Modern Interpretations of International Humanitarian Law's Martens Clause: Opening the Door to Strategies to Better Protect the Environment and Indigenous Peoples During Armed Conflict

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International humanitarian law falls short in protecting the environment and vulnerable persons, namely Indigenous Peoples, during armed conflicts under the Geneva Conventions. Indigenous Peoples disproportionately experience the impacts given their connection to ancestral lands including in Myanmar and Colombia. However, modern interpretations of the field's Martens clause used to "other" Indigenous Peoples, can per "the principles of humanity", open the door to Indigenous knowledge and international environmental law, international human rights law and international criminal law principles. The result being a holistic, less colonial and anthropocentric international humanitarian law better protecting the environment and Indigenous Peoples during armed conflicts.

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Shontelle has a strong interest in legal issues related to the environment, climate change, human rights and modern conflicts. Shontelle is interested in the interconnections between these areas and finding ways forward that can better protect the environment and Indigenous Peoples during armed conflicts. Shontelle sees the value of intersectional anti-racist, indigenous and postcolonial theories of justice, as essential in addressing underlying colonial biases in international humanitarian law, to make room for Indigenous Peoples and their distinct ways of operating in the world which are intrinsically tied to ancestral lands.

***Keywords*:** Coordination of international humanitarian law; the Martens clause, modern interpretations; better protection of the environment and vulnerable persons; Indigenous Peoples; protected zones; peace parks; Salween Peace Park; Special Jurisdiction of Peace; integration of international environmental law, international human rights law and international criminal law principles with international humanitarian law; decoloniality.

I. Introduction

International humanitarian law is falling short in protecting the environment and vulnerable populations, particularly Indigenous Peoples who disproportionately experience armed conflicts' impacts given their connection to the land.[1] The general understanding is "gaps and opportunities" exist in international humanitarian law to do better for these groups,[2] particularly given only two provisions in Articles 35(3) and 55(1) of Additional Protocol I 1977 to the Geneva Conventions[3] protect the environment during international armed conflicts.[4] No direct provisions upholding the environment or Indigenous interests exist in common Article 3 and Additional Protocol II 1977 to the Geneva Conventions,[5] applicable to non-international armed conflicts which are the most common form of warfare today.[6]

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[1] Michael Bothe et al., "International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities", *International Review of the Red Cross*, Vol. 92, No. 879, 2010.
[2] *Ibid* p. 569.
[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (Additional Protocol I 1977 to the Geneva Conventions).
[4] M. Bothe, above note 1, pp. 575–9.
[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (Additional Protocol II 1977 to the Geneva Conventions); M. Bothe, above note 1.
[6] Bruno Demeyere et al., "The Updated ICRC Commentary on the Second Geneva Convention: Demystifying the Law of Armed Conflict at Sea", *International Review of the Red Cross*, Vol. 98, No. 902, p. 407.

This Article therefore argues international humanitarian law can better protect these groups via its Martens clause,[7] to open the door to apply principles and legal avenues from international environmental law, international human rights law and international criminal law.[8] This coordinated approach is needed given international humanitarian law's colonial and anthropocentric origins have regarded the protection of European civilian life as most important.[9] The Article recognises the Martens clause was originally applied to exclude Indigenous Peoples from its universal protection,[10] therefore constituting an "othering" process in which such persons have been ignored and viewed as separate from the field's ambit.[11] However, modern intersectional interpretations of its "principles of humanity" and "dictates of public conscience", applying perspectives from anti-racist, indigenous and postcolonial theories of justice, offer a key means to garner a fuller understanding of how international humanitarian law has operated to perpetuate injustices against the environment and Indigenous Peoples.[12] These intersectional interpretations, which pay attention to those often relegated to the edge of

[7] Convention Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 187 CTS 227 (18 October 1907), preambular para. 8 (Hague Convention IV or Martens clause); see also Additional Protocol I 1977 to the Geneva Conventions, above note 3, Art. 1(2) and Additional Protocol II 1977 to the Geneva Conventions, above n 5, preambular para. 4 (Martens clause).

[8] Marja Lehto, "Overcoming the Disconnect: Environmental Protection and Armed Conflicts", *Blog of the International Committee of the Red Cross,* 27 May 2021, available at: https://blogs.icrc.org/law-and-policy/2021/05/27/overcoming-disconnect-environmental-protection-armed-conflicts/ (all internet references were accessed on 27 March 2024); Raphaël van Steenberghe, "International Environmental Law as a Means for Enhancing the Protection of the Environment in Warfare: A Critical Assessment of Scholarly Theoretical Frameworks", *International Review of the Red Cross*, 2023.

[9] *Ibid.*

[10] Martens clause, above note 7.

[11] Frédéric Mégret, "From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Law's 'Other'", in Anne Orford (ed.), *International Law and Its Others*, Cambridge University Press, 2006, p. 265.

[12] Martens clause, above note 7; Benjamin Sovacool et al., "Pluralizing Energy Justice: Incorporating Feminist, Anti-Racist, Indigenous and Postcolonial Perspectives", *Energy Research & Social Science*, Vol. 1, 2023, pp. 6–7; Dieter Fleck, "The Martens Clause and Environmental Protection in Relation to Armed Conflicts", *Goettingen Journal of International Law*, Vol. 10, No. 1, 2020; Antonio Cassese, "The Martens Clause: Half a Loaf or Simply Pie in the Sky?", *European Journal of International Law*, Vol. 11, No. 1, 2000.

international humanitarian law, can provide visibility and tackle the nuances of colonialism, patriarchy, racism and whiteness that shaped international humanitarian law's beginnings,[13] the result being a holistic, less anthropocentric and colonial international humanitarian law that better protects Indigenous Peoples and the environment in armed conflicts.

Part II begins with a critical analysis on the environment "as a 'silent victim'" of armed conflict, given the environment is valued for its strategic importance during armed conflicts, but the consequent effects from warfare are often irremediable and completely overlooked.[14] This Part also explores the colonialism of armed conflicts, providing examples from Myanmar and Colombia, where Indigenous Peoples disproportionately experienced its impacts given their connection to ancestral lands, and contrary to rights to self-determination. Part III explores how international humanitarian law has insufficient legal provisions in protecting the environment and Indigenous Peoples, and how its Martens clause (via modern intersectional perspectives) can open the field to other areas of law to better protect these groups.[15] Part IV looks forward, analysing how the International Law Commission Draft Principles on the Protection of the Environment in Armed Conflict designating protected zones,[16] and the International Committee of the Red Cross Revised Guidelines providing

[13] B. Sovacool, above note 12, p. 5.
[14] Vincent Chapaux, Frédéric Mégret and Usha Natarajan, *The Routledge Handbook of International Law and Anthropocentrism,* Routledge, Oxon, 2023, p. 137; Filfteia Repez and Mirela Atanasiu, "The Environment – A "Silent Victim" of Armed Conflicts", *Relationes Internationales*, Vol. 12, No. 2, 2019, p. 123 and 127; Ricardo Pereira, Britta Sjöstedt and Torsten Krause, *The Environment and Indigenous People in the Context of the Armed Conflict and the Peacebuilding Process in Colombia: Implications for the Special Jurisdiction for Peace and International Criminal Justice*, German-Colombian Peace Institute and Centre for the Study of Latin American Criminal Law and Criminal Procedure Policy Brief, April 2021, p. 6.
[15] Martens clause, above note 7; M. Bothe, above note 1, pp. 575–9.
[16] International Law Commission, Draft Principles on Protection of the Environment in Relation to Armed Conflicts, UN Doc. A/74/10, 9 August 2022.

heightened environmental protection, can assist.[17] This Part also analyses developments in international environmental law (for instance, the precautionary principle), international human rights law (the right to a clean, healthy and sustainable environment including ecocentric and anthropocentric elements)[18] and international criminal law (i.e. increased avenues for environmental prosecution), as well as political avenues, which can help coordinate international humanitarian law to better protect the environment and Indigenous Peoples during armed conflict.[19]

II. Setting the Scene: A Critical Background Analysis of the Disproportionate Impacts the Environment and Indigenous Peoples Experience During Armed Conflicts

The intention of this section is to provide background analysis on how the environment has long been "a silent victim" of armed conflict (section A),[20] including the disproportionate impacts on Indigenous Peoples given their connection to the land and the colonial power imbalances that exist (section B). This is in the context that these two groups have long been overlooked in international humanitarian law, owing to its colonial origins, and are still today, meaning that increased protection and inclusion of both groups is still very much needed.

A. The Environmental Impacts of Armed Conflict Underscore the Need for Increased Protection

The environment has long suffered from armed conflict, remaining "a silent casualty" of modern warfare, with the consequences affecting its

[17] International Committee of the Red Cross, Guidelines on the Protection of the Natural Environment in Armed Conflict, 25 September 2020 (International Committee of the Red Cross Revised Guidelines).
[18] UNGA Res. 76/300, 28 July 2022 (The Human Right to a Clean, Healthy and Sustainable Environment); UN HRC Res. 48/13, 8 October 2021 (The Human Right to a Clean, Healthy and Sustainable Environment);
[19] M. Lehto, above note 8.
[20] V. Chapaux, F. Repez and R. Pereira, above note 14.

health and civilian populations' wellbeing, thereby underscoring the need for increased environmental protection.[21] International humanitarian law recognises "under the principle of distinction…the environment is a civilian object" deserving of protection[22] from indiscriminate attacks until used for military objectives.[23] Military objectives per Article 52(2) Additional Protocol I 1977 to the Geneva Conventions are "*those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage*".[24] An example of targeting the environment as a military objective includes the US' deployment of Agent Orange during the Vietnam War to defoliate trees opposition forces were hiding within.[25] The devastating environmental and local health impacts (including higher cancer incidence amongst veterans and birth defects in subsequent generations) illustrate the need for the environment's protection, alongside protecting civilian lives.[26]

Many instances exist where the environment has suffered disproportionately in breach of international humanitarian law principles of necessity,[27] proportionality[28] and precautions in and against the effects

[21] *Ibid*; International Committee of the Red Cross Revised Guidelines, above note 17, p. 4.
[22] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Arts. 48 and 52; Tara Smith, *The Prohibition of Environmental Damage During the Conflict of Hostilities in Non-International Armed Conflict*, PhD Thesis, University of Galway, 2013, p. 88.
[23] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Art. 51(4).
[24] *Ibid* Art. 52(2) (emphasis added).
[25] Eliana Cusato, "From Ecocide to Voluntary Remediation Projects: Legal Responses to 'Environmental Warfare'", *Melbourne Journal of International Law*, Vol. 19, No. 2, 2018; Rigmor Argren, "The Obligation to Prevent Environmental Harm in Relation to Armed Conflict", *International Review of the Red Cross* Vol. 105, No. 924, 2023, p. 1209.
[26] Pamela King, *The Use of Agent Orange in the Vietnam Ware and its Effects on the Vietnamese People*, Master's Thesis, Georgetown University, 2010, p. 24.
[27] Hague Convention IV, above note 7, Art. 23(g); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, 12 August 1949 (entered into force 21 October 1950), Art. 53 (Geneva Convention IV); US Military Tribunal Nuremberg, *United States v List*, Case No 11 TWC 757, Trial Judgment, 19 February 1948, pp. 1253–5.
[28] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Art. 51(5)(b).

