

Translated from French

Comments and observations of the French Republic on the draft principles of the International Law Commission on protection of the environment in relation to armed conflicts

I. Introduction

In accordance with paragraph 68 of the annual report of the International Law Commission issued following its seventy-fourth session (2019), the Government of the French Republic has the honour to submit the following comments and observations on the Commission's draft principles on protection of the environment in relation to armed conflicts.

The 28 draft principles were provisionally adopted on first reading at the 3475th meeting of the Commission.

At its 3506th meeting, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft principles, through the Secretary-General, to Governments and international organizations for comments and observations, with the request that their comments and observations be submitted to the Secretary-General by 1 December 2020. Owing to the coronavirus disease (COVID-19) outbreak, the deadline was extended to 30 June 2021.

France thanks the Commission, in particular the Special Rapporteur, Ms. Marja Lehto, for the preparation and transmission of the draft principles and the commentaries thereto.

France will first make some general comments and observations on the text (section II) and will then discuss the draft principles individually (section III).

II. General comments and observations

1. Normative value of the draft principles

In its commentaries, the Commission indicates that the set of draft principles “contains provisions of different normative value, including those that can be seen to reflect customary international law, and those of a more recommendatory nature.”¹

¹ *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, para. (3) of the

France considers that some of the draft principles that the Commission has presented as prescriptive cannot be considered to reflect customary international law (draft principles 12, 13, 15, 16, 19 and 24).

Moreover, the mere fact that certain draft principles have been presented as recommendations does not mean that they should be exempt from careful scrutiny. Since the Commission was established as a United Nations entity for the codification and progressive development of international law, the recommendations contained in certain draft principles could be seen as rules *de lege ferenda*, or even as evidence of the initiation of a customary process that could, in time, lead to the principles becoming legally binding.

France does not consider that the initiation of such a process can be identified on the basis of the draft principles presented by the Commission as recommendations. In particular, it does not consider the practice and *opinio juris* of States to attest to the existence of emerging custom in relation to draft principles 2, 5, 6, 8, 10, 11, 25, 26 and 27.

France recalls, more generally, the need to take the diversity of the practice and *opinio juris* of States into account. The fact that some of the treaty instruments on which the Commission's draft principles are based have not been universally ratified should be taken into consideration, as should the reservations and declarations made by States parties to those instruments. In that regard, France wishes to recall the reservations and interpretative declarations that it made at the time of its ratification of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I).

2. Uniform application of the draft principles to international and non-international armed conflicts

In its commentary, the Commission states that the draft principles concern the protection of the environment in relation to “armed conflicts” and that, accordingly, “no distinction is generally made [in the draft principles] between international armed conflicts and non-international armed conflicts.”²

However, France considers that the existence of separate legal regimes for international and

commentary to the introduction to Part One of the draft principles on protection of the environment in relation to armed conflicts.

² Ibid., para. (3) of the commentary to draft principle 1.

non-international armed conflicts under the law of armed conflict cannot be disregarded. In that regard, it does not seem possible to consider certain draft principles, in particular those that are presented as prescriptive, to be uniformly applicable to international and non-international armed conflicts. This is the case for draft principles 13 and 16.

3. Relationship between international humanitarian law and other areas of international law

In the commentary, the Commission states that “the draft principles were prepared bearing in mind the intersection between the international law relating to the environment and the law of armed conflict.”³

The Commission seems to create a presumption that international human rights law and environmental law apply to situations of armed conflict. In this respect, its approach is consistent with the approach taken in the draft articles on the effects of armed conflicts on treaties, draft article 7 of which creates a presumption in favour of an indicative list of treaties that includes “treaties for the international protection of human rights” and “treaties relating to the international protection of the environment”.⁴

France wishes to nuance this point and to recall the debates provoked by this assessment and the continuing divergence of views on the question. In particular, it wishes to emphasize that while the applicability of treaties relating to the international protection of human rights or the international protection of the environment cannot be excluded in principle, their applicability must be assessed on a case-by-case basis, in the light of the provisions of the treaties and the intentions of the drafters.

France also considers that when such an assessment leads to the conclusion that provisions of a treaty relating to the international protection of human rights or the environment are applicable in situations of armed conflict, those provisions should be interpreted taking into account the specific context of situations of armed conflict and in the light of obligations under international humanitarian law, which is the applicable *lex specialis*.⁵

France wishes to highlight the general importance of not introducing confusion with regard to the extent of the obligations of belligerents in situations of armed conflict and of not making ill-

³ Ibid., para. (4) of the commentary to the introduction to Part One of the draft principles.

