasha Affolder, "Square Pegs and Round Holes? Environmental Rights and the Private Sector", in Ben Boer (ed.), *Environmental Law Dimensions of Human Rights*, Oxford University Press, Oxford, 2015, p. 17.

5 See e.g. Daniëlla Dam-de Jong and Saskia Wolters, "Through the Looking Glass: Corporate Actors and Environmental Harm Beyond the ILC", *Goettingen Journal of International Law*, Vol. 10, No. 1, 2020, p. 111. See also Mara Tignino, "Corporate Human Rights Due Diligence and Liability in Armed Conflicts: The Role of the ILC Draft Principles on the Protection of the Environment and the Draft Treaty on Business and Human Rights", *QIL Zoom-in*, Vol. 83, 2021, p. 47; Marie Davoise, "Business, Armed Conflict, and Protection of the Environment: What Avenues for Corporate Accountability?", *Goettingen Journal of International Law*, Vol. 10, No. 1, 2020, p. 151.

6 See e.g. Karen Hulme, "Using a Framework of Human Rights and Transitional Justice for Post-Conflict Environmental Protection and Remediation", in Carsten Stahn, Jens Iverson and Jennifer S. Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices*, Oxford University Press, Oxford, 2017.

7 UNGA Res. 76/300, 28 July 2022.

8 HRC Res. 48/13, 8 October 2021.

enterprises to respect human rights", and with the HRC resolution further specifying that this includes "the rights to life, liberty and security of human rights defenders working in environmental matters, referred to as environmental human rights defenders".[9]

While the right to a healthy environment has not been expressed in any treaty at the international level, binding formulations of the right to a healthy environment exist at the regional level, and at least 150 countries have "constitutional rights and/or provisions on the environment".[10] In addition, Schabas considers that there is "compelling evidence for a human right to a safe, clean, healthy, and sustainable environment under customary international law".[11] For instance, a large number of States have referred to environmental concerns and the right to a healthy environment as part of the Universal Periodic Review.[12]

The HRC and General Assembly resolutions recognizing the right to a healthy environment were preceded by several decades of discussion and deliberation on the linkages between human rights and the environment. The 1972 Stockholm Declaration, which has often been referred to as the birth of modern international environmental law,[13] outlined the "fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being", and the "solemn responsibility to protect and improve the environment for present and future generations".[14] This duty of care concept from the second part of Principle 1 of the Stockholm Declaration recurred in the 1994 report of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (UN Sub-

9 *Ibid.* Neither resolution refers specifically to conflict. The omission of a reference to environmental human rights defenders was noted with disappointment by several States in their statements following the adoption of Resolution 76/300: see e.g. Japan, New Zealand and EU statements in *Official Records of the General Assembly, Seventy-Sixth Session*, UN Doc. A/76/PV.97, 28 July 2022.

10 See Naysa Ahuja, Carl Bruch, Arnold Kreilhuber, Elizabeth Maruma Mrema and John Pendergrass, "Advancing Human Rights through Environmental Rule of Law", in J. R. May and E. Daly (eds), above note 4, p. 15. See also James R. May and Erin Daly, *Global Environmental Constitutionalism*, Cambridge University Press, New York, 2014; *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc. A/HRC/28/61, 3 February 2015, para. 73.

11 William A. Schabas, *The Customary International Law of Human Rights*, Oxford University Press, Oxford, 2021, p. 335.

12 *Ibid.*, fn. 34–45. See also *Analytical Study on the Relationship between Human Rights and the Environment: Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/19/34, 16 December 2011, para. 31; Rebecca M. Bratspies, "Reasoning Up: Environmental Rights as Customary International Law", in John H. Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment*, Cambridge University Press, Cambridge, 2018, p. 128: "This chapter suggests that 'reasoning up' – looking to state practice in the form of domestic regulation – supports the conclusion that at least procedural environmental rights have crystallized into customary international law."

13 See e.g. Jonas Ebbesson, "Getting It Right: Advances of Human Rights and the Environment from Stockholm 1972 to Stockholm 2022", *Environmental Policy and Law*, Vol. 52, No. 2, 2022, p. 80; and, in the context of protection of the environment in relation to armed conflicts, *Official Records of the General Assembly, Sixty-Sixth Session*, Supplement No. 10, UN Doc. A/66/10, 2011, Annex E, para. 6.

14 Declaration of the United Nations Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment*, UN Doc. A/CONF.48/14/Rev.1, 1973, Annex I, Principle 1.

Commission) and the associated proposed declaration and draft principles on human rights and the environment.[15]

In recent decades, human rights treaty bodies have increasingly recognized and referenced links between human rights and the environment.[16] This trend has sometimes been referred to as the "greening" of human rights.[17] As noted above, the right to a healthy environment has also been recognized and adopted as a legally binding obligation in numerous regional instruments,[18] and in domestic laws and constitutions.

The terms used to describe the right have varied across different times and geographic contexts, and the terminology has at times been criticized for being vague or open-ended.[19] While there is no universally recognized definition of the right to a healthy environment, it has often been characterized as containing substantive elements (clean air, a safe and stable climate, access to safe water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems) and procedural elements (access to information, access to meaningful participation in decision-making and access to justice).[20]

15 Commission on Human Rights, *Human Rights and the Environment: Final Report Prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur*, UN Doc. E/CN.4/Sub.2/1994/9, 6 July 1994, Annex I, Draft Principle 21: "All persons, individually and in association with others, have the duty to protect and preserve the environment." Regarding due diligence as a standard of care, see e.g. ILA Study Group on Due Diligence in International Law (ILA Study Group), *Second Report*, July 2016, p. 2; Lise Smit *et al.*, *Study on Due Diligence Requirements through the Supply Chain: Final Report*, European Commission, Directorate-General for Justice and Consumers, 2020, p. 262.

16 E.g. UN Human Rights Committee, General Comment No. 36, UN Doc. CCPR/C/GC/36, 3 September 2019, para. 62.

17 See e.g. Birgit Peters, "Clean and Healthy Environment, Right to, International Protection", in Anne Peters (ed.), *Max Planck Encyclopedia of Public International Law*, 2021, para. 8. See also Sanja Bogojevic and Rosemary Rayfuse (eds), *Environmental Rights in Europe and Beyond*, Hart, Oxford, 2018, p. 11; J. Ebbesson, above note 13, p. 88.

18 See e.g. African Charter on Human and Peoples' Rights, 1520 UNTS 217 (entered into force 21 October 1986), Art. 24; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447 (entered into force 30 October 2001), Art. 1; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (entered into force 22 April 2021) (Escazú Agreement), Art. 1.

19 Regarding criticism of the terms as vague or imprecise, see e.g. Stephen J. Turner, "Conclusion: Analysing the Development of Standards in the Field of Environmental Rights", in Stephen J. Turner, Dinah L. Shelton, Jona Razzaque, Owen McIntyre and James R. May (eds), *Environmental Rights: The Development of Standards*, Cambridge University Press, Cambridge, 2019, p. 392. See also David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, UBC Press, Vancouver, 2012, p. 33.

20 *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc. A/HRC/43/53, 30 December 2019, para. 2. See also UN Development Programme (UNDP), UN Environment Programme (UNEP) and Office of the UN High Commissioner for Human Rights (UN Human Rights), *What Is the Right to a Healthy Environment?*, Information Note, 2023.