of attacks,[29] reinforcing the need for environmental protection.[30] Necessity recognises military actions must serve a military purpose designed "to weaken the enemy" and "achieve their surrender",[31] with proportionality prohibiting actions causing "'collateral damage'…excessive in relation to the anticipated direct military advantage".[32] Precautions in attack is focused on "all feasible precautions in the choice of means and methods of attack" to avoid/minimise incidental loss, injury and damage to civilians and civilian objects, with precautions against the effects of attacks focused on "other necessary precautions to protect the civilian population, individual civilians and civilian objects…against the dangers resulting from military operations".[33] Despite these principles, experts argue Iraq's "dumping of up to four million barrels of crude oil into the Persian Gulf" preventing US forces landing on the Kuwait beach during the 1990–91 Gulf War was disproportionate.[34] Other violations include Russia's targeting of civilian water infrastructure and nuclear facilities during the Russia-Ukraine conflict,[35] prohibited in international humanitarian law,[36] and in breach of precautions in attack.[37]

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[29] *Ibid* Arts. 57–8.
[30] Emily Crawford and Alison Pert, *International Humanitarian Law*, Oxford University Press, 4th ed, Cambridge, 2021, pp. 43–51.
[31] *Ibid* p. 46.
[32] United Nations Environment Programme, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, 30 October 2009, p. 13.
[33] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Arts. 57–8.
[34] *Ibid*; Steven Freeland, *Addressing the Intentional Destruction of the Environment During Warfare Under the Rome Statute of the International Criminal Court*, PhD Thesis, Maastrict University, 2015, pp. 20–1; Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, Cambridge University Press, 4th ed, Cambridge, 2022, pp. 176 and 191.
[35] Mark Hibbs, "What Comes After Russia's Attack on a Ukrainian Nuclear Power Station?", *Carnegie Endowment for International Peace*, 17 March 2022, available at: https://carnegieendowment.org/2022/03/17/what-comes-after-russia-s-attack-on-ukrainian-nuclear-power-station-pub-86667; "The Multiple Impacts of War", *Nature Sustainability*, Vol. 6, No. 5, 2023, p. 479; Aaron Dumont, "A 'Clear' War Crime Against the Environment? The Destruction of the Nova Kakhovka Dam", *Völkerrechtsblog: International Law & Legal Thought*, 28 July 2023, available at: https://voelkerrechtsblog.org/a-clear-war-crime-against-the-environment/.
[36] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Art. 56(1); Additional Protocol II 1977 to the Geneva Conventions, above note 5, Art. 15.
[37] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Arts. 54 and 57–8.

Accordingly, the environment remains "a silent victim" of armed conflict with international humanitarian law protection being insufficient.[38] While international humanitarian law principles protect the environment as a civilian object,[39] States justify collateral environmental damage as necessary and proportionate to its military objective.[40] The precautionary principle of international environmental law (see Part IV) can help militaries understand their environmental obligations under these international humanitarian law principles.[41] International humanitarian law protection is justifiably focussed on civilians. However, international humanitarian law needs to further environmental protection per se, or from Indigenous perspectives, as a brother/sister protected in their own right.[42] This holistic understanding could better protect the environment, which is essential as Indigenous Peoples disproportionately experience armed conflict given their connection to ancestral lands.[43]

B. The Colonialism of Armed Conflicts: Indigenous Peoples Disproportionately Experience the Impacts Given Their Inherent Connection to the Land

[38] V. Chapaux, F. Repez and R. Pereira, above note 14.
[39] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Art. 52; Matthew Gillett, 'Criminalizing Reprisals Against the Natural Environment' *International Review of the Red Cross*, 2023, p. 2.
[40] Hague Convention IV, above note 7, Art 23(g); Additional Protocol I 1977 to the Geneva Conventions, above note 3, Art. 51(5)(b); Ilias Plakokefalos, "Reparation for Environmental Damage in *Jus Post Bellum:* The Problem of Shared Responsibility", in Carsten Stahn, Jens Iverson and Jennifer Easterday (eds.), *Environmental Protection and Transitions from Conflict to Peace*, Oxford University Press, Oxford, 2017, p. 260.
[41] Karen Hulme, "Using International Environmental Law to Enhance Biodiversity and Nature Conservation During Armed Conflict", *Journal of International Criminal Justice*, Vol. 20, No. 5, 2022, p. 1162.
[42] Brian Burkhart, *Indigenizing Philosophy Through the Land: A Trickster Methodology for Decolonizing Environmental Ethics and Indigenous Futures*, Michigan State University Press, Michigan, 2019, p. 69; Winona La Duke, *All Our Relations: Native Struggles for Land and Life*, South End Press, Chicago, 1999, pp. 167–196.
[43] *Ibid;* Anne Dienelt, *Armed Conflicts and the Environment: Complementing the Laws of Armed Conflict with Human Rights Law and International Environmental Law*, Springer, 2022, p. 15.

Indigenous Peoples' connection to the land sees them disproportionately experience armed conflict, impacting their identities as self-determining peoples to reinforce colonial inequities.[44] Influential scholar Mégret underscores the colonial genesis of international humanitarian law (discussed further in Part III) in which although the field seemingly provided protection for all civilian life, Indigenous Peoples and non-European peoples were excluded from such protection, therefore constituting an "othering" process that reinforced their supposed inferiority to European peoples.[45] Given the continued lack of protection for Indigenous Peoples during armed conflicts, including their special/inherent relationship with ancestral lands as "fundamental" to "their collective physical and cultural survival as peoples",[46] and "specific way of being, seeing and acting in the world", this colonialism exists in international humanitarian law and needs to be addressed.[47]

In this respect, international human rights law which applies alongside international humanitarian law could provide an essential mechanism (discussed in Part IV) to uphold Indigenous Peoples' connection to their lands, cultures and self-determination as distinct peoples during armed conflicts.[48] The United Nations Declaration on the

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[44] *State of the World's Indigenous Peoples,* Press Release, 14 January 2010.
[45] F. Mégret, above note 11.
[46] International Law Commission, Report of the International Law Commission, UN Doc. A/74/10, 29 April–7 June and 8 July–9 August 2019) 225; Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Case Series C No. 79, Judgment, 31 August 2001, pp. 24–5; Kealeboga Bojosi, "The African Commission Working Group of Experts on the Rights of Indigenous Communities/Populations: Some Reflections on its Works So Far", in Solomon Dersso (ed.), *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa*, Pretoria University Law Press, Cape Town, 2010, p. 126.
[47] Inter-American Court of Human Rights, *Río Negro Massacres v Guatemala*, Case Series C No. 250, Judgment, 4 September 2012), footnote 266 on p. 67, para. 177 referring to Inter-American Court of Human Rights, *Yakye Axa Indigenous Community v Paraguay*, Case Series C No. 125, Judgment, 17 June 2005, p. 76, para. 135.
[48] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*; United Nations Human Rights Office of the High Commissioner, *International Legal Protection of Human Rights in Armed Conflict,* Working Paper No HR/PUB/11/01, 2011.

Rights of Indigenous Peoples recognises Indigenous Peoples' right to self-determination and internal autonomy.[49] It is the overarching right to which other rights relate, including protection of Indigenous lands, resources and conservation.[50] The United Nations Declaration on the Rights of Indigenous Peoples prohibits Indigenous Peoples' forced displacement,[51] with no military activities to occur on their lands "unless justified by a relevant public interest or" where requested or consented by Indigenous Peoples.[52] Similarly, the International Covenant on Civil and Political Rights,[53] and International Covenant on Economic and Social Rights[54] which recognise the right to life[55] and right of minorities to culture,[56] further Indigenous rights to counter colonial inequities armed conflicts perpetuate.

However, armed conflicts still violate Indigenous rights to ancestral lands, life, and self-determination, "othering" such persons by failing to consider their lands worthy of protection, or often, by dehumanising Indigenous Peoples.[57] For instance, during Myanmar and Colombia's non-international armed conflict, Indigenous Peoples' experienced marginalisation given their biodiverse lands were targeted for resources.[58] In Myanmar, the military overthrew the elected civilian government in 2021, returning the country to an authoritarian State which has experienced conflicts from its independence in 1948.[59] The military

[49] *United Nations Declaration on the Rights of Indigenous Peoples,* UNGA Res. 61/295, 2 October 2007.
[50] *Ibid* Arts. 8, 10, 25–30 and 32.
[51] *Ibid* Art. 10.
[52] *Ibid* Art. 30(1).
[53] International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976).
[54] International Covenant on Economic, Social and Cultural Rights*,* 993 UNTS 3, 16 December 1966 (entered into force 3 January 1976).
[55] International Covenant on Civil and Political Rights, above note 53, Art. 6.
[56] International Covenant on Economic, Social and Cultural Rights, above note 54, Art. 27.
[57] F. Mégret, above note 11.
[58] Jonathon Liljeblad, *Intersections of Ecocide, Indigenous Struggle, & Pro-Democracy Conflict: Implications of Post-Coup Myanmar for Ecocide Discourses*, UCLA School of Law Symposium Paper, 2023, pp. 2–3 and R. Pereira, above note 14, p. 3.
[59] J. Liljeblad, above note 58, pp. 2 and 8.

continued its resource extraction including seizing lands of Indigenous Peoples living in rural areas at the country's borders who seek self-determination,[60] and also engaging in deforestation, mining and wildlife trade to impact Indigenous rights to life, privacy, health and culture, including access to water, food and housing to reinforce inequities.[61]

The military's grabbing of resources such as "timber, jade, and rare earth minerals" during a protracted non-international armed conflict has also increased the vulnerabilities of Myanmar's Indigenous Peoples to the triple planetary crisis of climate change, pollution and biodiversity loss which international humanitarian law must consider.[62] Given Myanmar's Indigenous population "have served as custodians of the environment for centuries", resource extraction disproportionately impacts and erodes their way of life.[63] It also increases their vulnerability to further conflict, given environmental degradation from armed conflicts and the impacts from the triple planetary crisis of climate change, pollution and biodiversity loss, often furthers such conflicts, therefore underscoring the interconnected and colonial nature of these issues which international humanitarian law needs to address.[64]

Similarly, Colombia has experienced decades of conflict, with its civil war commencing in 1964 resulting in Indigenous Peoples' marginalisation from their lands to underscore the colonialism of armed conflict and the need for Indigenous Peoples' further protection in international humanitarian law.[65] Prior to the Government's 2016 "peace agreement

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[60] *Ibid* pp. 2–3 and 8.
[61] *Ibid* p. 10.
[62] "Military Coup Has Exacerbated Already Severe Climate Risks in Myanmar: UN Experts", *United Nations Human Rights Office of the High Commissioner*, 27 November 2023, available at: https://www.ohchr.org/en/press-releases/2023/11/military-coup-has-exacerbated-already-severe-climate-risks-myanmar-un.
[63] *Ibid.*
[64] Geneva Academy, *Environmental Human Rights as a Tool in Early Warning and Conflict Prevention: The Role of the Human Rights Council*, Research Brief, 29 January 2024.
[65] Chris Kraul, "The Battles Began in 1964: Here's a Look at Colombia's War with the FARC Rebels", *Los Angeles Times*, 30 August 2016, available at:

with the Revolutionary Armed Forces of Colombia – People's Army" (FARC-EP),[66] more than three million people were displaced.[67] Its Constitutional Court recognised thirty-four Indigenous groups were at risk with Nukak Maku being close to extinction.[68] The non-international armed conflict involved violence between the State and guerrillas, between the guerrillas themselves (i.e., FARC-EP and the National Liberation Army (ELN)) and targeting of civilians.[69] Indigenous Peoples experienced brutal violence, including inhumane killing and burning of children, elders and community members engaging in social protest of ancestral lands.[70]

Resource extraction in Colombia also saw Indigenous Peoples experience disproportionate violations of the human right to the enjoyment of the highest attainable standard of physical and mental health,[71] the right to life,[72] and not to be subject to torture or cruel, inhuman and degrading treatment,[73] including clear violations of international humanitarian law and international criminal law.[74] For instance, guerrillas used Indigenous lands for illegal coca plantations to produce cocaine which the state sought to eradicate "via aerial fumigation with glyphosate herbicide" but which resulted in further "environmental degradation of native ecosystems and non-coca crops".[75] Gold mining also resulted in mercury pollution of rivers, such as the Amazon, and contaminated fish

https://www.latimes.com/world/mexico-americas/la-fg-colombia-farc-explainer-snap-story.html.

