

*Translated from Spanish*

**Comments and observations of the Kingdom of Spain on the draft principles of the International Law Commission on protection of the environment in relation to armed conflicts**

**I. Introduction**

1. At its sixty-fifth session (2013), the International Law Commission decided to include the topic “Protection of the environment in relation to armed conflicts” in its programme of work, and appointed Ms. Marie G. Jacobsson as Special Rapporteur.

2. Between 2014 and 2016, the Commission considered three reports on the topic submitted by Ms. Jacobsson. In 2017, when Ms. Jacobsson was no long a member of the Commission, Ms. Marja Lehto was appointed as the new Special Rapporteur, at the suggestion of a working group established for that purpose.

3. The Commission drafted a set of principles on protection of the environment in relation to armed conflicts, which it adopted, together with the commentaries thereto, on first reading on 8 August 2019. As noted in paragraph 68 of its report,<sup>1</sup> the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments, international organizations and others, including the International Committee of the Red Cross and the Environmental Law Institute, for comments and observations, with the request that such comments and observations be submitted by 1 December 2020. In September 2020, the submission deadline was extended to 30 June 2021.

4. Spain congratulates the Commission and, in particular, the Special Rapporteur, on the elaboration of the draft principles and the commentaries thereto. The merits of the text include its broad scope; it seeks to address all issues that could arise “in relation to” armed conflicts. This all-encompassing approach manifests itself first at the temporal level, in that the draft articles are intended to apply to the protection of the environment before, during and after an armed conflict (draft principle 1). The purposes behind the draft principles are also very broad; they are aimed at “enhancing the protection of the environment in relation to armed conflict”, not excluding non-international armed conflicts, and take a broad approach with regard to the parties involved (States, international organization, non-State actors, corporations and other business enterprises) and the situations addressed (belligerency, the presence of military forces, peace operations, human

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<sup>1</sup> See *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*.

displacement, situations of occupation and post-conflict actions). Spain wishes to highlight the efforts made by the Commission and the Special Rapporteur to ground the draft principles and the commentaries thereto in international practice and jurisprudence.

## II. General observations and comments

5. Spain considers that the Commission's work is generally focused on codifying the rules of the international law of armed conflict that establish principles relating to the protection of the environment. While the draft articles contain numerous references to elements drawn from international environmental law, the Commission has taken the international law of armed conflict as a starting point and then turned to international environmental law (not the other way around). Therefore, the text does not so much codify the principles and rules of international environmental law in relation to armed conflicts as set out the rules of the international law of armed conflict that contain provisions on the protection of the environment. **It would be desirable to have more integration between the two areas of law – international environmental law and the law of armed conflict – that are drawn upon in the text of the draft principles.** This would also be more advisable. In the diplomatic sphere, there is certainly less reticence about the progressive development of international environmental law than about the progressive development of the law of armed conflict.

6. The draft text includes both principles that are part of customary international law and others that constitute progressive development of international law in the area addressed by the text. The Special Rapporteur has attempted to clarify the nature of the draft principles using the Commission's own commentaries.<sup>2</sup> Her analysis leads her to the conclusion that most of the draft principles in Part Three, which concerns the principles applicable during armed conflict (draft principles 12 to 19), reflect customary international law, with the exception of the draft principle on the prohibition of reprisals (draft principle 16), which she considers to fall under progressive development. She also considers the draft principle concerning the responsibility of States for internationally wrongful acts (draft principle 9) and the three draft principles applicable in situations of occupation (draft principles 20, 21 and 22) to belong to the category of customary international law. In the opinion of the Special Rapporteur, the legal nature of the remaining draft principles is more varied, although she stresses that all of the draft principles are based on existing treaties, other authoritative sources or the best practices of States and international organizations. However, it does not seem sufficient to rely solely

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<sup>2</sup> Marja Lehto, "Armed conflicts and the environment: The International Law Commission's new draft principles", *Review of European, Comparative and International Environmental Law*, vol. 29 (2020), p. 74.

on the Commission's commentaries when determining the specific nature of each draft principle, since many of them are silent on the matter. **It would be desirable to clarify the legal nature of each of the draft principles in the commentaries. This would also help to clarify whether provisions are legally binding or are merely recommendations,** as the Commission's commentaries are not always sufficiently clear in that regard.