Impacts of armed conflict on the environment and human rights, including the right to a healthy environment

Human rights and the environment are particularly at risk in relation to armed conflicts, in part due to governance challenges and lack of regulatory oversight in conflict-affected contexts.[21] The former Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises noted in his reports on the topic that it is "well established that some of the most egregious human rights abuses, including those related to corporations, occur in conflict zones".[22] UNGP 7 states that the "risk of gross human rights abuses is heightened in conflict-affected areas".[23]

Accordingly, an enhanced human rights due diligence is required by companies in conflict-affected contexts in order to comply with the UNGPs and the legal obligations underpinning them.[24] In its 2018 report to the General Assembly, the UN Working Group on Business and Human Rights noted that "in high-risk operating environments, such as conflict-affected areas, business enterprises need to exercise heightened human rights due diligence".[25] Together with the UN Development Programme (UNDP), the UN Working Group on Business and Human Rights issued guidance on heightened human rights due diligence in conflict-affected contexts in 2022.[26] The report notes that business activities in a conflict-affected area will influence conflict dynamics and that businesses should respect international humanitarian law standards.[27] As per UNGP 12, businesses may also need to consider extra standards in addition to international human rights law more generally.[28]

Reference to the importance of peace and security in the context of the right to a healthy environment was made in the 1994 report of the UN Sub-Commission,[29] and in doctrinal commentary to the report and proposed

21 D. Dam-de Jong and S. Wolters, above note 5, p. 117: "Given the volatility of the situation and the lack of regulatory oversight, there is an increased risk that corporations intentionally or unintentionally contribute to human rights abuses and/or inflict harm on the environment." See also Virginie Rouas, *Achieving Access to Justice in a Business and Human Rights Context: An Assessment of Litigation and Regulatory Responses in European Civil-Law Countries*, University of London Press, London, 2022, p. 4; M. Tignino, above note 5, p. 47.

22 See *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, UN Doc. A/HRC/8/5, 7 April 2008, esp. paras 16, 47–49.

23 *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, UN Doc. A/HRC/17/31, 21 March 2011, Annex.

24 *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises – Business, Human Rights and Conflict-Affected Regions: Towards Heightened Action*, UN Doc. A/75/212, 21 July 2020, paras 44–45.

25 *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/73/163, 16 July 2018, para. 14(c).

26 UNDP, *Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide*, 2022.

27 *Ibid*., p. 10.

28 UN Doc. A/HRC/17/31, above note 23, commentary to UNGP 12: "Depending on circumstances, business enterprises may need to consider additional standards." See also UN Doc. A/75/212, above note 24.

29 UN Doc. E/CN.4/Sub.2/1994/9, above note 15, paras 111–116 and Annex I, Principle 1.

declaration.[30] The 1992 Rio Declaration includes a requirement in Principle 10 that everyone shall have access to information, participation and effective remedies in environmental matters, and also states in Principle 24 that since warfare "is inherently destructive of sustainable development", States must "respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary".[31]

In more recent years, two UN Environment Assembly resolutions regarding armed conflicts and the environment have also recognized that "sustainable development and the protection of the environment contribute to human well-being and the enjoyment of human rights".[32] The UN Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (UN Special Rapporteur on Human Rights and the Environment) has noted that

> more work is necessary to clarify how human rights norms relating to the environment apply to specific areas, including … the responsibilities of businesses in relation to human rights and the environment, the effects of armed conflict on human rights and the environment, and obligations of international cooperation in relation to multinational corporations and transboundary harm.[33]

In addition, the 2021 HRC resolution establishing the mandate of a Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change notes that "those living in conflict areas" are among those most acutely affected by the consequences of climate change.[34]

The UN Working Group on Business and Human Rights has outlined key elements that enhanced human rights due diligence should meet, including complementing the requirements for businesses to assess, avoid and mitigate adverse human rights impacts with a conflict-sensitive approach.[35] In order for businesses to operate in sensitive environments, enhanced human rights due diligence should include respect for relevant standards, including international environmental law norms.[36] A better understanding of enhanced human rights due diligence is needed, including to identify and address "potential negative impacts to the environment and human health".[37] In the following section, the article will explore opportunities for integrated human rights and environmental

30 See e.g. Neil A. F. Popovic, "In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment", *Columbia Human Rights Law Review*, Vol. 27, No. 3, 1996, pp. 502–504.

31 *Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I), 12 August 1992, Annex I. See also D. Boyd, above note 19, pp. 90–91.

32 UNEA Res. 2/15, 27 May 2016, Preamble; UNEA Res. 3/1, 30 January 2018, Preamble.

33 *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc. A/HRC/37/59, 24 January 2018, para. 18.

34 HRC Res. 48/14, 8 October 2021, Preamble.

35 UN Doc. A/75/212, above note 24, para. 44; see also UN Doc. A/73/163, above note 25.

36 See M. Tignino, above note 5, p. 60.

37 *Ibid.*, p. 49.

due diligence, and how the right to a healthy environment could contribute to enhanced due diligence standards.

Due diligence

This section will analyze the concept of due diligence and existing instruments, highlighting opportunities and challenges for their effective implementation and ability to support enhanced due diligence. Due diligence is defined by the *Max Planck Encyclopedia of Public International Law* as an "obligation of conduct on the part of a subject of law".[38] The International Law Association (ILA) Study Group on Due Diligence in International Law (ILA Study Group) refers to due diligence as "concerned with supplying a standard of care against which fault can be assessed",[39] contrasting due diligence obligations with strict or absolute liability.[40]

Ever since the *Corfu Channel* case before the International Court of Justice (ICJ), due diligence has been linked with the principle of prevention.[41] For instance, the latest draft of the proposed Legally Binding Instrument on Business and Human Rights includes a reference to due diligence under the heading "Prevention" (Article 6.3).[42]

Overall, several authors have highlighted the benefit of due diligence as a dynamic and flexible standard, making it possible to apply in many different contexts.[43] This flexibility has nonetheless also led to criticisms of such standards being "weak" or "elusive".[44] In addition, commentators have cautioned against due diligence requirements that are too wide, citing for instance the possibility that such measures may "dilute the link with the risk, and create legal uncertainty".[45]

38 Timo Koivurova and Krittika Singh, "Due Diligence", in Anne Peters (ed.), *Max Planck Encyclopedia of Public International Law*, 2022, para. 1. See also ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary*, Geneva, 2020, para. 46.

39 ILA Study Group, above note 15, p. 2.

40 *Ibid*, p. 2. On this contrast between strict liability and due diligence, see also Lise Smit, Claire Bright and Stuart Neely, "Muddying the Waters: The Concept of a 'Safe Harbour' in Understanding Human Rights Due Diligence", *Business and Human Rights Journal*, Vol. 8, No. 1, 2023, p. 8.

41 Joanna Kulesza, *Due Diligence in International Law*, Queen Mary Studies in International Law, Vol. 26, Brill Nijhoff, Leiden, 2016, p. 262: "due diligence is the source of the customary principle of prevention".