[66] *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace*, Colombia–FARC-EP (24 November 2016); R. Pereira, above note 14, p. 3.

[67] United Nations High Commissioner for Refugees, *'To Lose Our Land is to Lose Ourself": Indigenous People and Forced Displacement in Colombia*, Policy Brief, 4 March 2010, p. 2.

[68] *Ibid.*

[69] R. Pereira, above note 14, p. 4.

[70] David Goyes et al., "Genocide and Ecocide In Four Colombian Indigenous Communities: The Erosion of a Way of Life and Memory", *British Journal of Criminology*, Vol. 61, 2021, pp. 971–4.

[71] International Covenant on Economic, Social and Cultural Rights, above note 54, Art. 12.

[72] International Covenant on Civil and Political Rights, above note 53, Art. 6.

[73] *Ibid,* Art. 7.

[74] R. Pereira, above note 14.

[75] *Ibid* p. 4.

which is the staple food of Colombia's Indigenous Peoples.[76] The targeting of oil infrastructure saw "more than 3 million barrels of crude oil seeping into Colombian soils and rivers",[77] with the resulting environmental destruction eroding Indigenous cultural ways of life, constituting genocide and, some contend, ecocide (but the latter is yet to be recognised as a crime in international criminal law).[78] Colombia's Indigenous Peoples, particularly children, were recruited into illegal armed groups contrary to their rights, including autonomy and self-determination, highlighting the need for their protection in international humanitarian law.[79]

Consequently, if international humanitarian law is to better protect Indigenous Peoples, it must recognise armed conflict and its environmental degradation disproportionately impacts Indigenous Peoples, furthering colonial harms given their connection to the land. To rectify the situation, international humanitarian law should be interpreted "in light of" international human rights law,[80] given recent decisions recognise these bodies are "fused", including applying international environmental law principles.[81] This approach can uphold Indigenous self-determining rights, including the right to a clean, healthy and sustainable environment, which is important given the interconnected impacts of armed conflict and the triple planetary crisis, to better protect Indigenous Peoples and the environment during modern conflicts.[82]

III. The Inadequacy and Opportunities in International Humanitarian Law to Better Protect the Environment and Indigenous Peoples

[76] *Ibid.*
[77] *Ibid.*
[78] *Ibid* p. 3.
[79] *Ibid,* p. 4.
[80] R. Steenberghe, above note 8, p. 15.
[81] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v Kunarac*, Case Nos IT-96-23-T and IT-96-23/1-T, Judgment (Trial Chamber II), 22 February 2001); K. Hulme, above note 40, p. 1162.
[82] R. Pereira, above note 14, p. 14.

Before providing pathways forward, this Part analyses how international humanitarian law has long fallen short in protecting the environment and Indigenous Peoples. The first section analyses conventions available in international humanitarian law to illustrate few provisions explicitly protect the environment and Indigenous Peoples (section A).[83] The second section exposes international humanitarian law's core problem – that is, it has "othered" and excluded Indigenous Peoples and the environment from its protection via the Martens clause on the standard of "humanity" which upheld European notions of civilisation and who was deserving of protection.[84] Still, modern interpretations of the Martens clause can open the door to international environmental law, international human rights law, international criminal law and Indigenous knowledge to coordinate international humanitarian law, and to better protect Indigenous Peoples and the environment during armed conflicts (section B).[85]

A. Few International Humanitarian Law Conventions Protect the Environment and Indigenous Peoples' Interests[86]

As noted in Part II, many armed conflicts result in environmental destruction, but unfortunately few conventions in international humanitarian law provide protection for the environment or Indigenous Peoples' interests.[87] Following the Vietnam War, the Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques of 1976 (ENMOD) was adopted.[88] The US military used the environmental modification technique of cloud-seeding during Operation Popeye to increase rainfall during the monsoon season in Vietnam "to

[83] M. Bothe, above note 1, pp. 570 and 575–9.
[84] Martens clause, above note 7; F. Mégret, above note 11, pp.1–3.
[85] Martens clause, above note 7; D. Fleck and A. Cassese, above note 12; M. Lehto, above note 8.
[86] M. Bothe, above note 1, pp. 570–5.
[87] *Ibid.*
[88] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1108 UNTS 151, 10 December 1976 (entered into force 5 October 1978) (ENMOD).

destabilise the enemy" and help it "to win the war".[89] ENMOD has consequently prohibited "environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party".[90] While the alternative requirement of "widespread, long-lasting *or* severe", imposes a lower standard of harm, ENMOD proscribes "the environment [being turned] into a 'weapon'".[91] ENMOD therefore prohibits techniques provoking earthquakes and tsunamis, providing the environment some protection, but not explicit protection per se.[92]

In contrast, Additional Protocol I 1977 to the Geneva Conventions contains two environmental provisions (applicable during international armed conflicts), but with limited utility to protect the environment and Indigenous lands given its high threshold of harm.[93] Under Article 35(3) "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment" are prohibited.[94] Article 55(1) details "[c]are shall be taken in warfare to protect the natural environment" from this level of damage, proscribing "methods or means of warfare which are intended or may be expected to cause" environmental damage "prejudic[ing] the health or survival of the population".[95] Only Article 35(3) protects the environment per se, with Article 55(1) incorporating anthropocentric concerns, and the

[89] "274. Memorandum From the Deputy Under Secretary of State for Political Affairs (Kohler) to Secretary of State Rusk", *Office of the Historian: United States of America Department of State*, available at: https://history.state.gov/historicaldocuments/frus1964-68v28/d274; Eleanor Cummins, "With Operation Popeye, the U.S. Government Made Weather an Instrument of War", *Popular Science*, 20 March 2018, available at: https://www.popsci.com/operation-popeye-government-weather-vietnam-war/.
[90] ENMOD, above note 88, Art. 1.
[91] *Ibid; Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, above note 31, p. 12; A. Dienelt, above note 43, p. 150.
[92] ENMOD, above note 88.
[93] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Arts. 35(3) and 55(1).
[94] *Ibid* Art. 35(3).
[95] *Ibid* Art. 55(1); R. Argren, above note 25, p. 7; Michael Schmitt, *Essays on Law and War at the Fault Lines*, Springer, The Hague, 2012, p. 375.

triple cumulative standard "of widespread, long-term and severe damage" in Article 35(3), imposing "a threshold of harm" too high to meet in conventional warfare.[96] The environment and lands to which Indigenous identities are tied therefore remain under-protected in international humanitarian law.

Similarly, the Convention on Prohibitions or Restrictions on the Use of Certain Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects and its Protocol III of 1980, provides insufficient protection of the environment and Indigenous Peoples as it imposes the same standard of harm.[97] The Convention's preamble proscribes "methods or means of warfare…intended, or may be expected to cause widespread, long-term and severe damage to the natural environment".[98] An amendment extends this Convention to apply to non-international armed conflicts, with Article 2(4) Protocol III of 1980 prohibiting incendiary weapon use against forests or plants (except where they constitute military objectives).[99] However, the cumulative threshold means it falls short of providing adequate environmental protection during armed conflicts.[100]

Accordingly, international humanitarian law conventions provide limited protection of the environment and Indigenous Peoples' interests.

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[96] Additional Protocol I 1977 to the Geneva Conventions, above note 3; *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, above note 31, p. 11; M. Bothe, above note 1, pp. 575–6; R. Argren, above note 25, p. 7.

[97] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 1342 UNTS 137, 10 October 1980 (entered into force 2 December 1983).

[98] *Ibid* preambular para. 4.

[99] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, above note 97; *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, above note 32, p. 12.

[100] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, above note 97; *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, above note 32, p. 12; M. Bothe, above note 1, pp. 575–6.

No direct environmental protections exist in Additional Protocol II 1977 to the Geneva Conventions, applicable during non-international armed conflicts, the most common form of warfare which impact Indigenous Peoples disproportionately.[101] While customary international humanitarian law furthers principles of distinction, proportionality, and precautions in and against the effects of attacks, greater protection of these groups is needed.[102] This limited protection of the environment could be attributed to the late attention provided in international environmental law to recognise the causal link between humans and environmental degradation as recognised in the Stockholm Declaration.[103] Regardless, what is clear is that international humanitarian law's colonial origins has, via its Martens Clause on the standard of "humanity", excluded Indigenous Peoples from its protection.[104] As discussed in the next section, modern interpretations of the clause can open the door to international environmental law, international human rights law and international criminal law to better protect the environment and Indigenous Peoples in armed conflicts.[105]

B. International Humanitarian Law's Core Problem: Its Colonial Origins Has "Othered" Indigenous Peoples but Modern Interpretations of the Martens Clause Could Open the Door to Better Protect Indigenous Peoples and the Environment

[101] Additional Protocol II 1977 to the Geneva Conventions, above note 5.
[102] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005) pp. 3–74, rules 1–24.
[103] UNGA Res. 2994 (XXVII), 15 December 1972 (Stockholm Declaration). For instance, Art. 4 of the Stockholm Declaration declared "5 June as World Environment Day and urges Governments and organizations in the United Nations system to undertake on that day every year world-wide activities reaffirming their concern for the preservation and enhancement of the environment, with a view to deepening environmental awareness and to pursuing the determination expressed at the Conference".
[104] Martens clause, above note 7.
[105] D. Fleck and A. Cassese, above note 12; M. Lehto, above note 8.

