

Translated from Spanish

Permanent Mission of Colombia to the United Nations

Comments of Colombia on the draft principles on protection of the environment in relation to armed conflicts

In response to note LA/COD/32 from the Office of Legal Affairs concerning the draft principles on protection of the environment in relation to armed conflicts, adopted on first reading by the International Law Commission at its seventy-first session and transmitted, through the Secretary-General, to Governments, with the request that they submit their comments and observations by 30 June 2021, as set out in the Commission's report (A/74/10) and General Assembly decision 74/566, the Republic of Colombia wishes to submit the following observations:¹

A. General comments

1. Colombia reaffirms the importance of this topic for the country and recognizes the great work that the International Law Commission has done so far, which has enabled it to complete its first reading of the draft principles and the commentaries thereto, and welcomes the Commission's decision to transmit the draft principles, through the Secretary-General, to Governments and international organizations for their comments.
2. Colombia reiterates the points made in the statements it delivered at the seventy-third and seventy-fourth sessions of the General Assembly, in which it addressed the topic of the report of the Commission regarding the protection of the environment in relation to armed conflicts, and recognizes that the environmental effects generated during and after an armed conflict could pose a serious threat to human beings and the surrounding ecosystems. In addition, the environmental damage caused by an armed conflict has long-term, potentially irreparable consequences, and it might undermine the reconstruction of societies and destroy large expanses of wilderness and ecosystems.
3. To date, laws enacted around the world to prevent, reduce and repair damage to the environment caused by armed conflict have been neither sufficient nor effective. In that connection, Colombia is well aware that international humanitarian law needs to be integrated into other branches of law, such as environmental law, human rights law and treaty law.

¹ *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)* and General Assembly decision 74/566.

4. As mentioned in its last statement delivered at the seventy-fourth session of the General Assembly, Colombia continues to identify two gaps which, in its view, should be taken into consideration at this stage of the draft principles:

5. First, the draft principles make no reference to the responsibility of non-State armed groups. As the history of Colombia, and the growing number and impact of such actors in other parts of the world show, they must also take responsibility for any damage to the environment. Colombia therefore suggests that the Commission include a principle emphasizing the responsibility of non-State armed groups for the protection of the environment.

6. Second, a provision should be included in the draft principles requesting States and non-State armed groups to review the environmental impact of weapons they were considering using, to determine whether such use would be prohibited by any norm of international law.

7. Although Colombia is well aware that the draft principles are not intended to be binding, it suggests that the wording and form of the document be reviewed, because several of the draft principles seem to be intended to reflect a legally binding obligation.

8. Indeed, as currently drafted, they appear to contain mandatory wording in some sections that is more in line with an agreement, a treaty or any other binding instrument. Many of them are drafted using formulations that are more suited to undertakings, such as “shall adopt”, “shall occupy”, “shall act”, “is prohibited” and “shall not use”. These expressions contrast with enunciative wording that is more in line with a soft law instrument, such as “should”, “shall ensure” or “is encouraged”. Although the reference that the Commission makes in the commentaries is generally whether a given provision is an obligation or a recommendation, it is important to be able to refer more to the nature of the draft principles as a whole. Colombia therefore suggests that the draft principles be more enunciative and that they be drafted using formulations that do not imply obligations – which will also have to be accepted by States – and that they be phrased as recommendations.

B. Specific comments

9. In draft principle 1, reference is made to the protection of the environment before, during or after an armed conflict.

“Principle 1. Scope

The present draft principles shall apply to the protection of the environment before, during or

after an armed conflict.”

10. Multilateral environmental agreements refer to protection before an armed conflict, which means that there is already an international legal structure in place for the protection of the environment during an armed conflict. Colombia therefore suggests that the emphasis in the terms of environmental protection in the draft principles be reviewed to ensure that they do not duplicate or contradict the principles already enunciated in international environmental law.

11. As a country with limited operational, financial or logistical capacities and significant national defence and public security challenges, Colombia is concerned² about the difficulties and complexity of complying with all these principles in the “during” phase of a conflict, and the limited scope of action of countries with such characteristics.