⁴ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/66/10)*, draft article 7 (Continued operation of treaties resulting from their subject matter) of the draft articles on the effects of armed conflicts on treaties.

⁵ This principle is recalled by the Commission in A/74/10; see para. (4) of the commentary to draft principle 9.

considered changes to existing international law.

In particular, France questions the fact that some of the draft principles and commentaries appear to indicate that damage to the environment resulting from acts of war that are compliant with international humanitarian law or the law of the use of force could entail the international responsibility of a State if the acts are in violation of competing obligations arising from treaties relating to the international protection of human rights or the environment. This is particularly true of draft principle 9 and the commentary thereto. France considers such a conclusion to be questionable. It also considers that, in any case, the draft principles cannot create new legal obligations for France.

4. Terminology

France notes that the Commission has indicated that it will decide at the time of the second reading whether to use the term “natural environment” or “environment” in those provisions of Part Three of the draft principles that draw on Additional Protocol I to the Geneva Conventions.

For the sake of consistency, it would be preferable for the draft principles that draw on Additional Protocol I to the Geneva Conventions to contain only the term “natural environment”, as used in Additional Protocol I.

III. Comments and observations on the draft principles

Draft principle 5 (Protection of the environment of indigenous peoples)

In its commentary to this draft principle, the Commission refers to the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization and the United Nations Declaration on the Rights of Indigenous Peoples of 2007.

France wishes to recall that it has not ratified Convention No. 169 of the International Labour Organization, as the concepts of “indigenous and tribal peoples” are incompatible with its Constitution. The constitutional principles of the unity and indivisibility of the Republic, the equality of citizens and the unity of the French people prevent even the recognition of the existence of distinct peoples within the French people in the international commitments of France. They also prevent the granting of collective rights to any group defined by a common origin, culture, language or belief. France largely adheres to the principles of Convention No. 169, and the incompatibility of the Convention with the French Constitution has never been an obstacle to the adoption of

ambitious policies for the benefit of indigenous populations. However, France does not consider the provisions of the Convention to have acquired customary value.

France recalls that it does not consider the United Nations Declaration on the Rights of Indigenous Peoples of 2007, which it co-sponsored, to be legally binding or to reflect customary international law.

Consequently, France does not consider draft principle 5 to reflect customary international law.

Draft principle 6 (Agreements concerning the presence of military forces in relation to armed conflict)

The Commission recommends that States include provisions concerning the protection of the natural environment in “agreements concerning the presence of military forces in relation to armed conflict.” The wording and scope of this draft principle could be clarified. It is not clear at this stage whether or not the agreements mentioned include defence or stationing agreements concluded in peacetime in anticipation of a possible future conflict.

Draft principle 8 (Human displacement)

The wording of this draft principle could be made clearer.

While it is clarified in the Commission’s commentary that the draft principle concerns measures that should be taken to prevent and mitigate environmental degradation caused by human displacement in connection with armed conflict, the wording of the draft principle itself seems more vague.

France would also like to emphasize that the draft principle, and the reference therein to the adoption of appropriate measures, can constitute no more than a recommendation that is not reflective of the existence of any legal obligations incumbent on States under customary international law or their treaty commitments.

Draft principle 9 (State responsibility)

This draft principle should be made clearer.

Paragraph 2 indicates that the rules on the responsibility of States for damage to the

environment resulting from an internationally wrongful act, as referred to in paragraph 1, are “without prejudice” to the general rules on the responsibility of States for internationally wrongful acts. This phrasing seems ambiguous and could be read as recognition of a special regime of responsibility for internationally wrongful acts that cause damage to the environment. It might be more appropriate to indicate simply that the assigning of responsibility for an internationally wrongful act that causes damage to the environment is governed by the general rules on the responsibility of States for internationally wrongful acts.

France is also concerned that draft principle 9 and the commentary thereto could be understood to mean that damage to the environment done in the context of an armed conflict can entail the international responsibility of a State even if the damage results from an act of war that is in compliance with international humanitarian law and the law of the use of force. The commentary to the draft principle seems to envisage the possibility of acts of war violating provisions of treaties on the international protection of human rights and the environment, even if they are in compliance with international humanitarian law and the law of the use of force. As stated in its general comments on the relationship between international humanitarian law and other branches of international law, France considers that this position is legally questionable, creates confusion with regard to the extent of the obligations of belligerents in situations of armed conflict and paves the way for ill-considered changes to existing international law.