International humanitarian law's core problem is its colonial origins with the field having, via its Martens Clause on the standard of "humanity", originally applied to exclude Indigenous Peoples from protection.[106] As Mégret notes, while international humanitarian law is to protect "all individuals in armed conflict", its constitution "othered" Indigenous Peoples justifying colonial violence against the "barbarian savage".[107] The Martens clause, which appeared in the Hague Convention of 1907, and the Geneva Conventions' Additional Protocols,[108] implicitly included all humanity, but was applied to exclude Indigenous Peoples deemed not part of civilised society.[109] Its inclusive and exclusive nature is as follows:[110]

> [u]ntil a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[111]

These "laws of humanity" and "dictates of the public conscience" were Eurocentric and justified colonial warfare against "inferior" non-European persons,[112] rendering invisible injustices perpetrated against Indigenous Peoples.[113] Even though international humanitarian law arose near the end of the nineteenth century, when European colonial powers instigated the "Scramble for Africa", carving up and dominating the

[106] Martens clause, above note 7.
[107] F. Mégret, above note 11, pp. 2–5, 17 and 29.
[108] Martens clause, above note 7.
[109] F. Mégret, above note 11, pp. 14–21.
[110] *Ibid;* A. Cassese, above note 12, p. 188.
[111] Martens clause of the Hague Convention IV, above n 7.
[112] Martens clause, above note 7.
[113] F. Mégret, above note 11.

continent, "the laws of humanity" did not apply.[114] These conflicts were different to wars between European States, given tribes were deemed to have no laws of war and would resort to brutal violence.[115] Inhumane weapons such as dum dum bullets (infected with smallpox) were permitted, even if unlawful during European wars.[116] Similarly, France and Italy's "extreme violence" in Algeria, Madagascar and Morocco was "permissible", as was Germany's horrific massacre of the African Herero.[117] International humanitarian law in its early years furthered the colonial project, with its harms casting a "dark" forgotten shadow of the injustices Indigenous Peoples experienced.[118]

Still, modern anti-racist, postcolonial and indigenous interpretations of the Martens clause present opportunities to open the door to better protect Indigenous Peoples and the environment through a less colonial and more "universal" application of "the principle of humanity".[119] For instance, anti-racist theories of justice focus on challenging "dominant notions of justice" that reinstate rather than delegitimate "extant knowledge and power regimes, including legacies of discrimination".[120] Similarly, indigenous theories of justice "challenge the historical and contemporary institutions" using their power to oppress Indigenous Peoples.[121] Finally, postcolonial theories of justice "seeks to understand who is being heard or silenced, whose experiences are acknowledged, who is capable of producing knowledge, and whose knowledge is excluded".[122] Both indigenous and postcolonial theories have a strong focus on

[114] *Ibid* p. 4; Martens clause of the Hague Convention IV, above note 7; Samuel Hartridge, *The Rule of Law in War: Can There Be A Rule of law Regulating the Use of Lethal Force in International Armed Conflicts, Should There be Such a Rule of Law, and to What Extent is There One?*, PhD Thesis, UNSW Sydney, 2022, p. 129.
[115] F. Mégret, above note 11, pp. 3–11.
[116] *Ibid* p. 11.
[117] *Ibid* pp. 11–12 and 19–20.
[118] *Ibid* pp. 5 and 22.
[119] Martens clause, above note 7; D. Fleck and A. Cassese, above note 12; B. Sovacool, above note 12, p. 5.
[120] Sovacool, above note 12, at p. 3.
[121] *Ibid.*
[122] *Ibid,* at p. 4.

upholding human rights to end systems of oppression with indigenous justice focused on restoring Indigenous traditional knowledge, self-determination and Indigenous-led governance including to their ancestral lands which international humanitarian law has failed to adequately protect.[123]

Consequently, principles from international humanitarian law such as distinction,[124] proportionality[125] and precautions in and against the effects of attacks[126] are important in determining to what extent military operations can occur,[127] but they can be extended via modern understandings of the Martens' clause "principle of humanity" to more fully protect the environment and Indigenous Peoples.[128] For instance, anti-racist interpretations of "the principle of humanity" in the Martens clause proscribes "inflicting unnecessary suffering, injury and destruction", illustrating that modern international humanitarian law recognises violence per racial understandings of who is and is not superior, is never justified.[129] Instead, universally upholding international humanitarian law's core tenet of protecting civilian life and objects from harm is the way forward.[130]

Similarly, postcolonial interpretations of "the principle of humanity" in the Martens clause can broaden the field's application to include considerations from international environmental law, international human rights law and international criminal law, to protect the

[123] *Ibid,* at p. 5.
[124] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Arts. 48 and 52.
[125] *Ibid* Art. 51(5)(b).
[126] *Ibid* Arts. 57–8.
[127] Hague Convention IV, above not 7, Art. 23(g); Geneva Convention IV, above note 27, Art. 53.
[128] Martens clause, above note 7.
[129] *Ibid*; *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, above note 32, p. 13; International Committee of the Red Cross Revised Guidelines, above note 17, pp. 56–7, paras. 125–128.
[130] *Ibid.*

environment and Indigenous Peoples' rights.[131] It is now accepted the Martens' clause focus on upholding humanity's interests and "the public conscience",[132] encompasses environmental considerations, including for future generations.[133] A postcolonial approach to the Martens Clause can also help to fill gaps and promote customary international humanitarian law and new treaties to protect Indigenous Peoples and the environment.[134]

In this respect, the International Committee of the Red Cross study of 2005, "Customary International Humanitarian Law", illustrates how international humanitarian law is becoming receptive to environmental concepts outside its own field to better protect the environment and Indigenous interests. Rule 44 imposes standards of "due regard" and "feasible precautions" (variations of international humanitarian law principles) to protect the natural environment from "incidental damage" during military operations.[135] Its final sentence details: "[l]ack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions."[136] Rule 44 applies the international environmental law precautionary principle to international humanitarian law's duty to take precautions, which was "revolution[ary]" given limited state practice existed, with the International Committee of the Red Cross drawing on the Nuclear Weapons Advisory Opinion of the International Court of Justice confirming environmental considerations are relevant in armed conflicts.[137] While the Nuclear Weapons Advisory Opinion condemns the

[131] Martens clause, above note 7; B. Sovacool, above note 12, p. 5.
[132] *Ibid.*
[133] *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, above note 31, p. 13; International Committee of the Red Cross Revised Guidelines, above note 17, pp. 79–80, rule 16.
[134] *Ibid;* Martens clause, above note 7.
[135] J.M. Henckaerts and L. Doswald-Beck, above note 102, pp. 147–151, rule 44.
[136] *Ibid.*
[137] *Ibid*; M. Bothe, above note 1, p. 575; International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, paras. 30–1 (*Nuclear Weapons Advisory Opinion*).

"destructive power of nuclear weapons [which] cannot be contained in either space or time,"[138] it furthers colonial power, permitting nuclear weapons in an instance of extreme self-defence where "its very survival would be at stake".[139]

Despite this, modern postcolonial/indigenous theories of what is "humanity" and the Martens' clause "dictates of the public conscience"[140] has seen progress via the development of the Treaty on the Prohibition of Nuclear Weapons 2017 (TPNW) to better protect the environment and Indigenous Peoples.[141] The TPNW (albeit having no signatures from nuclear States or States possessing nuclear weapons), applies the Nuclear Weapons Advisory Opinion to prohibit nuclear weapons' use, testing and manufacture outright.[142] It also provides environmental remediation and victim assistance provisions to recognise that Indigenous Peoples disproportionately experienced nuclear weapons activities owing to US, UK and French testing in ancestral lands in the Pacific region such as at the Marshall Islands, French Polynesia/Te Ao Maohi, Kiribati and Maralinga and Emu Field.[143] This recognition alongside environmental remediation and victim assistance provisions provides visibility to the environment and Indigenous Peoples to acknowledge that the harm experienced is not only historical, but one that continues to impact the environment and Indigenous Peoples today.[144]

In sum, although international humanitarian law has few environmental provisions protecting the environment and Indigenous

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[138] *Ibid* p. 21, para. 35.
[139] *Ibid* p. 41, para. 97.
[140] Martens clause, above note 7.
[141] Treaty on the Prohibition of Nuclear Weapons, 57 ILM 347, 7 July 2017 (entered into force 22 January 2021).
[142] *Ibid*, Art. 1; *Nuclear Weapons Advisory Opinion*, above note 137.
[143] "Pacific Nuclear Test Archive", *Pace University,* available at: https://disarmament.blogs.pace.edu/nuclear-test-archive/#:~:text=IPPNW%20report.,bombings%20in%20Hiroshima%20and%20Nagasaki.
[144] Treaty on the Prohibition of Nuclear Weapons, above note 141, preambular para. 7 and Art. 6.

Peoples, its Martens clause provides a mechanism to open the door to other fields such as international environmental law, international human rights law, international criminal law, and Indigenous knowledge.[145] The application of principles and human rights from these areas can create an integrated approach to international humanitarian law, that is holistic and less colonial/anthropocentric in its application given it actively seeks to include, and better protect, both the environment and Indigenous Peoples during armed conflict.[146] The following section analyses developments in these bodies of law and the inclusion of Indigenous knowledge in international humanitarian law to achieve this end.

IV. Looking Forward

This Part looks to potential avenues for international humanitarian law to better protect the environment and Indigenous Peoples during armed conflict per the Marten's clause "dictates of the public conscience" and "humanity".[147] It begins with an analysis of the International Committee of the Red Cross Revised Guidelines[148] and the International Law Commission Draft Principles on the Protection of the Environment in Armed Conflict, [149] given these international documents further interpret existing international humanitarian laws that parties are to follow during armed conflict, and as they are becoming increasingly receptive to environmental and indigenous interests. It then looks further to avenues in international environmental law and international human rights law, including the right to a clean, healthy and sustainable environment to further coordinate international humanitarian law. It also considers the need for increased international criminal law prosecution of crimes committed against the environment and Indigenous Peoples, if the field is

[145] Martens clause, above note 7; D. Fleck and A. Cassese, above note 12; M. Lehto, above note 8.
[146] M. Lehto, above note 8.
[147] *Ibid;* Martens clause, above note 7.
[148] International Committee of the Red Cross Revised Guidelines, above note 17.
[149] International Law Commission, Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above n 16.

to move from its colonial origins to better protect the environment and Indigenous Peoples during armed conflicts.

A. The International Committee of the Red Cross Revised Guidelines and the International Law Commission Draft Principles on the Protection of the Environment in Armed Conflict

The International Committee of the Red Cross Revised Guidelines provide an important source to create a holistic and less colonial international humanitarian law that includes and protects the environment and Indigenous Peoples during armed conflict.[150] Firstly, the International Committee of the Red Cross recognises "the Martens clause to be of a customary nature",[151] detailing where gaps in treaty law exist, States cannot argue what is not explicitly prohibited, is permitted.[152] This interpretation is important given technological developments have changed warfare with scientific advances increasing our knowledge and ability to protect the environment.[153] This protection is especially important in a time of the triple planetary crisis where the effects of climate change exacerbate the underlying vulnerabilities of populations, including from armed conflict, and where the science of the Intergovernmental Panel on Climate Change demonstrates the necessity and urgency for such protection.[154] Secondly, the International Committee of the Red Cross

[150] International Committee of the Red Cross Revised Guidelines, above note 17.
[151] Martens clause, above note 7.
[152] International Committee of the Red Cross Revised Guidelines, above note 17, p. 79, rule 16, referring to *Nuclear Weapons Advisory Opinion*, above note 137.
[153] International Committee of the Red Cross Revised Guidelines, above note 17, p. 79, para. 200.
[154] For instance, the Intergovernmental Panel on Climate Change, *AR6 Synthesis Report: Climate Change 2023*, Geneva, p. 68 finds "in the near term (2021 – 2040), the 1.5°C global warming level is very *likely* to be exceeded under the very high GHG emissions scenario (SSP5-8.5)", meaning that deep-cuts in greenhouse gas emissions are needed. It also finds at pp. 5 – 7 that climate change is already impacting ecosystems extensively and the "adverse impacts from human-caused climate change will continue to intensify". For a summary of the report's ten key findings, see Sophie Boehm and Clea Schumer, "2023 IPCC Report on Climate Change", *World Resources Institute,* 20 March 2023, available at: https://www.wri.org/insights/2023-ipcc-ar6-synthesis-report-climate-change-findings.