42 HRC, *Text of the Third Revised Draft Legally Binding Instrument with Textual Proposals Submitted by States during the Seventh and the Eighth Sessions of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, UN Doc. A/HRC/52/41/Add.1, 23 January 2023, pp. 22–29.

43 Alice Ollino, *Due Diligence Obligations in International Law*, Cambridge University Press, Cambridge, 2022, p. 270. See also Heike Krieger and Anne Peters, "Due Diligence and Structural Change in the International Legal Order", in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order*, Oxford University Press, Oxford, 2020, p. 356, noting that "due diligence works as a legal tool to *restrict* or to *create* accountability".

44 A. Ollino, above note 43, p. 266.

45 Federica Violi, "The Function of the Triad 'Territory', 'Jurisdiction', and 'Control'", in H. Krieger, A. Peters and L. Kreuzer (eds), above note 43, p. 91.

The link between a due diligence standard and procedural duties also provides a connection to the procedural elements of the right to a healthy environment,[46] as well as the corporate responsibilities outlined by the UN Special Rapporteur on Human Rights and the Environment in the Framework Principles on Human Rights and the Environment, calling for human rights due diligence and "meaningful consultation with potentially affected groups and other relevant stakeholders".[47]

The next sections of the article will outline key elements of the due diligence concept in international environmental law and international human rights law before identifying a few points about the trend of integrated human rights and environmental due diligence.[48]

In international environmental law

Famously, the *Trail Smelter* case required a due diligence obligation of prevention of significant harm to another State, and not a prohibition of all possible harm.[49] The level of due diligence required depends in part on aspects such as the gravity of outcome, capabilities, and the moment of assessment.[50] The 2001 ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities clarified that the "degree of care is proportional to the degree of hazard involved".[51]

It has been suggested that due diligence in fact has a broader scope than the prevention principle, since while the prevention principle covers "significant" or "material" harm, the due diligence requirement does not necessarily include such a restriction.[52] In *Pulp Mills*, the ICJ considered that the obligation to carry out an environmental impact assessment where there is a risk of a significant adverse impact "may now be considered a requirement under general international law".[53] The judgment also included a discussion on the separation between procedural and substantive norms, with the majority noting that there is "a functional link, in regard to prevention, between the two categories of obligations …, but that link does not prevent the States parties from being required to

46 H. Krieger and A. Peters, above note 43, p. 363: "In various subfields of international law, procedural duties (duties to notify, warn, inform or consult) are tied to the due diligence standard."

47 UN Doc. A/HRC/37/59, above note 33, Annex, para. 22; see also para. 35. See also Chiara Macchi, *Business, Human Rights and the Environment: The Evolving Agenda*, T. M. C. Asser Press, The Hague, 2022, pp. 94–95.

48 For further discussion on due diligence in international humanitarian law specifically, see e.g. Marco Longobardo, "Due Diligence in International Humanitarian Law", in H. Krieger, A. Peters and L. Kreuzer (eds), above note 43; ILA Study Group, *First Report*, 2014, pp. 11–14.

49 T. Koivurova and K. Singh, above note 38, para. 29. See also Leslie-Anne Duvic-Paoli, *The Prevention Principle in International Environmental Law*, Cambridge University Press, Cambridge, 2018.

50 Pierre-Marie Dupuy, Ginevra Le Moli and Jorge E. Viñuales, "Customary International Law and the Environment", in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law*, Oxford University Press, Oxford, 2021, p. 395. See also J. Kulesza, above note 41, p. 269, regarding the required duty of care of "a good government".

51 *Official Records of the General Assembly, Fifty-Sixth Session*, Supp. 10, UN Doc. A/56/10, 2001, Chap. V, commentary to Draft Article 3, para. 18.

52 P.-M. Dupuy, G. Le Moli and J. Viñuales, above note 50, p. 394.

53 ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *ICJ Reports 2010*, p. 14, para. 204.

answer for those obligations separately".[54] In their joint dissenting opinion, Judges Al-Khasawneh and Simma stated that the "conclusion whereby non-compliance with the pertinent procedural obligations has eventually had no effect on compliance with the substantive obligations is a proposition that cannot be easily accepted".[55]

Whether the international legal ecosystem can be said to include two harm prevention standards or one standard which has evolved into a second continues to be discussed in the doctrine, as does the degree of separation between procedural and substantive norms more generally.[56] It is nonetheless clear from the decisions of the ICJ and the associated commentary that due diligence comprises both substantive and procedural aspects.[57]

Due diligence in international environmental law is also informed by extraterritoriality in multilateral environmental agreements.[58] As Vordermayer notes, this tendency can be seen as a corresponding and similar development to the "progressive developments in the context of [economic, social and cultural] rights, in terms of the emergence of home state duties to regulate non-state actor activities abroad".[59]

In international human rights law

The importance and relevance of due diligence obligations for businesses has been emphasized within the international human rights ecosystem, with commentators noting that due diligence pertaining to non-State actors is "especially a relevant question in the context of business activities, as many multinational corporations wield economic and political powers all over the world".[60] In this context, due diligence has also been described as "the standard of conduct necessary to comply with a duty to protect".[61]

Within human rights law, due diligence has been considered as outlining a standard of conduct on the one hand, and denoting management of risk on the other. Baade notes that the UNGPs seem to include both perspectives when contrasting UNGPs 15–21 with UNGPs 11 and 13.[62] This distinction is

54 *Ibid.*, para. 79.
55 *Ibid.*, Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, para. 26.
56 See T. Koivurova and K. Singh, above note 38, para. 31, noting that "[s]cholarly discussion on this issue is ongoing and of relevance to the understanding of due diligence in these situations". See also Jutta Brunnée, *Procedure and Substance in International Environmental Law*, Brill Nijhoff, Leiden, 2020, pp. 145–146.
57 See e.g. Jutta Brunnée, "Harm Prevention", in L. Rajamani and J. Peel (eds), above note 50, p. 274.
58 See e.g. Peter H. Sand, "Origin and History", in L. Rajamani and J. Peel (eds), above note 50, p. 64: "One much-neglected aspect … has been the extraterritorial application of multilateral environmental agreements."
59 Markus Vordermayer, "The Extraterritorial Application of Multilateral Environmental Agreements", *Harvard International Law Journal*, Vol. 59, No. 1, 2018, p. 124.
60 T. Koivurova and K. Singh, above note 38, para. 44.
61 Björnstjern Baade, "Due Diligence and the Duty to Protect Human Rights", in H. Krieger, A. Peters and L. Kreuzer (eds), above note 43, p. 92.
62 *Ibid.*, p. 95: "Whether the term 'due diligence' is used coherently in the Guiding Principles has recently become controversial." See also ILA Study Group, above note 15, pp. 29–30; Jonathan Bonnitcha and Robert McCorquodale, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights", *European Journal of International Law*, Vol. 28, No. 3, 2017, p. 909. For a different perspective, see John Ruggie and John Sherman III, "The Concept of 'Due Diligence' in the

important as the focus on risk management seeks to identify risks to the business as compared to impacts on stakeholders.[63] It is interesting in this context to note that the EU CMR refers to the five-step due diligence process under the heading of "Risk Management Obligations".[64]

The UNGPs outline a four-step approach of human rights due diligence in UNGP 17;[65] this is similar to the Organisation for Economic Co-operation and Development (OECD) due diligence requirements, which delineate five steps. These standards have in turn influenced and informed the understanding of the EU CMR and ILC Principle 10, both of which explicitly state that the standards therein build upon the OECD standards and the UNGPs.