Draft principles 10 (Corporate due diligence) and 11 (Corporate liability)

France notes that the Commission’s commentaries highlight that these draft principles do not reflect customary international law.

Draft principle 12 (Martens Clause with respect to the protection of the environment in relation to armed conflict)

France would like to make a comment on the interpretation and scope that the Commission seems to accord the “Martens Clause”.

The Commission indicates that it does not intend to take “a position on the various interpretations regarding the legal consequences of the Martens Clause.” However, it also states in the commentary to draft principle 12 that “the function of the Martens Clause is generally seen as providing residual protection in cases not covered by a specific rule” and that the clause “thus prevents the argument that any means or methods of warfare that are not explicitly prohibited by the

relevant treaties are permitted, or, in a more general manner, that acts of war not expressly addressed by treaty law, customary international law, or general principles of law, are *ipso facto* legal.” The Commission thus seems to present as consensual the interpretation according to which the Martens Clause is an autonomous source of law and is able to establish prohibitions, in particular in relation to certain categories of weapons, even in the absence of applicable treaty rules or rules of customary law.

France considers that this interpretation is questionable and, in any event, does not enjoy the consensus that the Commission seems to attribute to it. Moreover, it seems likely to introduce considerable uncertainty as to the exact scope of the obligations of the parties to an armed conflict under international humanitarian law.

Draft principle 13 (General protection of the natural environment during armed conflict)

This draft principle, which is presented as prescriptive, does not reflect customary international law.

France recalls that it does not consider articles 35 and 55 of Additional Protocol I to the Geneva Conventions, which inspired the drafting of this draft principle, to have customary value. The Protocol has not been universally ratified, and several States parties have formulated reservations or interpretative declarations.

When France ratified the Protocol, it stated that the provisions of the instrument could not hinder the “exercise of its inherent right of self-defence in conformity with Article 51 of the Charter of the United Nations”, the “use of nuclear weapons” or “the use, in accordance with international law, of the means [...] indispensable to protect its civilian population from grave, obvious and deliberate violations of the Geneva Conventions and the Protocol by the enemy.”

France also recalls that the international law applicable to situations of non-international armed conflict does not appear to include any prohibitions equivalent to those set out in articles 35 and 55 of Additional Protocol I to the Geneva Conventions.

Draft principles 14 (Application of the law of armed conflict to the natural environment) and 15 (Environmental considerations)

France wishes to make three comments on these two draft principles, which it believes should be read together and could, therefore, be merged in a revised version of the text. These

comments concern the need to situate the draft principles more strictly within the framework of existing international humanitarian law, in order to prevent any risk of confusion with regard to the nature and scope of the obligations incumbent on the parties to an armed conflict.

First, it does not seem appropriate to refer to “military necessity” or “rules on military necessity” as if they were on a par with the principles of distinction, proportionality and precaution. Military necessity, like the principle of humanity, is a general principle, and the need for reconciliation with these two principles permeates the whole of international humanitarian law. They thus appear to belong to a higher order of generality than the principles of distinction, proportionality and precaution. While military necessity and the principle of humanity form the basis for and clarify the provisions establishing the principles of distinction, proportionality and precaution, they do not in themselves establish specific rules governing the conduct of hostilities or prohibiting certain means or methods of warfare. France therefore considers that the reference to the principle of “military necessity” could be removed from draft principle 14 and that the reference to the “rules on military necessity” in draft principle 15 should be replaced with a reference to the principle of precaution.

Furthermore, the notion of “environmental considerations” does not correspond to any known and clearly defined concept in international humanitarian law and seems likely, owing to its vagueness, to create detrimental confusion as to the extent of the obligations of belligerents in situations of armed conflict, in particular with regard to the principles of proportionality and precaution.

More generally, France questions the appropriateness of draft principle 15 and the rewriting of the exhaustive and complex provisions of international humanitarian law concerning the principles of proportionality and precaution.

In that connection, it should be recalled that international humanitarian law requires only that account be taken of the foreseeable effects of an attack, on the basis of the information available at the time, and that such precautionary measures as are practicable be adopted, taking into account the circumstances at the time, including humanitarian and military considerations. France wishes to recall that it made interpretative declarations to that effect when it acceded to Additional Protocol I, which, although it has not been universally ratified, inspired the Commission’s drafting of draft principles 13, 14 and 15.