Guidelines makes important strides given they interpret the "principles of humanity and the dictates of public conscience" as requiring environmental protection not just to ensure humanity's survival, but given its value "in and of itself".[155] This approach aligns with Indigenous understandings of non-human beings' personhood as being connected to the land to protect both groups during armed conflict.[156]

The International Committee of the Red Cross Revised Guidelines also provide some holistic understandings of protecting the environment from "widespread, long-term and severe" harm in Articles 35(3) and 55(1) of Additional Protocol I 1977 to the Geneva Conventions,[157] to further its protection, albeit retaining the cumulative triple threshold.[158] While the International Committee of the Red Cross applies traditional influences of the Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques of 1976,[159] whereby "widespread" applies to large areas of at least several hundred square kilometres, it is realistic on the meaning of "long-term".[160] The International Committee of the Red Cross recognises that biotoxins in plants, animals and humans persist for many years with technological developments in assessing damage, allowing harms which did not meet "the 'long-term' test" of decades of harm, to do so today.[161] On "severe", the International Committee of the Red Cross reinforces Article 35(3) as ecocentric, prohibiting "serious or significant disruption" to ecosystems,[162] with Article 55(1) deeming damage to population "health or survival" "a

[155] *Ibid* pp. 79–80, para 201; Martens clause, above note 7.
[156] B. Burkhart and W. La Duke, above note 42.
[157] Additional Protocol I 1977 to the Geneva Conventions, above note 3.
[158] International Committee of the Red Cross Revised Guidelines, above note 17, pp. 29–39, rule 2.
[159] ENMOD, above note 88.
[160] International Committee of the Red Cross Revised Guidelines, above note 17, p. 31, para. 52.
[161] *Ibid* pp. 34–5, paras. 61–6.
[162] *Ibid* p. 36, paras. 67–8.

factor" in assessing damage with the environment's interdependency seeing harm extend to many of its components.[163]

The International Committee of the Red Cross Revised Guidelines therefore reinforce the holistic interconnections between humans and the environment to further its protection,[164] which is crucial given the enjoyment of the right to a safe, clean, healthy and sustainable environment is "depend[ent] on a healthy biosphere".[165] The right's "substantive elements" focus on providing "a safe climate, clean air, clean 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".[166] These elements are underscored by other important international treaties such as the United Nations Framework Convention on Climate Change[167] where States are "to prevent dangerous anthropogenic interference with the climate system",[168] and the Paris Agreement which aims "to limit the [global average] temperature increase to 1.5°C above pre-industrial levels".[169] The International Red Cross Revised Guidelines therefore furthers the focus of the right to a safe, clean, healthy and sustainable environment in bridging anthropocentric and ecocentric approaches to preventing environmental degradation, with the right recognising that "[n]ature's contributions to people are immense and irreplaceable", all-encompassing and

[163] *Ibid* pp. 36–7, paras. 69–71; Additional Protocol I 1977 to the Geneva Conventions, above note 3.
[164] *Ibid.*
[165] Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, David R. Boyd: Human Rights Depend on a Healthy Biosphere, UN Doc. A/75/161, 15 July 2020, p. 2.
[166] David Boyd, 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/74/161, 15 July 2019, p. 13, para. 43; Right to a Healthy Environment: Good Practices, UN Doc A/HRC/43/53, 30 December 2019, pp. 8–18.
[167] United Nations Framework Convention on Climate Change, 1771 UNTS 107, 9 May 1992 (entered into force 21 March 1994).
[168] Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, above note 166.
[169] Paris Agreement to the United Nations Framework on Climate Change, TIAS No. 16-1104, 12 December 2015 (entered into force 4 November 2016), Art. 2(1)(a).

interrelated.[170] This focus is crucial given it challenges the Western anthropocentric perspective in which humans are separate from nature and the most important in the hierarchy of living beings,[171] to create a more holistic and decolonial application of international humanitarian law, and to reframe our own relationship with the environment, as deserving protection.

Similarly, the International Law Commission's Draft Principles on the Protection of the Environment in Armed Conflict, which applies during international armed conflicts and non-international armed conflicts, can help international humanitarian law to better protect the environment and Indigenous Peoples during armed conflict, given its specific provisions on designating protected zones (Principle 4) and protection of Indigenous Peoples' lands (Principle 5).[172] Protected zones in international humanitarian law are demilitarised zones in which parties to a conflict cannot use such zones for military purposes,[173] and are often known as "safe havens", "buffer zones" or "protected areas" given they protect civilians not taking part in hostilities.[174] Principle 4 extends this concept by recognising "States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones." Protected zones have similarities to the international environmental law concept of protected areas as "a geographically defined area which is designated or regulated and managed to achieve specific

[170] Human Rights Depend on a Healthy Biosphere, above note 165, p. 4, para. 3.
[171] Suzanne Hindmarch and Sean Hillier, "Reimagining Global Health from Decolonisation to Indigenization'", *Global Public Health*, Vol. 18, No. 1, 2023, pp. 4–6.
[172] Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above note 16; M. Lehto, above n 8.
[173] K. Hulme, above note 41, pp. 1168–71; "Demilitarized Zones", *ICRC*, Webpage, available at: https://casebook.icrc.org/a_to_z/glossary/demilitarized-zones#:~:text=A%20"demilitarized%20zone"%20is%20an,or%20during%20an%20armed%20conflict..
[174] Emanuela-Chiara Gillard, *Enhancing the Security of Civilians in Conflict: Notifications, Evacuations, Humanitarian Corridors, Suspensions of Hostilities and Other Humanitarian Arrangements*, Research Paper, April 2024, pp. 46–7.

conservation objectives".[175] Principle 18 continues the protection during armed conflict where the protected zone contains no military objectives.[176] Principle 5 is broader recognising in armed conflicts "States, international organizations and other relevant actors shall take appropriate measures…to protect the environment of the lands and territories that indigenous peoples inhabit or traditionally use," detailing effective consultations with Indigenous institutions is needed to progress remedial measures.[177] Cooperation with Indigenous Peoples, including in creating protected zones is crucial, and per the elements of free, prior and informed consent of the United Nations Declaration on the Rights of Indigenous Peoples, can further Indigenous rights during armed conflicts to their lands and self-determination.[178]

Protected zones could therefore enable international humanitarian law to further Indigenous self-determination and better protect the environment during armed conflicts, if implemented correctly. This focus is crucial given the direct link between the ancestral lands of Indigenous Peoples and the enjoyment of their human rights which these lands provide, including rights to food and water,[179] privacy[180] and cultural rights.[181] Indigenous peoples may be sceptical of Principle 4 of the Draft Principles on the Protection of the Environment in Armed Conflict,[182] given colonial powers used protected areas like national parks to evict

[175] Convention on Biological Diversity, 1760 UNTS 69, 5 June 1992, (entered into force 29 December 1993), Art. 2.
[176] Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above note 16.
[177] *Ibid.*
[178] *United Nations Declaration on the Rights of Indigenous Peoples*, above note 49, Arts. 10–11, 19 and 28.
[179] International Covenant on Economic, Social and Cultural Rights, above note 54, Arts. 11–12.
[180] *United Nations Declaration on the Rights of Indigenous Peoples*, above note 49, Art. 12; International Covenant on Civil and Political Rights, above note 53, Art. 17.
[181] *United Nations Declaration on the Rights of Indigenous Peoples*, above note 49, Arts. 3, 5, 8, 11–12, 14–16, 31, 36; International Covenant on Economic, Social and Cultural Rights, above note 53, Arts. 1, 3, 6 and 15.
[182] Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above note 16.

Indigenous Peoples from their lands for "conservation".[183] However, the Indigenous Karen created the Salween Peace Park, during Myanmar's non-international armed conflict, to further rights to self-determination and conservation of ancestral lands.[184] Given Indigenous lands constitute eighty percent of the world's biodiversity, with Indigenous Peoples having traditional knowledge to ensure it flourishes, including during wartime, environmental conservation must occur in conjunction with Indigenous Peoples, with protected zones providing this possibility.[185]

The Salween Peace Park provides a helpful example to international humanitarian law on how such areas can enable Indigenous resistance to defend their lands, further environmental protection and self-determining rights during a brutal non-international armed conflict.[186] The Salween Peace Park provides visibility of the Karen's plight to revive traditional practices and achieve self-determination.[187] Its Charter contains provisions on governance including representation from the Karen National Union, civil society organisations and community representatives, with provisions protecting the environment, cultural heritage and conservation.[188] The intention is to uphold the Karen's traditional land institution of kaw, a governance system where communities practice subsistence agriculture, create rice paddies, hunt, gather and rotate through ancestral lands.[189] While the Karen experience rights violations, the Salween Peace Park

[183] Stan Stevens, *Indigenous Peoples, National Parks, and Protected Areas: A New Paradigm Linking Conservation, Culture and Rights*, University of Arizona Press, Tuscon, 2014) pp. 3–12; Victoria Tauli-Corpuz, Rights of Indigenous Peoples, UNGA Res. 71/229, 29 July 2016, p. 15, para. 39.
[184] Andrew Paul, Robin Roth and Saw Twa, "Conservation for Self-Determination: Salween Peace Park as an Indigenous Karen Conservation Initiative", *AlterNative*, Vol. 19, No. 2, 2023.
[185] "International Day for Biological Diversity 2023: From Agreement to Action – Building Back Biodiversity Through Inclusive Conservation", *International Union for Conservation of Nature*, Webpage, available at: https://www.iucn.org/story/202305/international-day-biological-diversity-2023-agreement-action-building-back; Claudia Sobrevila, *The Role of Indigenous Peoples in Biodiversity Conservation: The Natural but Often Forgotten Partners*, Report, World Bank, May 2008, p. xii.
[186] A. Paul, above note 184.
[187] *Ibid* p. 272.
[188] *Ibid* pp. 276–8.
[189] *Ibid* p. 274.

provides active means to assert Indigenous autonomy, creating a vision of peace to protect the land and Karen ways of life.[190]

Accordingly, the International Committee of the Red Cross Revised Guidelines[191] and the International Law Commission Draft Principles on the Protection of the Environment in Armed Conflict incorporate international environmental law principles into international humanitarian law to protect the environment and Indigenous Peoples in armed conflicts.[192] However, the mechanisms are limited, with international humanitarian law's "principles of humanity" and "dictates of public conscience" as expressed in the Martens clause requiring coordination.[193] The following section analyses how interpreting international humanitarian law "in light of" international environmental law and international human rights law principles creates coherency to further protect the environment and Indigenous Peoples.[194]

B. Interpreting International Humanitarian Law "in Light of" International Environmental Law and International Human Rights Law Concepts

Alongside the international humanitarian law documents discussed in the previous section, international humanitarian law needs to be further interpreted "in light of" international environmental and international human rights law to better protect the environment and Indigenous

[190] Carloyn Cowan, 'Award-Winning, Indigenous Peace Park Dragged into Fierce Conflict in Myanmar', *Mongabay*, 15 May 2023, available at: https://news.mongabay.com/2023/05/award-winning-indigenous-peace-park-dragged-into-fierce-conflict-in-myanmar/.
[191] International Committee of the Red Cross Revised Guidelines, above note 17.
[192] Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above note 16.
[193] Martens clause, above note 7; M. Lehto, above note 8.
[194] R. Steenberghe, above note 8, pp. 15 and 22; K. Hulme, above note 41, pp. 1158 and 1161–71.