Several UN human rights mechanisms have contributed to the understanding of due diligence. In its General Comment No. 31 (2004), the Human Rights Committee called for the exercise of "due diligence to prevent, punish, investigate or redress the harm caused by [violations] by private persons or entities".[66] In 2017, the Committee on Economic, Social and Cultural Rights (CESCR) noted that there is a duty for States to "adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights".[67] In addition, the CESCR expands on extraterritorial obligations in its General Comment and notes that States have an obligation to take "steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control".[68] Duvic-Paoli notes that while "a general extraterritorial obligation of prevention under human rights law has not yet consolidated", there is "good support for the obligation both in the scholarship and in practice".[69]

UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale", *European Journal of International Law*, Vol. 28, No. 3, 2017.

63 Robert McCorquodale, "Human Rights Due Diligence Instruments: Evaluating the Current Legislative Landscape", in Axel Marx, Geert Van Calster, Jan Wouters, Kari Otteburn and Diana Lica (eds), *Research Handbook on Global Governance, Business and Human Rights*, Edward Elgar, Cheltenham, 2022, p. 123. Regarding the risks of "cosmetic" due diligence and "bluewashing", see also Eliana Cusato, *The Ecology of War and Peace: Marginalising Slow and Structural Violence in International Law*, Cambridge University Press, Cambridge, 2021, pp. 176–177; Fatimazahra Dehbi and Olga Martin-Ortega, "An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective", *Regulation and Governance*, 2023, p. 8.

64 EU CMR, above note 3, Art. 5.

65 (1) Identifying and assessing adverse human rights impacts, (2) integrating findings from impact assessments across company processes, (3) tracking effectiveness, and (4) communicating how impacts are being addressed. See e.g. UN Doc. A/73/163, above note 25, para. 10.

66 Human Rights Committee, General Comment No. 31, "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 8.

67 UN Committee on Economic, Social and Cultural Rights, "General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities", UN Doc. E/C.12/GC/24, 23 June 2017, para. 16.

68 *Ibid.*, para. 30.

69 L.-A. Duvic-Paoli, above note 49, pp. 236–237. See also *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc. A/HRC/25/53, 30 December 2013, para. 64: "[M]ost of the sources reviewed that have addressed the issue do indicate that States have obligations to protect human rights, particularly economic, social and cultural rights, from the extraterritorial environmental effects of actions taken within their territory."

In 2017, the Inter-American Court of Human Rights (IACtHR) issued an Advisory Opinion calling for activities to minimize risks to the environment and human rights, including through environmental impact studies, licensing, and supervision. In the Advisory Opinion, the Court stated:

> Most environmental obligations are based on this duty of due diligence. The Court reiterates that an adequate protection of the environment is essential for human well-being, and also for the enjoyment of numerous human rights, particularly the rights to life, personal integrity and health, as well as the right to a healthy environment itself.[70]

The standard of due diligence is also referenced as an obligation of conduct that requires "appropriate measures".[71] The formulation "appropriate measures" was re-emphasized in the Court's decision in *Lhaka Honhat v. Argentina*, which also stated that due diligence must be proportionate to the level of risk of environmental harm.[72]

In a 2022 report to the UN General Assembly, the UN Special Rapporteur on Human Rights and the Environment called upon States to "enact legislation requiring businesses that contribute to climate change, biodiversity loss, pollution and other forms of environmental degradation to conduct inclusive and rigorous human rights and environmental due diligence",[73] and noted that such regulation should cover the full supply chain.[74] In a dedicated policy brief on human rights and environmental due diligence legislation, the Special Rapporteur emphasized the possibility for robust due diligence regulations to prevent human rights and environmental harms, while also noting that existing regulations are frequently "fraught with inconsistencies, ambiguities, exemptions and other weaknesses that prevent them from adequately responding to the often-overlapping human rights and environmental abuses that are plaguing rightsholders and ecosystems worldwide".[75] The brief defines "vulnerable rightsholders" as including "protected populations under occupation or in conflict-affected areas".[76]

70 IACtHR, *Medio ambiente y derechos humanos*, Advisory Opinion No. OC 23-17, Series A, No. 23, 15 November 2017, para. 124.

71 *Ibid.*, para. 123.

72 IACtHR, *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v. Argentina*, Series C, No. 400, 6 February 2020, para. 208.

73 *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc. A/77/284, 10 August 2022, para. 38.

74 *Ibid.*, para. 81.

75 UN Special Rapporteur on Human Rights and the Environment, *Essential Elements of Effective and Equitable Human Rights and Environmental Due Diligence Legislation*, Policy Brief No. 3, June 2022, p. 5.

76 *Ibid.*, p. 21.

A tendency towards integration: Human rights and environmental due diligence

Recent years have seen an increase in national and regional standards and regulations on human rights and environmental due diligence, such as in France, Germany and the EU.[77] In addition, there has been a tendency to "harden" due diligence norms regarding human rights abuses and environmental impacts from voluntary standards to binding regulations.[78]

The UN Working Group on Business and Human Rights has emphasized in its report on due diligence that the practice of human rights due diligence has "moved beyond the niche realm of socially responsible investors to become part of a wider trend of greater focus on managing the social impact of business and integrating environmental, social and governance considerations into mainstream investment decision-making".[79] This integrative approach was also highlighted in a study on due diligence requirements through the supply chain developed for the European Commission, which noted that the

> evolution and the insertion of human rights due diligence, beyond the requirements for business of [human rights impact assessments] as a onetime activity, have environmental implications. Firstly, because the right to a healthy environment is recognized as a human right, and secondly because the enjoyment of many other human rights requires a healthy environment.[80]

Nonetheless, commentators have also highlighted potential risks. For instance, without "well-targeted and appropriate legislation, there is a risk that a 'tick-box' approach will occur so that existing corporate practices may continue".[81] In addition, "transplanting" or integrating a concept from one area of the law to another runs the risk that its application becomes decontextualized and/or ahistorical.[82]

Human rights and environmental due diligence in relation to armed conflicts: Comparing the ILC Principles with the EU Conflict Minerals Regulation

The EU Conflict Minerals Regulation

The EU CMR was developed to address linkages between conflict and human rights abuses and the sourcing of tin, tantalum, tungsten and gold (3TG).[83] One of the

77 C. Macchi, above note 47, pp. 95–104.
78 See e.g. Colin Mackie, "Due Diligence in Global Value Chains: Conceptualizing 'Adverse Environmental Impact'", *Review of European, Comparative and International Environmental Law*, Vol. 30, No. 3, 2021, p. 298.
79 UN Doc. A/73/163, above note 25, para. 86.
80 L. Smit *et al.*, above note 15, p. 357.
81 R. McCorquodale, above note 63, p. 141.
82 Natasha Affolder, "Contagious Environmental Lawmaking", *Journal of Environmental Law*, Vol. 31, No. 2, 2019, pp. 190–195 (referring particularly to environmental impact assessments).
83 See e.g. EU CMR, above note 3, Preamble, para. 14.

stated aims of the regulation was to complement the Dodd-Frank Act in the United States,[84] which also focuses on 3TG. The regulation entered into force on 1 January 2021.