12. Draft principle 2 reads as follows:

“Principle 2. Purpose

The present draft principles are aimed at enhancing the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures.”

13. According to that text, the draft principles are aimed at enhancing the protection of the environment in relation to armed conflicts. Nonetheless, in order not to conflict with other obligations under international environmental law, it could be specified in this principle that preventive measures are meant to protect the environment in the event of an armed conflict. It could also be clarified that these principles will not run counter to other obligations of States under other international conventions or the principles of international environmental law. The aim would be to make it clear that the draft principles will not duplicate existing protection regimes.

14. The wording of draft principle 3 [4] does not provide clarity between the different measures that should be adopted under paragraphs 1 and 2. In the commentaries to the draft principle, the Commission says that the measures referred to in paragraph 1, which States are required to adopt, derive from international law, while paragraph 2 addresses other voluntary effective measures and is less prescriptive than paragraph 1, as reflected in the use of the word “should”. However, Colombia

² Ministry of Defence - Policy Department. Assessment of the draft principles on protection of the environment in relation to armed conflicts, adopted by the Commission on first reading. Received by email on 16 June 2021.

suggests that the wording be made more precise, or that examples of measures to be taken be included in paragraph 2, in order to provide greater clarity as to their scope.

15. With regard to draft principle 4 (Designation of protected zones), Colombia suggests that the wording be made more precise. It understands that the Commission uses the expression “by agreement or otherwise” only in order to maintain some flexibility, and that in the commentaries, it indicates that the types of situations contemplated may include an agreement concluded verbally or in writing, reciprocal and concordant declarations, as well as those created through a unilateral declaration or designation through an international organization. However, Colombia considers it necessary to clarify with what types of actors the State would have to “designate by agreement” areas of environmental or cultural importance. Would it be a bilateral agreement between the State and the United Nations? Is it between the opposing parties? Is it a unilateral declaration by the State?

16. In draft principle 6 [7] (Agreements concerning the presence of military forces in relation to armed conflict), Colombia suggests adding the word “environmental”, to circumscribe the scope of the impact assessments mentioned. It proposes that the amended text read as follows: “Such provisions may include preventive measures, [environmental] impact assessments, restoration and clean-up measures”. Otherwise, the concept of impact assessments would be very broad and could encompass many components from other areas.

17. Colombia also suggests reviewing the wording of the rest of the draft principle, taking into consideration the fact that, these days, military forces are not necessarily the central actors in an armed conflict, nor are they the main and only party responsible for environmental damage. The battlefields of today tend to be dominated by a broad spectrum of organizations operating asymmetrically and engaging in hybrid warfare. The same would apply to the battlefields of tomorrow.

18. Leaving the proposed actions up to “military forces” is understandable, since they are the easiest actors to identify and on whom demands could be made. However, this does not imply that they are necessarily the main actors responsible for environmental impacts. The wording should therefore be carefully reviewed to identify the responsibility of actors in an armed conflict with regard to restoration and preventive and clean-up measures.

19. On draft principle 9 (State responsibility), the scope of the concept of full reparation needs to be clarified. Accordingly, it would be important to mention the constituent elements of the concept of reparation, as well as the criteria that would need to be included for it to have that character, which are absent from the commentaries to the draft principle.

20. Colombia also suggests that the rest of the wording be reviewed, taking into consideration the fact that the establishment of the responsibility of a “State” for an act is a highly complex process, especially when it comes to asymmetrical and degraded conflict scenarios involving organizations of different types and scopes.

21. It should be borne in mind that, to establish the responsibility of the party that will have to repair any damage to the environment, it is necessary to take into account the actors involved, including considering the presence of a variety of (non-State) actors and/or organizations, which may be the principal causes of the damage to natural resources.

22. On draft principle 10 (Corporate due diligence), and draft principle 11 (Corporate liability), it would be important to have greater clarity as to what may or may not be required of a private party operating in an armed conflict zone.

23. On draft principle 12 (Martens Clause), Colombia suggests bearing in mind that, as the context here is that of hybrid wars, more elements could be provided as to the variables contemplated in this draft principle, how to estimate such variables, and the consequent actions expected of States during armed conflicts, especially with regard to the dictates of public conscience.