interests.[195] For instance, international environmental law's precautionary principle and conventions can delineate an understanding of the term "environment" which remains undefined in international humanitarian law.[196] It can also increase the standard of care in protecting the environment under international humanitarian law principles and Additional Protocol I 1977 to the Geneva Conventions,[197] and further coordinate designated protected zones under the International Law Commission Draft Principles on the Protection of the Environment in Armed Conflict.[198] Similarly, other international environmental law/international human rights law influences such as the right to a clean, healthy and sustainable environment (recognised by the Human Rights Council and General Assembly),[199] and the doctrine of non-State armed groups as "guardians of the environment" further international humanitarian law protections of the environment and Indigenous lands.[200]

Starting with international humanitarian law's lack of a definition on the environment, international environmental law treaties can help delineate the term and apply a holistic understanding to uphold the environment's biodiversity and Indigenous understandings of the world.[201] Additional Protocol I 1977 to the Geneva Conventions per "Article 55

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[195] *Ibid*; Michael Bothe, "The Ethics, Principles and Objectives of Protection of the Environment in Times of Armed Conflict", in Rosemary Rayfuse (ed), *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict*, Brill, Leiden, 2014, pp. 91 and 102–7, paras 3.2–3.3; Eliana Cusato, *The Ecology of War and Peace: Marginalising Slow and Structural Violence in International Law*, Cambridge University Press, Cambridge, 2021, pp. 91–2.
[196] K. Hulme, above note 41, pp. 1163–5.
[197] *Ibid* 1165–67; Additional Protocol I 1977 to the Geneva Conventions, above note 3, Art. 55.
[198] Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above note 16, principles 4 and 18.
[199] HRC Res. 19/10, 19 April 2012 (Human Rights and the Environment) and UNGA Res. A/76/L.75, 26 July 2022 (The Human Right to a Clean, Healthy and Sustainable Environment).
[200] Thibaud de La Bourdonnaye, "Greener Insurgencies? Engaging Non-State Armed Groups for the Protection of the Natural Environment During Non-International Armed Conflicts", *International Review of the Red Cross*, Vol. 102, No. 914, 2020, p. 584.
[201] K. Hulme, above note 41, pp. 1163–5.

requires care to be taken in warfare to protect the natural environment",[202] but with no definition and with negotiating States preferring a "division of the 'natural environment' from the 'human environment'".[203] While the Draft Principles on the Protection of the Environment in Armed Conflict uses the term "environment", no definition exists.[204] The Convention on Biological Diversity 1992[205] could further this term to maintain biodiversity "within species, between species and of ecosystems".[206] Given this approach includes diverse conceptions of nature, wildlife, and habitats, and Indigenous understandings of connections between humans and non-humans, it creates a less colonial international humanitarian law to further protect the environment and Indigenous Peoples interests.[207]

Furthermore, the precautionary principle from international environmental law helps international humanitarian law increase the standard of care in protecting the environment under Article 55 of Additional Protocol I 1977 to the Geneva Conventions and international humanitarian law principles, to protect the environment and Indigenous lands.[208] The precautionary principle in the Convention on Biological Diversity 1992,[209] World Heritage Convention 1972[210] and Ramsar Convention on Wetlands 1975[211] protects world biodiversity by underscoring uncertainty in resulting "damage should not bar or delay

[202] Additional Protocol I 1977 to the Geneva Conventions, above note 3; Bing Bing Jia, "'Protected Property' and Its Protection in International Humanitarian Law", *Leiden Journal of International Law*, Vol. 15, No. 1, 2002, p. 142.
[203] K. Hulme, above note 41, pp. 1163–5.
[204] Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above note 16.
[205] Convention on Biological Diversity, above note 175.
[206] K. Hulme, above note 41, 1163–4.
[207] *Ibid.*
[208] Additional Protocol I 1977 to the Geneva Conventions, above note 3.
[209] Convention on Biological Diversity, above note 175.
[210] Convention Concerning the Protection of the World Cultural and Natural Heritage, 11 ILM 1358, 16 November 1972, (entered into force 17 December 1975) (World Heritage Convention 1972).
[211] Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 996 UNTS 245, 2 February 1971 (entered into force 21 December 1975).

environmental protection measures".[212] Its application to Article 55,[213] and international humanitarian law principles of necessity and precautions in attack, means militaries must understand the effects of their weapons on ecosystems, including social and cultural impacts to Indigenous territories present in the field of military operations.[214] Further training, including cultural programmes on Indigenous Peoples' rights, and provisions for environmental impact assessments for militaries in estimating the impacts of their attacks, raise the bar to inform military personnel of the value of protecting the environment and Indigenous Peoples' territories.[215] Military personnel are likely to weigh these considerations more greatly against the necessity and proportionality of attacks, and may demarcate areas protecting the environment and Indigenous lands.[216]

Similarly, the precautionary principle along with international environmental law and international human rights law conventions can reinforce the International Law Commission Draft Principles on the Protection of the Environment in Armed Conflict designating protected zones to protect the environment and Indigenous territories during armed conflicts.[217] The Special Rapporteur Marja Lehto, in analysing the "Protection of the Environment in Relation to Armed Conflicts" (holding this mandate from 2017 – 2022) clarified,[218] there must be "an express agreement on the designation of an area as protected from attack during

[212] Rio Declaration on Environment and Development 31 ILM 874, 1992, principle 15; K. Hulme, above note 41, p. 1168.
[213] Additional Protocol I 1977 to the Geneva Conventions, above note 3.
[214] K. Hulme, above note 41, 1165–7.
[215] *Ibid.*
[216] *Ibid* pp. 1165–7 and 1190.
[217] *Ibid* pp. 1168–71; Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above note 16, principles 4 and 18.
[218] "Interview with Marja Lehto," *IRRC*, December 2023, available at: https://international-review.icrc.org/articles/interview-with-marja-lehto-924#:~:text=She%20was%20a%20member%20of,of%20Humanitarian%20Law%20since%202019..

armed conflict",[219] raising the question of pre-conflict designation.[220] However, many international environmental law conventions designate protected areas, such as the World Heritage Convention regime's on cultural and natural heritage, which could serve as a "starting point".[221] While several World Heritage sites were designated without consulting Indigenous Peoples,[222] if done per the elements of free, prior and informed consent of the United Nations Declaration on the Rights of Indigenous Peoples, these areas and associated buffer zones could further Indigenous land and self-determination rights during armed conflicts.[223] For instance, the Thawthi Taw-Oo Indigenous Park was recently created by an Indigenous Karen sub-group in Taw-Oo District, north of the Salween Peace Park, to protect their traditional cultures.[224] The precautionary principle of international environmental law could increase coordination between Indigenous Peoples and States where protected zones cross borders or regions to conduct assessments protecting endangered species, and prevent the militarisation of such areas including conflicts occurring in Indigenous lands.[225]

The right to a clean, healthy and sustainable environment[226] can also push international humanitarian law forward to protect the environment

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[219] International Law Commission, *Third Report on Protection of the Environment in Relation to Armed Conflicts, by Marja Lehto, Special* Rapporteur, A/CN.4/750, 16 March 2022, 68.
[220] K. Hulme, above note 41, p. 1170.
[221] *Ibid*, pp. 1168–71; World Heritage Convention, above note 210.
[222] Ana Vrdoljak, "Indigenous Peoples, World Heritage, and Human Rights", *International Journal of Cultural Property*, Vol. 25, No. 3, 2018.
[223] United Nations Declaration on the Rights of Indigenous Peoples, above note 49, Arts. 10–11, 19 and 28; K. Hulme, above note 41, pp. 1168–71.
[224] "Thawthi Taw-Oo Indigenous Park", *UNESCO*, webpage, available at: https://www.unesco.org/en/articles/thawthi-taw-oo-indigenous-park-ttip?TSPD_101_R0=080713870fab20000830584b9643569667aea607919e8ac161bf2e0a259746c9e5b4e89f7adce56608422b08f0143000b2b96f2eb77fcb13b769fc75970b62f4be44c2e8ba9def0bd3291f7b43363707dc0aab232434fbb02e4347a769a4cc96; "Thawthi Taw-Oo Indigenous Park", Kesan, webpage, available at: https://kesan.asia/land-forest-management/thawthi-taw-oo-ip/.
[225] K. Hulme, above n 41, 1168–71.
[226] HRC Res. 19/10, 19 April 2012 (Human Rights and the Environment) and UNGA Res. A/76/L.75, 26 July 2022 (The Human Right to a Clean, Healthy and Sustainable Environment), above note 196; Sara Ceolin, *The Right to Land of Indigenous Peoples in Latin-*

and Indigenous Peoples during conflicts.[227] On the right to a clean, healthy and sustainable environment, the United Nations General Assembly, Human Rights Council and Inter-American Court of Human Rights advisory opinion[228] (alongside other bodies)[229] recognise the right "as fundamental to human existence", including to future generations.[230] As mentioned, the right encompasses a spectrum of rights including rights to "a safe climate, clean air, clean water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work,

America: Collectivity, Culture and Territory, Master's Thesis, Università Ca' Foscari Venezia, 2019/20, p. 78.

[227] T. De La Bourdonnaye, above note 200.

[228] UNGA Res. 76/300 and UN HRC Res. 48/13, above note 18; Inter-American Court of Human Rights, *The Environment and Human Rights*, Case No. Series A No 23, Advisory Opinion, 15 November 2017.

[229] See for instance, the African Charter on Human and Peoples' Rights of 1981, (1982) 21 ILM 58, 27 June 1981 (entered into force 21 October 1986), Art. 24 recognises: "All peoples shall have the right to a general satisfactory environment favourable to their development"; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, OAS Treaty Series No. 69, 17 November 1988 (entered into force 16 November 1999) (Protocol of San Salvador), Art. 11(1) also recognises: "Everyone shall have the right to live in a healthy environment and to have access to basic public services"; Arab Charter on Human Rights of 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893, 2005 (entered into force 15 March 2008), Art. 38 indirectly recognises "a right to a safe environment" within "the right to an adequate standard of living"; Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 2161 UNTS 447, 25 June 1998 (entered into force 30 October 2001) (Aarhus Convention), Art. 1 notes: "In order to contribute to the operation of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention"; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Carribbean, C.N.195.2018, 4 March 2018 (entered into force 22 April 2021) (Escazú Agreement), Art. 4(1): "Each Party shall guarantee the right of every person to live in a healthy environment …"; ASEAN Human Rights Declaration (19 November 2012), Art. 28 recognises: "Every person has the right to an adequate standard of living for himself or herself and his or her family including: f. The right to a safe, clean and sustainable environment."