Article 2(d) of the EU CMR states that

> "supply chain due diligence" means the obligations of Union importers of tin, tantalum and tungsten, their ores, and gold in relation to their management systems, risk management, independent third-party audits and disclosure of information with a view to identifying and addressing actual and potential risks linked to conflict-affected and high-risk areas to prevent or mitigate adverse impacts associated with their sourcing activities.

The phrase "conflict-affected and high-risk areas" is further defined in Article 2 (f) as "areas in a state of armed conflict or fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses".

Drawing on the *OECD Due Diligence Guidance for Responsible Supply Chain of Minerals from Conflict-Affected Areas* (OECD Guidance), the EU CMR outlines a five-step process of due diligence, requiring importers to (1) establish management systems, (2) identify and assess the risk of adverse impacts in the supply chain, (3) develop and implement a strategy to respond to identified risks, (4) carry out independent third-party audits, and (5) report on supply chain due diligence annually.[85] As noted by several commentators, this approach is similar to that outlined in the UNGPs, and integrated in the OECD Guidance.[86] The geographic scope covers potentially all countries linked to EU importers, which is broader than the Dodd-Frank Act's focus on the Democratic Republic of the Congo and neighbouring countries.[87]

While welcomed as a step towards greater transparency and implementation of the UNGPs,[88] the EU CMR has been critiqued on several accounts. For instance, it has been noted that the development and implementation of the regulation does not require consulting "individuals within the countries concerned directly impacted by it".[89] In addition, the focus on 3TG limits the application of the regulation,[90] with the concern that this might have implications for the aim of establishing a "level playing field" with other

84 See e.g. Lena Partzsch, "The New EU Conflict Minerals Regulation: Normative Power in International Relations?", *Global Policy*, Vol. 9, No. 4, 2018, p. 479.

85 EU CMR, above note 3, Arts 4–7. See also L. Smit *et al.*, above note 15, pp. 167–168.

86 R. McCorquodale, above note 63, p. 132. See also D. Dam-de Jong and S. Wolters, above note 5, p. 143, discussing the linkages between the OECD Guidance and the associated five-step approach building on the human rights due diligence process outlined in UNGP 17.

87 Chiara Macchi, "A Glass Half Full: Critical Assessment of EU Regulation 2017/821 on Conflict Minerals", *Journal of Human Rights Practice*, Vol. 2, No. 2, 2021, p. 276.

88 *Ibid.*, p. 279: "The Regulation, generally speaking, constitutes a positive development both in an EU law perspective and from the point of view of the implementation of the UNGPs."

89 Phoebe Okowa, "The Pitfalls of Unilateral Legislation in International Law: Lessons from Conflict Minerals Legislation", *International and Comparative Law Quarterly*, Vol. 69, No. 3, 2020, p. 710.

90 *Ibid.*, p. 711.

sectors,[91] and that such an approach will "fail to prevent or address adverse impacts which take place outside of this sector".[92] In addition, several commentators have highlighted the limitation that the regulation does not apply to downstream corporations directly,[93] and the weak system of enforcement,[94] leading to limited accountability and access to justice for those affected by corporate malpractice across the supply chain. While increased transparency requirements are important, accountability does not necessarily follow from such regulation.[95] Revised standards on greater access to justice, through e.g. legal aid and shifting the burden of proof, could serve as pathways to addressing procedural hurdles and contributing to the effective enjoyment of the right to healthy environment.[96]

In general, the EU CMR can be seen as a "partial response" to address abuses across the supply chain.[97] The regulation focuses on certain "choke points" or "control points" in the supply chain through which most materials pass and which are thus considered to be "best placed to track the materials" concerned.[98]

The OECD Guidance refers to the *OECD Guidelines for Multinational Enterprises* (MNE Guidelines) as a relevant instrument for assessing supply chain risks.[99] In 2020–22, the OECD undertook a stocktake of the MNE Guidelines, which identified the need for further detail on the "scope of environmental impacts to be addressed and the interconnections between the human rights and environmental chapters, including reference to the right to a healthy environment" as well as "further clarity on obligations relating to climate due diligence in particular and how this intersects with human rights due diligence".[100] Thus, it is possible that the continuous updating of OECD standards and their implementation will contribute to a further alignment of the due diligence requirements in the OECD Guidance and associated regulations with the right to a healthy environment.[101]

91 See e.g. C. Macchi, above note 87, p. 283.
92 L. Smit *et al.*, above note 15, p. 226.
93 Luis Miguel Vioque, "A Proposal for Criminal Liability for Breach of Due Diligence Obligations: The European Conflict Minerals Regulation as an Example", *European Criminal Law Review*, Vol. 11, No. 1, 2021, p. 81. See also C. Macchi, above note 87, p. 282.
94 C. Macchi, above note 87, p. 283.
95 Sara Ghebremusse, "The Shortcomings of Regulating Transparency for Sustainable Development in African Mining", in Beate Sjåfjell, Carol Liao and Aikaterini Argyrou (eds), *Innovating Business for Sustainability: Regulatory Approaches in the Anthropocene*, Edward Elgar, Cheltenham, 2022, p. 149.
96 Regarding burden of proof, see e.g. UN Special Rapporteur on Human Rights and the Environment, above note 75, p. 25; UN Doc. E/C.12/GC/24, above note 67, para. 45.
97 C. Macchi, above note 87, p. 281.
98 *Ibid.*, pp. 282, 284.
99 OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 3rd ed., 2016, p. 42.
100 OECD, *Stocktaking Report on the OECD Guidelines for Multinational Enterprises*, 2022, pp. 57–58.
101 See also cases before OECD National Contact Points (NCPs) referring to the linkages between human rights and the environment, e.g. Norwegian and Swedish NCPs, *Jinjevaerie Saami Village v. Statkraft AS*; Dutch NCP, *Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) v. ING*.

The ILC Principles on Protection of the Environment in Relation to Armed Conflicts

Prompted in part by the recommendations of an expert seminar and subsequent report by the International Committee of the Red Cross (ICRC) and UN Environment Programme (UNEP),[102] the topic "Protection of the Environment in Relation to Armed Conflicts" was included in the long-term programme of work of the ILC in 2011,[103] and was included in the current programme of work at the 65th session in 2013.[104] In 2022, a set of Draft Principles was adopted by the Commission,[105] and later taken note of by UN General Assembly Resolution 77/104, which encouraged their widest possible dissemination.[106] The ILC commentary to Draft Principle 10 notes that the Principle has been phrased as a recommendation,[107] and that "due diligence by business enterprises" refers to a "wide network of frameworks" which include "nonbinding guidelines as well as binding regulations at the national or regional level".[108] The preamble of General Assembly Resolution 77/104 also notes that the Principles provide recommendations for the progressive development of international law "to the extent that they do not reflect customary or treaty-based obligations of States, as applicable".[109]

The Principles are structured in accordance with general temporal phases (before, during and after armed conflicts) and include two provisions specifically focusing on business: Principle 10 on due diligence and Principle 11 on corporate liability.