Draft principle 16 (Prohibition of reprisals)

Draft principle 16 provides that “attacks against the natural environment by way of reprisals are prohibited.” As a basis for this prescriptive principle, the Commission states in its commentary that “if the environment, or part thereof, became an object of reprisals, it would be tantamount to an attack against the civilian population, civilians or civilian objects, and would thus violate the laws of armed conflict.”

France considers that customary international law applicable to situations of non-international armed conflict does not appear to provide for such a prohibition. In this regard, the Commission itself notes in its commentary that “there is no corresponding rule to article 55, paragraph 2, [of Additional Protocol I] in common article 3 to the four Geneva Conventions or in Additional Protocol II which explicitly prohibits reprisals in non-international armed conflicts.”

In any case, France is also of the view that the draft principle does not reflect customary international law applicable in international armed conflicts. It is derived from articles 51 and 55 of Additional Protocol I to the Geneva Conventions, which has not been universally ratified and has been the subject of reservations and interpretative declarations by some States parties. France recalls that it made an interpretative declaration at the time of its ratification of the Protocol, in 2001, in which it stated that its compliance with paragraph 8 of article 51 of the Protocol would “not hinder the use, in accordance with international law, of the means it deems indispensable to protect its civilian population from grave, obvious and deliberate violations of the Geneva Conventions and the Protocol by the enemy.”⁶

Draft principle 19 (Environmental modification techniques)

The prohibition laid down by this principle would, in accordance with the wording used by the Commission, be binding on States “in accordance with their international obligations”. This wording suggests that there is a rule of customary international law that reflects draft principle 19. This is also indicated in the commentary, in which the Commission provides more detail on the nature of the obligations in question, stating that these may include not only the treaty obligations of States parties to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1976 but also, “to the extent that the prohibition overlaps with a customary obligation that, according to the ICRC study on customary international humanitarian law, prohibits the use of the environment as a weapon, the obligations under

⁶ Reservations and interpretative declarations concerning the ratification by France of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), para. 11.

customary international law.”

France does not consider draft principle 19, or the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1976, from which it is derived, to reflect customary international law. In particular, it should be noted that this Convention has not been universally ratified and cannot be considered as reflecting a general practice accepted as law.

France therefore considers that this draft principle should be removed.

Part Four: Principles applicable in situations of occupation (draft principles 20, 21 and 22)

France wishes to make a general comment on the scope of principles 20, 21 and 22 and on the definition of “Occupying Power” used by the Commission in its commentaries.

The Commission states that, even in a scenario involving “operations relying on the consent of the territorial State”, “the law of occupation may provide guidance and inspiration for international territorial administration entailing the exercise of functions and powers over a territory that are comparable to those of an Occupying Power.” The Commission adds that “the term ‘Occupying Power’ [...] is sufficiently broad to cover such cases.”

However, the characterization of “Occupying Power”, and the obligations incumbent on Occupying Powers under international law, cannot be applied in cases where the competent territorial State has consented to the presence and actions of armed forces. Article 42 of the Regulations respecting the Laws and Customs of War on Land of 1907 (Hague Regulations), which seems to reflect customary law on this point, indicates that “territory is considered occupied when it is actually placed under the authority of the **hostile** army” (emphasis added).

The scope of draft principles 20, 21 and 22 could therefore be clarified in order to better reflect international law and avoid any confusion on this point.

Draft principle 24 (Sharing and granting access to information)

It is not clear whether there is actually a general obligation to share information under customary international law, as draft principle 24 seems to suggest.

Draft principle 26 (Relief and assistance)

The wording of this draft principle could be made clearer. In particular, the normative value of this draft principle is not clearly conveyed, owing to the ambiguity resulting from the word “encourage”.

France may be required to take remedial measures in fulfilment of its international obligations under certain treaties to which it is a party (for example, Amended Protocol II and Protocol V to the 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, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction of 1997 and the Convention on Cluster Munitions of 2008).

However, France considers that there is no principle of customary international law such as the principle set forth in draft principle 26.

Draft principle 27 (Remnants of war)

France has two comments to make on this draft principle.

The treaty provisions which inspired the Commission, in particular those in Protocol V to the Convention on Certain Conventional Weapons, refer only to the category of “explosive remnants of war”, not “toxic and hazardous” remnants of war. In this regard, it does not necessarily seem appropriate to create a new, ill-defined general category.

In any case, it is not clear whether the treaty provisions on which the Commission based this draft principle have acquired customary value.