[230] Inter-American Court of Human Rights, *The Environment and Human Rights*, above note 228, p. 26, para. 59; Maria Tigre, "International Recognition of the Right to a Healthy Environment: What is the Added Value for Latin America and the Caribbean?", *American Society of International Law*, Vol. 117, 2023, p. 185.

study and play, and healthy biodiversity and ecosystems".[231] The Inter-American Court of Human Rights advisory opinion recognises its holistic and interrelated nature noting "the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas".[232] The advisory opinion also recognises States have a duty "to exercise due diligence" "to prevent significant harm or damage to the environment, within or outside their territory", heightening environmental protection standards if applied to international humanitarian law, including Indigenous Peoples' connection to ancestral lands.[233]

Finally, the doctrine of non-State armed groups as "guardians of the environment" can further the protection of the environment and Indigenous Peoples during non-international armed conflicts, the most common form of warfare today.[234] The doctrine sees non-State armed groups' engagement to include environmental policies in military manuals, and based on their territorial control, assume environmental obligations to increase the visibility of environmental protection and respect Indigenous Peoples' ways of life.[235] The doctrine is important

[231] David Boyd, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, above note 166; Right to a Healthy Environment: Good Practices, above note 166. The right to a safe, clean, healthy and sustainable environment is discussed in various reports of Special Rapporteurs. For instance, see Reports of the Special Rapporteur David R. Boyd: Human Rights Depend on a Healthy Biosphere, above note 165; Healthy and Sustainable Food: Reducing the Environmental Impacts of Food Systems on Human Rights, UN Doc A/76/179, 19 July 2021; Human Rights and the Global Water Crisis: Water Scarcity and Water-Related Disasters, UN Doc A/HRC/46/28, 19 January 2021; The Right to a Clean, Healthy and Sustainable Environment: Non-Toxic Environment, UN Doc A/HRC/49/53, 12 January 2022. See also the Report of Special Rapporteur John H. Knox, Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc A/HRC/40/55, 8 January 2019.
[232] Inter-American Court of Human Rights, *The Environment and Human Rights*, above note 228, p. 28, para. 62.
[233] Inter-American Court of Human Rights, *The Environment and Human Rights*, above note 228, pp. 52–6, paras. 128–140, referring in footnote 187 to *Trail Smelter (United States v Canada)*, Case No. 3 RIAA 1905, Judgment, 1938.
[234] T. De La Bourdonnaye, above note 200.
[235] *Ibid,* p. 584.

given "at least forty percent of all [NIACs] over the last sixty years have a link to natural resources",[236] with non-state actors contributing to the degradation of the natural environment, including Indigenous Peoples' lands. Recent developments include the National Liberation Army of Colombia including "a qualified provision" in their Code of War where "acts of sabotage shall, *as far as possible*, avoid causing environmental damage."[237] While other non-State armed groups have taken it to be their duty to protect the environment for future generations, highlighting the importance of the engagement of non-State armed groups with international environmental principles, if protection of the environment and Indigenous lands is to occur.[238]

Accordingly, alongside international humanitarian law developments in the International Committee of the Red Cross Revised Guidelines[239] and the International Law Commission Draft Principles on the Protection of the Environment in Armed Conflict,[240] interpreting international humanitarian law "in light of" international environmental law and international human rights law can coordinate the field to better protect Indigenous Peoples and the environment during armed conflicts.[241] However, given only one provision of the Rome Statute of the International Criminal Court provides that "widespread, long-term and severe damage to the natural environment" in international armed conflicts constitutes a war crime,[242] further prosecution avenues are equally important. This is to deter future international humanitarian law violations and create a less colonial/anthropocentric vision of the law, which per the Martens' clause "dictates of public conscience" and

[236] *Ibid,* p. 582; United Nations Environment Programme, *Protecting the environment During Armed Conflict*, above note 32, p. 10.
[237] T. De La Bourdonnaye, above note 200, p. 585.
[238] *Ibid.*
[239] International Committee of the Red Cross Revised Guidelines, above note 17.
[240] Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above note 16.
[241] R. Steenberghe, above note 8, p. 22; K. Hulme, above note 41, pp. 1158 and 1161–71.
[242] Rome Statute of the International Criminal Court*,* 2187 UNTS 90, 17 July 1998, (entered into force 1 July 2002), Art. 8(2)(b)(iv).

"humanity", achieves justice for the environment and Indigenous Peoples.[243]

C. Furthering International Criminal Law Prosecution Avenues for Offending Against the Environment and Indigenous Peoples

Increased avenues for prosecution of offending against the environment and Indigenous Peoples could, per "the dictates of public conscience", help international humanitarian law overcome its colonial anthropocentric origins to better protect these groups during armed conflicts by deterring future offending.[244] The Rome Statute of the International Criminal Court provides one explicit environmental crime – prosecuting environmental harm as a war crime under Article 8(2)(b)(iv) where the harm reaches the triple cumulative threshold of harm.[245] However, this provision is difficult to meet and no environmental prosecutions have occurred,[246] with only two cases having prioritised environmental harm under provisions prohibiting pillage and land grabbing as a crime against humanity.[247] While the 2016 Policy Paper of the International Criminal Court sees the court begin to prioritise environmental crimes,[248] it will be onerous without decolonising the Rome Statute's application to prosecute and deter future environmental offending in armed conflicts.[249]

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[243] Martens clause, above note 7.
[244] *Ibid.*
[245] Rome Statute of the International Criminal Court, above note 242; Ammar Bustami and Marie-Christine Hecken, "Perspectives for a New International Crime Against the Environment: International Criminal Responsibility for Environmental Degradation Under the Rome Statute", *Goettingen Journal of International Law*, Vol. 1, 2021, p. 163.
[246] Payal Patel, "Expanding Past Genocide, Crimes Against Humanity, and War Crimes: Can an ICC Policy Paper Expand the Court's Mandate to Prosecuting Environmental Crimes?", *Loyola University Chicago International Law Review*, Vol. 14, No. 2, 2016.
[247] A. Bustami and M.C. Hecken, above note 245, pp. 149–50; Rome Statute of the International Criminal Court, above note 242, Arts. 7, 8(2)(b)(xvi) and 8(2)(e)(v).
[248] International Criminal Court, *Policy Paper on Case Selection and Prioritisation*, Paper, 15 September 2016.
[249] Rome Statute of the International Criminal Court, above n 242.

Other important avenues for increasing prosecution against Indigenous Peoples and the environment to achieve a less colonial application of the law includes recognising ecocide is a form of genocide under art 6 Rome Statute of the International Criminal Court.[250] Ecocide is yet to be recognised in international criminal law. However, the crime of genocide applies in peacetime, and during international armed conflicts and non-international armed conflicts, which is important given the Article 8(2)(b)(iv) war crime avenue is "only applicable in international armed conflicts".[251] Genocide though has "the specific" "intent to destroy, in whole or in part, a national, ethnical, racial or religious group", making it challenging to apply to environmental crimes.[252] Some scholars call for recognition of the destruction of animals, lands and ecosystems as constituting an additional "act" of genocide, given Indigenous Peoples' intrinsic connection to the land.[253] Rights to a healthy environment and rights of nature could form "the basis" for prosecuting the crime, given the destruction of the environment, and the related displacement and killing of Indigenous Peoples from their ancestral lands during armed conflict,[254] while some push the definition even further to stress ecocide without any human destruction is genocide, but States are unlikely to accept this position.[255]

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[250] *Ibid.*

[251] *Ibid*; Matthew Gillett, "Eco-Struggles: Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict" in Carsten Stahn, Jens Iverson and Jennifer Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace*, Oxford University Press, Oxford, 2017, p. 221.

[252] *Rome Statute of the International Criminal Court*, above note 240, Art 6; *Prosecutor v Blagojević*, International Criminal Tribunal for the Former Yugoslavia, Case No IT-02-60-T, Judgment (Trial Chamber I), 5 April 2004), pp. 241–2, paras. 655–6.

[253] Martin Crook and Damien Short, "Developmentalism and the Genocide-Ecocide Nexus", *Journal of Genocide Research*, Vol. 23, No. 2, 2021, p. 162.

[254] R. Pereira, above note 14, p. 14.

[255] Lauren Eichler, "Ecocide is Genocide: Decolonizing the Definition of Genocide", 14(2) *Genocide Studies and Prevention: An International Journal*, Vol. 14, No. 2, 2020; Douglas Irvin-Erickson, *Raphael Lemkin and the Concept of Genocide*, University of Pennsylvania Press, Philadelphia, 2017); Legge Brooman, "Reflecting on 25 Years of Teaching Animal Law: Is it Time for an International Crime of Animal Ecocide?", *Liverpool Law Review*, Vol. 41, No. 2, 2020; Tim Lindgren, "Ecocide, Genocide and the Disregard of Alternative Life-Systems", *International Journal of Human Rights*, Vol. 22, No. 4, 2018.

Still, crimes against humanity prosecutions could provide another way forward to achieve justice for Indigenous Peoples and the environment to deter future offending, given it is applicable during non-international armed conflicts, international armed conflicts and in peacetime.[256] Article 7 recognises crimes against humanity are "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[257] The crime includes the commission of acts such as extermination, murder, forcible transfer and, per Article 7(1)(k), "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[258] The requirement the perpetrator only needs to have knowledge of the "systematic attack" – as seems likely in Colombia's non-international armed conflict – could see prosecutions given the physical, mental and spiritual harm to Indigenous Peoples, including killings, forced displacement and degradation of ancestral lands.[259] This environmental approach to crimes against humanity approach can provide better protection to the environment, illustrating that "mass harms" inflicted on humans through "directly produced" harm to the environment can be prosecuted.[260] This approach creates a more holistic understanding of the interconnected relationship between the environment and human populations, including Indigenous Peoples, and likely would change behaviours to prevent violations of international humanitarian law.

Indeed, academics argue the environmental crimes against humanity approach can provide justice to the environment and more vulnerable populations, such as Indigenous Peoples, without stretching the credulity

[256] Rome Statute of the International Criminal Court, above note 242, Art. 7.
[257] *Ibid.*
[258] *Ibid.*
[259] A. Dumont, above note 35; R. Pereira, above note 14, pp. 14–16.
[260] Darryl Robinson, "ICL and Environmental Protection Symposium: Environmental Crimes Against Humanity", *Opinio Juris*, 2 June 2020, available at: http://opiniojuris.org/2020/06/02/icl-and-environmental-protection-symposium-environmental-crimes-against-humanity/.

of international criminal law.[261] Focusing on the commission of "other inhumane acts" in Article 7(1)(k), an example of exploiting natural resources – for instance, mining to fund military activities during an armed conflict, and which poisons the air with high levels of toxic metals to engulf a human village or city – would clearly "caus[e] great suffering, or serious injury to body or to mental or physical health".[262] While it would be more difficult to meet the Article 7(1)(k) element of being "of a similar character" to other prohibited acts listed in Article 7(1) (which are focused on "direct physical harms" such as extermination), the result of poisoning people and causing severe health problems or deaths is likely "of a similar character".[263] The intent element would be met as it covers "both direct intent (purpose) and indirect intent, ie. knowing that the harm is a substantially certain consequence of one's conduct".[264] However, while the attack is to be directed against a civilian population, there is no need to have a "special intent" or "desire" to harm civilian populations; it is sufficient the harm occurs, for instance, in pursuit of broader aims such as making a profit.[265] This approach could effectively prosecute crimes committed against the environment, and Indigenous Peoples whose ways of life are tied to ancestral lands, therefore also influencing domestic prosecutions.