The general importance of Principles 10 and 11 has been highlighted by several authors, with Wolters and Dam-de Jong noting that their inclusion in the (then-Draft) Principles is "highly significant, not in the least because of the involvement of corporations in the illicit exploitation of natural resources financing armed conflicts, which is a prevalent cause of environmental harm in contemporary armed conflicts".[110] It has also been suggested that the Principles overall add "an international legal dimension to what some may consider to be existing ethical responsibilities".[111] This aligns with the general tendency of a

102 ICRC/UNEP technical seminar organized in March 2009 in Nairobi, as referenced in David Jensen and Silja Halle (eds), *Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law*, UNEP, 2009.

103 UN Doc. A/66/10, above note 13, para. 365.

104 *Official Records of the General Assembly, Sixty-Eighth Session*, Supp. 10, UN Doc. A/68/10, 2013, para. 167.

105 *Official Records of the General Assembly, Seventy-Seventh Session*, Supp. 10, UN Doc. A/77/10, 2022, paras 52–54.

106 See above note 2.

107 UN Doc. A/77/10, above note 105, Annex E, commentary to Draft Principle 10, para. 1.

108 *Ibid.*, para. 2.

109 UNGA Res. 77/104, above note 2, Preamble.

110 D. Dam-de Jong and S. Wolters, above note 5, p. 113. See also Daniëlla Dam-de Jong and Britta Sjöstedt, "Enhancing Environmental Protection in Relation to Armed Conflict: An Assessment of the ILC Draft Principles", *Loyola of Los Angeles International and Comparative Law Review*, Vol. 44, No. 2, 2021, p. 141.

111 Alexandra Wormald, "Protecting the Environment during and after Armed Conflict, the International Law Commission and an Overdue Due Diligence Duty for Corporations: Good in Principle?", *Journal of International Humanitarian Legal Studies*, Vol. 12, No. 2, 2021, p. 317.

"hardening" of soft law and standards regarding corporate conduct and the shift from voluntary standards like the OECD Guidance to binding measures such as the EU CMR and the proposed EU Corporate Sustainability Due Diligence Directive.[112]

Principle 10 on "Due Diligence by Business Enterprises" reads:

> States should take appropriate measures aimed at ensuring that business enterprises operating in or from their territories, or territories under their jurisdiction, exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area affected by an armed conflict. Such measures include those aimed at ensuring that natural resources are purchased or otherwise obtained in an environmentally sustainable manner.

During the discussions at the ILC and in submissions from States and observers, the reference to "human health" was considered at length.[113] For instance, submissions by civil society and the International Union for Conservation of Nature (IUCN) called for revising the reference.[114] The commentary underlines "the close link between environmental degradation and human health as affirmed by international environmental instruments, regional treaties and case law", and refers to the "broad recognition of the right to a safe, clean, healthy and sustainable environment both at the national and international levels".[115] The fact that the commentary to Draft Principle 10 explicitly refers to the right to a healthy environment is significant since ILC commentaries are "crucial for the identification and interpretation of rules"[116] and have been treated as "supplementary means of treaty interpretation" and as "the context in which draft provisions are to be interpreted".[117]

The reference to the importance of the environment for the enjoyment of human rights in the preamble further underscores this close link between the environment and human rights as part of the context against which the Principles should be interpreted.[118] The ILC Special Rapporteur also referred to international human rights law as the legal foundation for Principle 10.[119]

112 See e.g. Tamás Szabados, "Multilevel Hardening in Progress – Transition from Soft Towards Hard Regulation of CSR in the EU", *Maastricht Journal of European and Comparative Law*, Vol. 28, No. 1, 2021.

113 See e.g. "Protection of the Environment in Relation to Armed Conflicts: Statement of the Chair of the Drafting Committee, Mr. Claudio Grossman Guiloff", 8 July 2019, p. 9. See also D. Dam-de Jong and S. Wolters, above note 5, p. 115.

114 *Protection of the Environment in Relation to Armed Conflicts: Comments and Observations Received from Governments, International Organizations and Others*, UN Doc. A/CN.4/749, 17 January 2022, p. 169.

115 UN Doc. A/77/10, above note 105, commentary to Draft Principle 10, para. 11.

116 Danae Azaria, "The Working Methods of the International Law Commission: Adherence to Methodology, Commentaries and Decision-Making", in United Nations, *Seventy Years of the International Law Commission: Drawing a Balance for the Future*, Koninklijke Brill, Leiden, 2021, p. 177.

117 *Ibid.*, p. 180.

118 See e.g. Christian Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction*, Cambridge University Press, Cambridge, 2016, section 6.4: "The context of the treaty comprises according to Art. 31(2) [of the Vienna Convention on the Law of Treaties] *inter alia* the preamble and annexes to the treaty." See also section 7.1.

119 *Second Report on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, Special Rapporteur*, UN Doc A/CN.4/728, 27 March 2019, paras 67–103. See also D. Dam-de Jong and S. Wolters, above note 5, p. 127.

Comparison between the ILC Principles and the EU Conflict Minerals Regulation

There are a number of similarities and differences between the ILC Principles and the EU CMR. The ILC Principles contribute to extending extraterritorial application to obligations under international law. In her 2022 report, Special Rapporteur Marja Lehto states that as the phrase "operating in or from their territories" has been "interpreted in the OECD practice to cover both territory and jurisdiction", it should also be understood in this manner as part of the ILC Principles.[120] The commentary to Draft Principle 10 also states that "the phrase [operating in or from their territories] may be interpreted to cover both territory and jurisdiction".[121] Wolters and Dam-de Jong note in their analysis of the 2019 version of the Draft Principles and commentaries that "with the proposal of Draft Principle 10, the trend of extending obligations extraterritorially is further recognized and the concept is strengthened".[122] This extension is important to avoid, for instance, businesses adopting "policies domestically for subsidiaries to carry out activities abroad that will violate environmental rights in conflict zones".[123]

The EU CMR has been identified as increasing "the number of EU trade rules with extraterritorial reach aimed at pursuing public values (such as the protection of the environment or internationally recognised human rights) outside the EU".[124] As noted above, the regulation draws on similar materials to the ILC Principles, including the OECD Guidance, which has been considered to have extraterritorial reach given that due diligence should be undertaken throughout the global supply chain.[125]

Historically, international environmental law has integrated extraterritorial effects to a greater extent than international human rights law.[126] Dienelt, writing on

120 See also *Third Report on Protection of the Environment in Relation to Armed Conflicts, by Marja Lehto, Special Rapporteur*, UN Doc. A/CN.4/750, 16 March 2022, para. 107.

121 UN Doc. A/77/10, above note 105, commentary to Draft Principle 10, para. 8. See also D. Dam-de Jong and S. Wolters, above note 5, p. 115.

122 D. Dam-de Jong and S. Wolters, above note 5, p. 139.

123 *Ibid.*, pp. 138–139.

124 Valentina Grado, "The EU 'Conflict Minerals Regulation': Potentialities and Limits in the Light of the International Standards on Responsible Sourcing", *Italian Yearbook of International Law*, Vol. 27, 2017, p. 249.