7. **Spain also proposes that the wording of the English and Spanish versions of the draft text be harmonized.** In the Spanish version, the word "*deben*" is used when the provision does not set out a legal obligation, and "*deberán*" is used in draft principles that do set out legally binding obligations. This use of the present tense to indicate that content of a codified provision is not obligatory and the future tense to indicate that it is obligatory does not correspond to the wording in the English version of the text, in which there is a clear distinction between provisions that set out an obligation ("shall") and those that merely set out a recommendation ("should").<sup>3</sup> It is therefore particularly urgent to raise this issue with the Commission so that appropriate measures can be taken to harmonize the English and Spanish versions of the draft principles. In particular, the English word "should" should be translated as "*deberían*" (instead of "*deben*", as it appears in several of the draft principles).<sup>4</sup> Furthermore, the use of certain Spanish terms, such as "*restauración*" (draft principles 6 and 23) and "*reparación*" should be reviewed, as they are employed without the appropriate legal rigour. Spain suggests that the term "*restaurar*" be used in references to the reinstatement of the damaged environment (draft principles 5 (2), 6, 7, 24 and 25), and that the term "*reparar*" be used in references to responsibility and compensation for damage (draft principles 9 (1) and 26).

8. A circular legislative technique is used in parts of the draft text. The "in accordance with"/"pursuant to"<sup>5</sup> and "without prejudice"<sup>6</sup> clauses that appear in some of the draft principles are redundant; the draft text is presented as setting out principles derived from international law that are "in accordance with" international law. **These caveats, which are intended to ensure that the draft principles do not change or expand the scope of the rules of international law in force, could be consolidated in a general provision, in the form of an *obiter dictum*, in the introductory part of**

<sup>3</sup> It also does not correspond to the French text, in which the word "*devraient*" is used in cases where States are called upon to take a certain approach but no firm legal obligation is imposed on them.

<sup>4</sup> The mismatch between the terminology used in the English version ("should") and the Spanish version ("*debe*") occurs in draft principles 3 (2), 4, 5 (2), 6, 8, 10, 23 (1), 23 (2) and 28.

<sup>5</sup> The "in accordance with"/"pursuant to" international law clauses occur in draft principles 3 (1) (legislative, administrative and other measures to enhance the protection of the environment in relation to armed conflict), 13 (1) (respect for and protection of the natural environment), 19 (non-engagement in military or any other hostile use of environmental modification techniques), 20 (1) (respect for and protection of the environment of the occupied territory) and 24 (sharing of and granting of access to relevant information).

<sup>6</sup> The "without prejudice" clause is used in draft principles 9 (2) (rules on the responsibility of States for internationally wrongful acts) and 27 (3) (remnants of war).

**the text.**

9. As for the use of terms in the draft principles, the Commission has explained 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 that draw on Additional Protocol I to the Geneva Conventions. **Spain considers that the term “environment” better reflects developments in international law in this area since the adoption of Additional Protocol I in 1977 and is consistent with the broad approach that the Commission has decided to take to the topic of protection of the environment in relation to armed conflicts.**

10. It is striking that the draft principles do not address issues concerning the suppression of **international crimes** related to the protection of the environment during armed conflict, which are referred to only occasionally in some of the commentaries.

11. Lastly, Spain considers that it would be desirable to include in the draft text some considerations concerning the **monitoring of the application** of the rules and principles of international law on protection of the environment in relation to armed conflicts.

### **III. Specific observations and comments on certain draft principles**

#### **Principle 4**

##### **Designation of protected zones**

States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.

12. Spain suggests that the Commission clarify the wording of draft principle 4, on protected zones, by adding the (disjunctive) conjunction “or” alongside the (cumulative) conjunction “and”, in line with the developments in international humanitarian law relating to demilitarized zones. It might also be preferable to use the phrase “cultural heritage and natural heritage“, which appears in the United Nations Educational, Scientific and Cultural Organization Convention for the Protection of the World Cultural and Natural Heritage of 1972, rather than the term “major environmental and cultural importance”.

#### **Principle 5**

##### **Protection of the environment of indigenous peoples**

1. States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit.

2. After an armed conflict that has adversely affected the environment of the territories that indigenous peoples inhabit, States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.

13. With regard to draft principle 5, on protection of the environment of indigenous peoples, Spain suggests that the Commission amend the text of this provision by replacing the verb “should” with “shall”. This proposed amendment is in line with developments in international law in this area, in particular in relation to the obligation to obtain free, prior and informed consent when implementing measures that could have an impact on indigenous peoples or their territories. Moreover, while it is recognized in the commentary that the environmental vulnerability of the lands of indigenous peoples may increase in the event of armed conflict, the protective measures envisaged are optional and subject to certain limitations. For example, it is stated in the commentary that the belligerent State should take steps to ensure that military activities do not take place in the lands of indigenous peoples “unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous people concerned” (para. (6)). The commentary does not provide any guidance as to what reasons of public interest can justify the conduct of military activities that cause environmental damage in the territories of indigenous peoples. Spain suggests that some guidance be included in that respect.