In this respect, Colombia's Special Jurisdiction of Peace, in seeking transitional justice is pursuing a more ecocentric approach recognising Indigenous territories as victims of its non-international armed conflict,[266] including indicting mid-level FARC-EP members for crimes against humanity in case 05, and indicating environmental destruction is "a war

[261] *Ibid.*
[262] *Ibid.*
[263] *Ibid.*
[264] *Ibid.*
[265] *Ibid.*
[266] Alexandra Huneeus and Pablo Rueda-Saiz, "Territory as a Victim of Armed Conflict", *International Journal of Transitional Justice*, Vol. 15, No. 1.

crime".[267] In its resolution, the Special Jurisdiction of Peace uses words of affected Indigenous groups to recognise the Great Nasa Territory of the Cxhab Wala Kile is "a living being [who]…feels [and]…must be nourished and cared for".[268] Its indictment recognises that FARC-EP rebels implemented "a 'regime of terror'" against Indigenous Peoples, including homicides and child recruitment, with their reckless conduct "br[eaking] the environmental balance of the region" in mowing down vegetation to establish camps, plant landmines and illegal mining, including cultivating coca crops to manufacture cocaine.[269] The environmental destruction is described as "a war crime", and the attitude of FARC-EP "ambiguous" in not "hav[ing] an active policy to prevent the damages caused", but also directly allowing the harm which "altered the relationship of communities with their ancestral lands".[270] The judgment of the Special Jurisdiction of Peace therefore recognises the environmental harm inflicted, the value in protecting the environment as a person, including to uphold Indigenous ways of life during armed conflicts.

Moreover, international criminal law could push its field and international humanitarian law forward in protecting the environment and Indigenous Peoples during armed conflicts, through a new ecocide crime.[271] This crime would decolonise international criminal law and international humanitarian law by not only including the environment within its ambit of protection but underscoring the environment deserves

[267] Andrés Bermúdez Liévano, "Colombia: New FARC Indictment Puts Spotlight on Indigenous and Afro Victims", *JusticeInfo.Net*, 27 March 2023, available at: https://www.justiceinfo.net/en/114385-colombia-new-farc-indictment-indigenous-and-afro-victims.html; Andrés Bermúdez Liévano, "Colombia's Transitional Justice Cannot Agree on How to Prosecute Environmental Crimes", *JusticeInfo.Net*, 9 Mau 2023, available at: https://www.justiceinfo.net/en/116565-colombia-transitional-justice-cannot-agree-on-how-to-prosecute-environmental-crimes.html.
[268] A. Huneeus and P. Rueda-Saiz, above note 266, pp. 220–1.
[269] A. Bermúdez Liévano, above note 267.
[270] *Ibid.*
[271] Polly Higgins, *Eradicating Ecocide*, Shepheard-Walywyn, 2nd ed, London, 2015; Rosemary Mwanza, "Enhancing Accountability for Environmental Damage Under International Law: Ecocide as a Legal Fulfilment of Ecological Integrity", *Melbourne Journal of International Law*, Vol. 19, No. 2, 2018.

protecting per se.[272] The International Criminal Court should drop the cumulative threshold in Article 8(2)(b)(iv) to implement a list of acts constituting ecocide with the crime defined along the lines of ecocide as: "any of the following acts or omissions committed in times of peace or conflict which cause or may be expected to cause widespread or long-term and severe damage to the environment."[273] The new crime of ecocide would therefore be able to prosecute serious crimes committed against the environment, including for instance, damage to the Nova Kakhovka dam and resulting flooding committed during the Russia Ukraine conflict.[274] It could also encourage States to change their laws and domestic constitutions to recognise the crime of ecocide and provide further protection to the environment during armed conflicts.[275]

Still, if the International Criminal Court were to introduce the crime of ecocide, making its field less anthropocentric, a successful case should address underlying structural issues such as the discrimination and oppression of Indigenous Peoples.[276] For instance, "the 'end' of ecocidal conduct may not signal the end of subjugation or denied access to natural resources" for marginalised groups such as Indigenous Peoples.[277] While "land restitution and related reparations" are important, they may not tackle underlying systems of practice that exclude Indigenous understandings of caring and protecting the environment.[278] Instead, identifying intersections of race, class, gender, sexuality, and disability "which influence access to natural resources" remains crucial, including hearing these perspectives before a reparation order is made, as this would better accord with the Martens' clause "dictates of public conscience" and

[272] T. Lindgren, above note 255, pp. 539–43.
[273] A. Bustami and M.C. Hecken, above note 247, p. 173.
[274] Richard Honey, "Environmental Damage in the Context of International Criminal Law," *Francis Taylor Building*, available at: https://www.ftbchambers.co.uk/elblog/view/environmental-damage-in-the-context-of-international-criminal-law.
[275] *Ibid.*
[276] Rachel Killean, *Reparation in the Aftermath of Ecocide*, UCLA School of Law Symposium Paper, 2023, pp. 5 –8.
[277] *Ibid.*
[278] *Ibid.*

"humanity" to achieve justice for Indigenous Peoples and the environment.[279]

D. Indigenous Peoples' Inclusion in International Humanitarian Law Political Processes Remains Crucial

The final crucial means to push international humanitarian law forward to better protect the environment and Indigenous Peoples, is to include Indigenous Peoples in international humanitarian law political forums and peace-making processes. The inclusion of Indigenous Peoples is a key part of the procedural element of the right to a clean, healthy and sustainable environment, which underscores the importance of "access to information, public participation and access to justice with effective remedies".[280] Indigenous Peoples' knowledge has much to offer, including the Martens clause "dictates of public conscience" and "humanity", to create a fairer international humanitarian law that overcomes its colonial origins to uphold their interests.[281] For instance:

- Indigenous laws of war can contribute to interpretations of principles of distinction,[282] necessity[283] and proportionality in attack.[284] Australian First Nations' applied the principle of junkarti (equity in damages), seeing "no one…walk away holding a grudge".[285] This principle created rules limiting attacks against

[279] *Ibid;* Martens Clause, above note 7.
[280] "Promoting Environmental Democracy: Procedural Elements of the Human Right to a Clean, Healthy and Sustainable Environment," *United Nations Human Rights Office of the High Commissioner*, 2 October 2023, available at: https://www.ohchr.org/en/calls-for-input/2023/promoting-environmental-democracy-procedural-elements-human-right-clean; Right to a Healthy Environment: Good Practices, above note 166, pp. 5–8.
[281] Martens clause, above note 7.
[282] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Arts. 48 and 52.
[283] Hague Convention IV, above note 7, Art. 23(g); Geneva Convention IV, above note 27, Art. 53; *United States v List*, above note 27.
[284] Additional Protocol I 1977 to the Geneva Conventions, above note 3, Art. 51(5)(b).
[285] Samuel White and Ray Kerkhove, "Indigenous Australian Laws of War: *Makarrata, Milwerangel and Junkarti*", *International Review of the Red Cross*, Vol. 102, No. 914, 2020, pp. 971–3.

civilians and civilian objects, stopping fighting against injured persons, and ending conflicts "on a note of complete forgiveness and goodwill".[286] Similarly, Aotearoa New Zealand's Indigenous Māori underscored warfare is conducted per tikanga/customary principles of utu/reciprocity to restore mana/moral authority, balance and peace whereby all becomes kua ea/settled.[287]

- The 2011 Me Rongo Congress for Peace, Sustainability and Respect for the Sacred reinforced Indigenous Peoples' knowledge contributes to international humanitarian law peace-making processes, including environmental protection.[288] Its Congress gathered Indigenous Peoples to share peacekeeping traditions, with its title coming from Aotearoa New Zealand's Moriori Indigenous term of "me rongo" which translates to "in peace" or "to listen".[289] Their reissued Covenant of Peace provides ingredients of peaceful living, recognising armed conflict is often due to disputes over resources and lands.[290] The way forward includes "(re)learning how to live 'in connection with', rather than increasingly 'disconnected from', our planet and planetary systems", and for international humanitarian law to listen to Indigenous Peoples if the environment and their rights are to be upheld.[291]

Accordingly, if international humanitarian law is to better protect the environment and Indigenous Peoples during armed conflicts, it must include Indigenous Peoples in its forums and advocate for a holistic

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[286] *Ibid* p. 978.
[287] Hirini Moko Mead, *Tikanga Māori: Living by Māori Values*, Huia Publishers, revised ed, Wellington Aotearoa New Zealand, 2016, pp. 270–1 and 278–81; Te Aka Matua o te Ture/Law Commission, *He Poutama*, Study Paper No. 24, September 2023, pp. 66–71.
[288] Heather Devere et al., "Regeneration of Indigenous Peace Traditions in Aotearoa New Zealand" in Heather Devere, Kelli Te Maihāroa and John Synott (eds), *Peacebuilding and the Rights of Indigenous Peoples: Experiences and Strategies for the 21st Century*, Springer, Cham, 2017, pp. 53 and 56–7.
[289] *Ibid.*
[290] "Me Rongo Declaration 2011", *Education Resources: Moriori Resource*, webpage, para 6, available at: https://education-resources.co.nz/moriori/2019/08/15/me-rongo-declaration-2011/.
[291] H. Devere, above note 288, p. 57.

international humanitarian law recognising the interconnections between humans and non-human life.[292] This approach could adopt resolutions with Indigenous Peoples' input to recognise their customary rights to lands and self-determination during armed conflicts.[293] Through including Indigenous Peoples in these processes, alongside applying principles from international environmental law, international human rights law, as well as international criminal law, international humanitarian law could come full circle. That is, it could move away from its colonial origins of excluding Indigenous Peoples to create a coordinated regime better protecting both the environment and Indigenous Peoples during armed conflicts.[294]

V. Conclusion

This Article explored how international humanitarian law can better protect the environment and Indigenous Peoples during armed conflict. Its answer is that while international humanitarian law has few provisions protecting the environment in international armed conflicts, and none in non-international armed conflicts, the Martens clause which originally "othered" Indigenous Peoples, can via modern intersectional interpretations of "the principles of humanity" and "dictates of public conscience", open the door to principles from other bodies of law.[295] This combined approach of applying international humanitarian law and international environmental law/international human rights law/international criminal law[296] sees proposals for protected zones to uphold the environment and Indigenous rights to self-determination,

[292] *Ibid.*
[293] Inna Toropenko, "Indigenous Peoples: Rights in Armed Conflicts", *New Geopolitics*, 31 May 2021, available at https://www.newgeopolitics.org/2021/05/31/indigenous-peoples-rights-in-armed-conflicts/.
[294] F. Mégret, above note 11; M. Lehto, above note 8.
[295] Martens clause, above note 7.
[296] M. Lehto, above note 8; R. Steenberghe, above note 8, pp. 15 and 22; K. Hulme, above note 41, pp. 1158 and 1163–71.

along with the precautionary principle and right to a clean, healthy and sustainable environment increasing militaries' due diligence in conducting operations.[297] Further avenues for prosecuting crimes against the environment and Indigenous Peoples can deter future offending, with Indigenous Peoples' inclusion in international humanitarian law political processes crucial to garner understandings on peacekeeping and environmental protection.[298] The "dictates of public conscience" and "humanity" see the value of these processes, together, in helping international humanitarian law overcome its colonial origins to protect the environment and Indigenous Peoples during armed conflict.[299]

[297] Draft Principles on Protection of the Environment in Relation to Armed Conflicts, above note 16, principles 4 and 18; K. Hulme, above note 41, pp. 1165–71.
[298] H. Devere, above note 288.
[299] Martens clause, above note 7; M. Lehto, above note 8.