125 *Ibid.*, p. 242 fn. 19. Some scholars have outlined potential risks with extraterritorial application of supply chain due diligence provisions, including that without meaningful participation and access to justice for affected populations, such application could aggravate social, economic and environmental injustices: see e.g. F. Dehbi and O. Martin-Ortega, above note 63, pp. 6–8; P. Okowa, above note 89. These risks could be mitigated by implementation of due diligence requirements that respect, protect and fulfil the right to a healthy environment, particularly given the emphasis on meaningful participation and access to justice as part of the right, and the large number of regional and domestic provisions recognizing the right. See e.g. Okowa, above note 89, p. 716: "[T]here are situations where unilateral legislation can sometimes be a force for good, especially in situations where multilateral enforcement is at an impasse. … This is likely to be the case where the underlying values are uncontested and have been arrived at by consensus, clear examples being extraterritorial unilateral measures for the protection of uncontested human rights norms or the protection of the environment."

126 See e.g. Olga Martin-Ortega, Fatimazahra Dehbi, Valerie Nelson and Renginee Pillay, "Towards a Business, Human Rights and the Environment Framework", *Sustainability*, Vol. 14, No. 11, 2022, p. 4.

armed conflicts and the environment, refers to the different approaches as extraterritorial application (of international human rights law) and extraterritorial effects (of international environmental law) and notes that these complement each other.[127] It could be argued that the integration and strengthened linkages between human rights law and international environmental law, including through human rights and environmental due diligence and the right to a healthy environment, may serve as a pathway for further extraterritorial obligations. It is interesting in this context that the Advisory Opinion before the IACtHR which clearly expressed the extraterritorial scope of due diligence obligations had as its material focus the question on human rights and the environment.[128] From a genealogical perspective, some of the formative documents which have contributed to the development and understanding of the right to a healthy environment have also informed the emerging concept and application of human rights and environmental due diligence. This includes, for instance, the 2017 General Comment by the CESCR.[129]

ILC Principle 10 calls for "appropriate measures" to ensure that due diligence standards are met, and the OECD Guidance providing the inspiration for the EU CMR refers to "appropriate" due diligence measures.[130] "Appropriate measures" is also the requirement of the IACtHR 2017 Advisory Opinion, which links the due diligence standard with the right to a healthy environment. Such measures must have a specific aim (in the case of Principle 10, being aimed at ensuring due diligence) while still allowing for flexibility as regards the specific form chosen (e.g. legislative, judicial or administrative measures).[131]

In terms of the scope of the two standards, the EU CMR is more limited as it applies to EU importers of 3TG. The ILC Principles apply to all States and all businesses regardless of sector; the HRC and General Assembly resolutions recognizing the right to a healthy environment both refer to all businesses. Moreover, stakeholders "have confirmed that there is no sector of business which does not pose any potential risks to human rights or the environment".[132] The limited scope of the EU CMR is also problematic considering the demand for non-3TG minerals such as cobalt as part of the transition to renewable energy, with multiple reports of violations of human rights and environmental standards by actors in this sector in conflict-affected areas.[133]

While this tendency towards a more integrative way of viewing human rights and environmental protection is promising, it is important to recall that human rights and environmental due diligence is not a panacea to remedy

127 Anne Dienelt, *Armed Conflicts and the Environment: Complementing the Laws of Armed Conflict with Human Rights Law and International Environmental Law*, Springer, Cham, 2022, pp. 272–273.
128 IACtHR, *Medio ambiente y derechos humanos*, above note 70.
129 See e.g. D. Dam-de Jong and S. Wolters, above note 5, p. 132.
130 OECD, above note 99, p. 15.
131 UN Doc. A/77/10, above note 105, commentary to Draft Principle 10, para. 7, referring to Draft Principle 3 and the associated illustrative list of relevant measures.
132 L. Smit *et al.*, above note 15, p. 226.
133 Business and Human Rights Resource Centre, *Investing in Renewable Energy to Power a Just Transition*, Investor Guide, October 2022, pp. 5, 9.

environmental injustice or address harm to the environment and human rights, just as the right to a healthy environment is not. Whereas this article has sought to provide elements for an improved understanding of due diligence and enhanced due diligence in light of the right to a healthy environment, it will be critical to continuously improve understanding of due diligence and requirements for enhanced due diligence in the implementation of standards such as the EU CMR and the ILC Principles, and in the adoption of norms under development such as the EU Corporate Sustainability Due Diligence Directive.[134]

Conclusion

As noted above, both the HRC and General Assembly resolutions recognizing the right to a healthy environment refer to the role of businesses. In the 2018 Framework Principles developed by the UN Special Rapporteur on Human Rights and the Environment, Principle 12 states that "States should ensure the effective enforcement of their environmental standards against public and private actors", noting in the associated commentary that "States must regulate business enterprises to protect against human rights abuses resulting from environmental harm and to provide remedies for such abuses".[135]

Elements of the right to a healthy environment are present in both the EU CMR and in the OECD Guidance which provided the inspiration for that regulation, and in the ILC Principles – even to the extent that the General Assembly and HRC resolutions, as well as national and regional developments on the right to a healthy environment, are mentioned in the commentary to Draft Principle 10.[136] A number of States and international organizations also welcomed the references to the right to healthy environment in the ILC Principles and their associated commentary during the plenary discussions in the Sixth Committee of the General Assembly.[137]

In particular, the procedural dimensions of the right to a healthy environment provide a strong link to due diligence requirements.[138] In fact, and building on an argument developed by Viñuales, the degree of due diligence could be informed by the right to a healthy environment – including its substantive components – as another "relevant norm" applicable between the parties under the principle of systemic integration in the Vienna Convention on the Law of Treaties.[139] This

134 See also M. Tignino, above note 5, p. 57.

135 UN Doc. A/HRC/37/59, above note 33, Annex, para. 34. see also S. J. Turner, above note 19, p. 389.

136 UN Doc. A/77/10, above note 105, commentary to Draft Principle 10, para. 11.

137 See e.g. Micronesia in *Official Records of the General Assembly, Seventy-Seventh Session*, UN Doc. A/C.6/77/SR.24, 12 December 2022, p. 6; El Salvador in *Official Records of the General Assembly, Seventy-Seventh Session*, UN Doc. A/C.6/77/SR.21, 12 December 2022, p. 20; the EU in *Official Records of the General Assembly, Seventy-Seventh Session*, UN Doc. A/C.6/77/SR.21, 12 December 2022, p. 9; and Portugal in UN Doc. A/CN.4/749, above note 114, p. 20. International organizations also referenced the right to a healthy environment: see e.g. OHCHR, UNHCR, UNECLAC and IUCN in UN Doc. A/CN.4/749, above note 114.

138 See e.g. H. Krieger and A. Peters, above note 43, p. 363.

139 Jorge E. Viñuales, "Due Diligence in International Environmental Law", in H. Krieger, A. Peters and L. Kreuzer (eds), above note 43, pp. 120–122 (referring to a right to an environment of a certain quality).

could for instance mean that since the right to a healthy environment includes as one constitutive element access to justice in environmental matters, due diligence criteria should be developed and interpreted to ensure stronger access to remedy and ensure coherence with the right to a healthy environment more broadly.