## **Principle 10**

### **Corporate due diligence**

States should take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area of armed conflict or in a post-armed conflict situation. Such measures include those aimed at ensuring that natural resources are purchased or obtained in an environmentally sustainable manner.

## **Principle 11**

### **Corporate liability**

States should take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories can be held

liable for harm caused by them to the environment, including in relation to human health, in an area of armed conflict or in a post-armed conflict situation. Such measures should, as appropriate, include those aimed at ensuring that a corporation or other business enterprise can be held liable to the extent that such harm is caused by its subsidiary acting under its *de facto* control. To this end, as appropriate, States should provide adequate and effective procedures and remedies, in particular for the victims of such harm.

14. It should be understood that draft principles 10 and 11, concerning corporate due diligence and corporate liability, are applicable *mutatis mutandis* in situations of occupation, although this is not stated explicitly in either the draft principles or the commentaries. Spain recommends that this be made explicit.

### **Principle 12**

#### **Martens Clause with respect to the protection of the environment in relation to armed conflict**

In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

15. In draft principle 12, the “Martens Clause”, it is stated that in cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience. The extension of the scope of application of the Martens Clause to include the protection of the environment during armed conflict has been generally welcomed and is a significant step forward. Spain also welcomes it.

### **Principle 13**

#### **General protection of the natural environment during armed conflict**

1. The natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.
2. Care shall be taken to protect the natural environment against widespread, long-term and severe damage.
3. No part of the natural environment may be attacked, unless it has become a military objective.

16. With regard to draft principle 13, on general protection of the natural environment during armed conflict, Spain suggests that paragraph 2 be worded disjunctively, along the lines of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977, which refers to the protection of the environment against widespread, long-lasting “or” severe effects. In fact, this is the approach taken in draft principle 19.<sup>7</sup> Such an amendment could help lower the threshold for the application of the draft principle. A cumulative approach makes the application of the draft principle virtually impracticable. It is expressly stated in the commentary to draft principle 13 that the draft principle “underlines the inherently civilian nature of the natural environment” (para. (10)). Given the importance and general nature of this affirmation of the inherently civilian nature of the natural environment, Spain suggests that rather than being reflected only in the commentary to the draft principle, it be incorporated into the text of the draft principles, at an appropriate place.

### **Principle 15**

#### **Environmental considerations**

Environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity.

17. Draft principle 15 indicates that “environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity.” Spain, like the Netherlands, considers that this provision is largely redundant and could therefore be considered for deletion.

### **Principle 20**

#### **General obligations of an Occupying Power**

1. An Occupying Power shall respect and protect the environment of the occupied territory in accordance with applicable international law and take environmental considerations into account in the administration of such territory.
2. An Occupying Power shall take appropriate measures to prevent significant harm to

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<sup>7</sup> Draft principle 19 (Environmental modification techniques): “In accordance with their international obligations, States shall not engage in military or any other hostile use of environmental modification techniques having *widespread, long-lasting or severe* effects as the means of destruction, damage or injury to any other State” (emphasis added).

the environment of the occupied territory that is likely to prejudice the health and well-being of the population of the occupied territory.

3. An Occupying Power shall respect the law and institutions of the occupied territory concerning the protection of the environment and may only introduce changes within the limits provided by the law of armed conflict.

18. Draft principle 20, on general obligations of an Occupying Power, is too vague, in particular in paragraph 2. Further clarification would be desirable, and the inclusion of terms such as “likely” and “significant” should be reconsidered.

## **Principle 24**

### **Sharing and granting access to information**

1. To facilitate remedial measures after an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under international law.

2. Nothing in the present draft principle obliges a State or international organization to share or grant access to information vital to its national defence or security. Nevertheless, that State or international organization shall cooperate in good faith with a view to providing as much information as possible under the circumstances.

19. It is established in paragraph 1 of draft principle 24 that, to facilitate remedial measures after an armed conflict, States and relevant international organizations “shall” share and grant access to relevant information in accordance with their obligations under international law. In paragraph 2, it is stated that, where such information is vital to national defence or security, States and international organizations shall not be obliged to share or provide access to information, although they shall cooperate in good faith with a view to providing as much information as possible under the circumstances. The normative bases underpinning this provision in the law of armed conflict and international environmental law are reviewed in the commentary to the draft principle (paras. (10) to (13)). It is stated in the commentary that while the term “share” refers to information provided by States and international organizations in their mutual relations and as a means of cooperation, the term “granting access” refers primarily to allowing access to individuals, for example (para. (6)). In the light of this explanation, and in order to make the wording of the provision clearer, it is suggested that an express reference to “individuals” be included in relation to access to information under the conditions set out in the provision.