24. On draft principle 13 [II-1, 9] (General protection of the natural environment during armed conflict), Colombia suggests that the wording be reviewed, especially paragraphs 2 and 3, since there seems to be a contradiction between them, given that paragraph 2 refers to the prevention of severe damage and paragraph 3 refers to a general prohibition of attacks against the natural environment. Although the Commission notes in the commentaries to the draft principle that the purpose of paragraph 3 is to highlight the rule that a distinction must be made between military objectives and civilian objects, phrasing paragraph 2 as a recommendation and paragraph 3 as a prohibition is confusing and does not reflect a clear relationship.

25. Colombia also suggests taking into consideration the fact that this principle has the limitation of assuming a linearity or full control of war activities during wars and on battlefields, a difficult assumption to be made in the light of recent conflicts. Here it is useful to remember that, despite the will of the actors involved, war events can evolve in unpredictable directions, as recent armed conflicts have shown. Also, taking such a principle into account requires the absolute commitment of the major world and regional powers, which have the forces that can destroy vast territories with various types of weapons.

26. On draft principles 14 [II-2, 10] (Application of the law of armed conflict to the natural environment) and 15 [II-3, 11] (Environmental considerations), Colombia suggests that the scope of application of the principles and rules contained therein concerning environmental protection be set out more clearly, with wording that would make it possible to determine whether the principles and rules also apply to non-State armed actors – who are most likely not governed by these types of considerations – especially in asymmetrical scenarios.

27. There is a need to further delimit the scope of draft principle 17 [II-5, 13] (Protected zones), owing to the circumstances that can surround armed conflicts, which inevitably have a negative impact on the ecosystems of these protected zones. As already mentioned under draft principle 4, Colombia suggests that the wording be reviewed to clarify with that types of actors the State would have to “designate by agreement” areas of environmental or cultural importance. Is it a bilateral agreement between the State and the United Nations? Is it between the opposing parties? Is it a unilateral declaration by the State?

28. On draft principle 19, although the Commission stated in the commentaries that the principle was modelled on the 1976 Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques, to which Colombia is not a party, it may be useful for the Commission to provide additional comments about the environmental modification techniques to which the document refers, in order to assess their relevance and implications for the defence and security sector.

29. On draft principle 23 [14] (Peace processes), Colombia wishes to share its experience with its own armed conflict, which has damaged the environment in various ways, ranging from illegal mining and logging, the presence of illicit crops, the planting of anti-personnel mines and the presence of explosive remnants of war, which have affected thousands of hectares of parts of the territory, to the destruction of wells and oil spills, which affect the health of the civilian population.

30. This is why the current Government encourages reintegrated fighters who appear in court to admit their acts in full and in detail, and to propose an individual or collective plan for reparation and restoration activities. The proposals expressly include the implementation of environmental protection programmes in reserve areas; the implementation of environmental recovery programmes in areas affected by the use of illicit crops and anti-personnel mines; and the implementation of programmes for access to drinking water and the construction of sanitation networks and systems.

31. The Government’s intent with such proposals is to recognize that natural resources and the

environment are essential to peace restoration and peacebuilding.³

³ The importance of the environmental dimension in peacebuilding processes was clearly established in the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace in Colombia, with the following phrase: “Having regard to the fact that the new vision of a Colombia at peace enables us to achieve a sustainable society that is united in diversity and that is based not only on consideration for human rights but on mutual tolerance, protection of the environment, respect for nature and its renewable and non-renewable resources and biodiversity”.

Although the Final Agreement does not contain a specific chapter on the environment, it contains different elements and useful tools for environmental protection and sustainability reflected in issues such as the definition and closing of the agricultural frontier, protection of areas of special environmental interest, appropriate use of land, participatory environmental zoning, productive reconversion to improve land use, and supply and implementation of sustainable production systems. Territorial Renewal Agency. Available at: https://www.renovacionterritorio.gov.co/Publicaciones/el_acuerdo_final_y_la_dimensin_ambiental