As noted by several commentators, the right to a healthy environment remains an open and evolving norm.[140] In a similar manner, the requirements for due diligence retain a certain level of flexibility in order to remain dynamic while still meeting an appropriate level of stability and foreseeability. This balance and need for legal certainty also requires integration and coherence.[141] A more integrated understanding of human rights and the environment, as exemplified both by the right to a healthy environment and combined human rights and environmental due diligence, could also address the risk of conflicts between these areas – for instance, the risk that environmental protection measures may contribute to human rights violations, or that actions developed to safeguard human interests may harm the environment.[142] In particular, integrated due diligence and the right to a healthy environment can both contribute to a greater focus on prevention in international human rights law in addition to ensuring remedies for past harms.[143]

This article has outlined how the EU CMR and the ILC Principles are both part of a tendency towards integrated human rights and environmental due diligence. This trend speaks to a stronger emphasis on the linkages between human rights and the environment overall and provides a fertile ground for implementation of the right to a healthy environment itself. It is significant in this context that the HRC resolution recognizing the right to a healthy environment affirms that its promotion "requires the full implementation of the multilateral environmental agreements under the principles of international environmental law".[144] The integrative approach has also been emphasized by George in her analysis of the UNGPs, and by the UN Working Group on Business and Human Rights in their report focusing on coherence.[145]

Both the EU CMR and the ILC Principles open the possibility of extraterritorial application of their respective standards. This tendency is in line

140 See e.g. Rosemary Mwanza, "Framing the Normative role of the Right to a Healthy Environment: Thinking with Internormativity, Embodiment and Emergence", *Journal of Human Rights and the Environment*, Vol. 13, No. 2, 2022, p. 369.

141 UN Special Rapporteur on Human Rights and the Environment, above note 75, p. 7.

142 See e.g. Marie-Catherine Petersmann, "Conflicts between Environmental Protection and Human Rights", in J. R. May and E. Daly (eds), above note 4, 2019, pp. 297–298.

143 Elena Cima, "The Right to a Healthy Environment: Reconceptualizing Human Rights in the Face of Climate Change", *Review of European, Comparative and International Environmental Law*, Vol. 31, No. 1, 2022, p. 48.

144 HRC Res. 48/13, above note 8, para. 3.

145 Erika George, "Shareholder Activism and Stakeholder Engagement Strategies: Promoting Environmental Justice, Human Rights, and Sustainable Development Goals", *Wisconsin International Law Journal* Vol. 36, No. 2, 2019, p. 298; *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/74/198, 19 July 2019, see e.g. para. 81. See also F. Dehbi and O. Martin-Ortega, above note 63. Regarding the ILC Principles, see also D. Dam-de Jong and S. Wolters, above note 5, p. 115, highlighting potential challenges and discussing "the appropriateness of the integrative approach taken by the Draft Principles with respect to international environmental and human rights law".

with the recognition of a universal human right to a healthy environment generally, as referenced above. Recent guidance developed by UNDP, UNEP and the Office of the UN High Commissioner for Human Rights (UN Human Rights) on the right to a healthy environment also states that realizing the right "requires … recognition of extraterritorial jurisdiction over human rights harms caused by environmental degradation".[146]

ILC Principle 10, the EU CMR and the normative developments regarding the right to a healthy environment can also be seen as part of the tendency of making soft law binding. For instance, the UNGPs and OECD Guidance are used as references and sources of terms for the EU CMR. The commentary to the ILC Principles also points to the OECD Guidance and the UNGPs for understanding and interpretation of due diligence requirements. The ILC commentary formulation that Draft Principle 10 has been phrased as a recommendation forms part of the Commission's mandate to codify and progressively develop international law.[147] While several States noted during their explanation of vote at the General Assembly that the resolution recognizing the right to a healthy environment in and of itself did not represent a binding commitment, the resolution nonetheless demonstrates the evolving norm as evidenced by its expression in recent treaties such as the 2018 Escazú Agreement,[148] in declarations and resolutions including at the UN Environment Assembly,[149] at the Council of Europe[150] and in constitutional provisions at the national level.

Finally, both human rights and environmental due diligence and the right to a healthy environment could be seen as part of a proceduralization of international law.[151] Specifically, a proceduralization of due diligence obligations could serve as a way to "increase legal certainty and overcome the ambiguity surrounding reasonableness".[152] This is particularly significant in situations of armed conflict, given the lack of regulatory oversight and enhanced risk of human rights violations and harm to the environment in such situations. One of the main contributions of the right to a healthy environment in this context

146 UNDP, UNEP and UN Human Rights, above note 20, p. 9.

147 UN Doc. A/77/10, above note 105, commentary to Draft Principle 10, para. 1; UNGA Res. 174(II), 21 November 1947, Art. 1. Regarding the impact of the ILC, see e.g. Laurence Boisson de Chazournes, "The International Law Commission in a Mirror – Forms, Impact and Authority", in United Nations, above note 116.

148 Escazú Agreement, above note 18, Art. 1.

149 Political Declaration of the Special Session of the United Nations Environment Assembly to Commemorate the Fiftieth Anniversary of the Establishment of the United Nations Environment Programme, UN Doc. UNEP/EA.SS.1/4, 8 March 2022.

150 Council of Europe, *Recommendation CM/Rec(2022)20 of the Committee of Ministers to Member States on Human Rights and the Protection of the Environment*, 27 September 2022.

151 J. Brunnée, above note 56, p. 140: "[T]he practical/functional linkages between procedure and substance find expression in the notion of due diligence." See also Maria Monnheimer, *Due Diligence Obligations in International Human Rights*, Cambridge University Press, Cambridge, 2020, p. 142: "Similar to the field of human rights protection, a strong emphasis on prevention has evolved in environmental law, and some inspiration might be drawn from the way in which preventive obligations have become more concrete and substantiated in light of environmental risks. The development of independent procedural obligations, in particular, could also enhance global human rights protection."

152 A. Ollino, above note 43, p. 270.

could be strengthening effective procedural rights in the area of environmental protection and bridging procedural and substantive rights.[153] It remains to be seen whether the proceduralization of international law will continue and, if so, if it can pave the way for more empowered engagement on environmental protection and human rights.[154]

While this article has sought to analyze and compare due diligence requirements in the ILC Principles and the EU CMR and suggest pathways for enhanced due diligence aligned with the right to a healthy environment, further research is needed, including on the terms "impacts" and "risks", and to better understand the development, requirements and implementation of enhanced human rights and environmental due diligence in conflict-affected contexts.[155] A greater understanding of human rights and environmental due diligence is particularly critical considering the regulations currently under development by actors such as the EU.

153 Walter F. Baber and Robert V. Bartlett, *Environmental Human Rights in Earth System Governance: Democracy beyond Democracy*, Cambridge University Press, Cambridge, 2020, p. 15: "[S]ubstantive environmental rights without complementary procedural components usually fail to protect human interests (often due to a lack of justiciability) and … procedural environmental rights (by themselves) guarantee nothing more than that ecologically disastrous decisions will be made after due process."

154 ILA Study Group, above note 15, p. 3. See also Karin Buhmann, *Power, Procedure, Participation, and Legitimacy in Global Sustainability Norms: A Theory of Collaborative Regulation*, Routledge, New York, 2018, p. 136.

155 C. Macchi, above note 47, p. 157.