**Principle 25****Post-armed conflict environmental assessments and remedial measures**

Cooperation among relevant actors, including international organizations, is encouraged with respect to post-armed conflict environmental assessments and remedial measures.

20. Draft principle 25, on post-armed conflict environmental assessments and remedial measures, encourages cooperation among relevant actors with respect to post-armed conflict environmental assessments and “remedial” measures (“*medidas de reparación*”). As explicitly stated in the commentary, the phrase “is encouraged” is hortatory in nature and is to be seen as an acknowledgement of the scarcity of practice in this field. The provision sets out other normative constraints that render it less exacting than the requirements of international environmental law in this area. According to the commentary, the environmental assessment referred to in this draft principle is distinct from the environmental impact assessment provided for under international environmental law (para. (3)). Furthermore, only environmental assessments carried out after armed conflicts have ended are envisaged; possible assessments conducted before or during the conflict, which might be advisable, are excluded. Also, the assessment envisaged would not be conducted with a view to ensuring compensatory “remediation” for the environmental damage caused, nor “recovery” from such damage. In reality, as stated in the commentary, the draft principle is aimed only at ensuring that environmental recovery programmes are in place that aim at strengthening the work of the national and local environmental authorities to rehabilitate ecosystems, mitigate risks and ensure sustainable utilization of resources in the context of the development plans of the concerned State (para. (6)).

**Principle 26****Relief and assistance**

When, in relation to an armed conflict, the source of environmental damage is unidentified, or reparation is unavailable, States are encouraged to take appropriate measures so that the damage does not remain unrepaired or uncompensated, and may consider establishing special compensation funds or providing other forms of relief or assistance.

21. Draft principle 26, on relief and assistance, addresses cases where it has not been possible to identify the source of environmental damage resulting from an armed conflict or where reparation is

unavailable. The provision encourages States, in such cases, to take appropriate measures so that the damage does not remain unrepaired or uncompensated, possibly through the establishment of special compensation funds or other forms of relief or assistance. Not only is the provision merely an invitation (“are encouraged”), which evokes the notion of ultra-soft law, but its content is confused, in that questions related to the need to repair the environmental damage caused are mixed with questions relating to compensation for such damage (which brings in issues related to responsibility for internationally wrongful acts). The commentary to the draft principle makes it clear that access to reparation extends to situations “where there has been no wrongful act”, which means that it extends to environmental damage that may result from acts not prohibited under international law (para. (1)). The explanations in the commentary concerning possible overlaps between this draft principle and other draft principles are evidence of the lack of clarity in this provision.

### **Principle 27**

#### **Remnants of war**

1. After an armed conflict, parties to the conflict shall seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment. Such measures shall be taken subject to the applicable rules of international law.
2. The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic and hazardous remnants of war.
3. Paragraphs 1 and 2 are without prejudice to any rights or obligations under international law to clear, remove, destroy or maintain minefields, mined areas, mines, booby-traps, explosive ordnance and other devices.

### **Principle 28**

#### **Remnants of war at sea**

States and relevant international organizations should cooperate to ensure that remnants of war at sea do not constitute a danger to the environment.

22. Draft principles 27 and 28 address remnants of war on land and at sea, respectively. It is established in paragraph 1 of draft principle 27 that, after an armed conflict, parties to the conflict shall seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction

or control that are causing or risk causing damage to the environment by taking appropriate measures, subject to the applicable rules of international law. In paragraph 2, it is indicated that the parties shall endeavour to reach agreement with other States and with international organizations on technical and material assistance, including the undertaking of joint operations to remove or render harmless the toxic and hazardous remnants of war. Paragraph 3 provides that the above shall be done “without prejudice to any rights or obligations under international law to clear, remove, destroy or maintain minefields, mined areas, mines, booby-traps, explosive ordnance and other devices.” The commentary to the draft principle does not generally help clarify its obscure elements, except by indicating that the draft principle applies to non-international armed conflicts as well as international armed conflicts (para. (5)). The “without prejudice” clause in paragraph 3 refers to existing treaty or customary international law obligations, which are recognized as prevailing (para. (7)), and it is stated in the commentary that the draft principle does not directly deal with the issue of responsibility or reparation for victims (para. (9)). This means that the content of the provision is close to being a blank rule. It would therefore be desirable to improve its content.

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