

1. The United Kingdom of Great Britain and Northern Ireland (**UK**) thanks the International Law Commission for the opportunity to submit written comments and observations on the Draft Principles on Protection of the Environment in relation to Armed Conflicts (the **Draft Principles**) and the commentary on the Draft Principles (the **Commentary**) adopted, on first reading, by the Commission at its seventy-first session (2019).<sup>1</sup> The UK expresses its sincere appreciation to the Special Rapporteur, Ms Maria Lehto, for her work, and is grateful to the Commission for its careful consideration of the topic.

### General Remarks

2. As a general point, the UK recognises the validity of applying international environmental law to matters that are not addressed by the law of armed conflict, particularly in relation to the periods before and after conflict. However, the UK is also conscious of the challenge faced in adopting principles that seek to cover the whole conflict cycle, while also seeking to address diverse areas of law, including the law of armed conflict, international human rights law and international environmental law. Further, the UK continues to have concerns that the Commentary cites a number of sources in support of the Draft Principles, of varying degrees of authority, many of which do not constitute State practice.
3. The UK therefore suggests that the Commentary make clear where the Principles do not reflect existing law, to the extent that it does not already do so.
4. The UK welcomes the fact that in its work on this topic the Commission does not seek to modify the law of armed conflict, or the law of occupation. The UK reiterates its view that this topic should not broaden in scope to examine how other legal fields, such as human rights, interrelate with it. The UK remains unconvinced that there is a need for new treaty provisions on the matters covered by the Draft Principles.
5. The Commission raises the question 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. The UK’s view is that the term “*natural environment*” should not be replaced with the term “*environment*”. The phrase “*protection of the natural environment*”

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<sup>1</sup> International Law Commission, ‘Report of the International Law Commission of its 71st session’ (29 April–7 June and 8 July–9 August 2019), A/74/10, Chapter VI ‘Protection of the environment in relation to armed conflicts’.

already takes into consideration the potential effect on the civilian population. By retaining “*natural environment*” in Part Three, the Draft Principles will maintain the language in API instead of introducing a new term, which could lead to uncertainty and even the inclusion of elements that were not intended to come within the meaning of “*natural environment*.”

6. The UK’s comments on specific Draft Principles are set out below.

#### **Draft Principles 2, 6, 7 and 8**

7. In respect of Draft Principles 2, 6, 7 and 8, we suggest that the State’s aims, obligations or commitments in relation to the environment in those contexts should be more consistently described in terms of the intention to “*prevent, mitigate and remediate harm to the environment*”. This consistency will provide more clarity. This would entail the following changes:

**Draft Principle 2:** “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~~ *to prevent, mitigate and remediate harm to the environment during armed conflict.*”

**Draft Principle 6:** “States and international organizations should, as appropriate, include provisions on environmental protection in agreements concerning the presence of military forces in relation to armed conflict. Such provisions “~~may include preventive measures, impact assessments, restoration and clean-up measures~~ *should include measures to prevent, mitigate and remediate harm to the environment.*”

**Draft Principle 7:** “States and international organizations involved in peace operations in relation to armed conflict shall consider the impact of such operations on the environment and take appropriate measures to prevent, mitigate and remediate ~~the negative environmental consequences thereof~~ *harm to the environment resulting from those operations.*”

**Draft Principle 8:** “States, international organizations and other relevant actors should take appropriate measures to prevent, *mitigate and remediate harm to the*

~~environment and mitigate environmental degradation~~ in areas where persons displaced by armed conflict are located, while providing relief and assistance for such persons and local communities.”

### **Draft Principle 3**

8. The UK is concerned about the interpretation of Common Article 1 of the Geneva Conventions in the Commentary. The Commentary states “Common article 1 is also interpreted to require that States, when they are in a position to do so, exert their influence to prevent and stop violations of the Geneva Conventions by parties to an armed conflict.” (our emphasis). The UK does not accept this interpretation, nor that Common Article 1 contains such an obligation.
9. The UK requests that the Commentary is amended to recognise that there is considerable debate over the ICRC position and does not simply accept it as a correct statement of law.

### **Draft Principle 4**

10. The UK agrees that, as recognised under this Draft Principle 4, it is positive to have a mechanism for conferring special protection on zones of major environmental importance.
11. The Commentary notes the differing views expressed on whether or not the word “cultural” should be included in Draft Principle 4. In order to bring it in line with the intention expressed in the Commentary, it is suggested that Draft Principle 4 be redrafted as follows: “States should designate, by agreement or otherwise, areas of major environmental ~~and cultural~~ importance, including those of cultural importance, as protected zones”.
12. Likewise, Draft Principle 17 should be redrafted as “An area of major environmental ~~and~~ importance, including one of cultural importance, designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective”.

### **Draft Principle 5**

13. Draft Principle 5(1) provides that “States *should* take appropriate measures, in the event of armed conflict, to protect the environment of the territories that indigenous peoples inhabit.” (our emphasis).

14. The Commentary provides that the wording of Draft Principle 5(1) is based upon the wordings of the United Nations Declaration on the Rights of Indigenous Peoples, and the International Labour Organization Convention concerning Indigenous and Other Tribal Peoples in Independent Countries. However, it must be recognized that these sources do not address armed conflict as such but instead reflect general protection measures that should be taken with respect to the indigenous population.
15. The Commentary appears to suggest that the land of indigenous people has some special protection under the law of armed conflict (**LOAC**). While international humanitarian law does afford special protection to certain objects, such as hospitals and cultural property, it does not afford such special protection to the land of indigenous people. The protection of civilian objects under Additional Protocol I apply to all objects which are not military objectives.
16. As stated in the UK's 2014 comment at the UN General Assembly Sixth Committee, the ILC mandate should not deal with "undecided and often controversial questions of international environmental law, human rights law, or the rights of indigenous peoples" with respect to the protection of the environment in relation to armed conflict.<sup>2</sup> Questions concerning the status of indigenous land in the context of armed conflict fall outside the topic.
17. The UK would propose that Draft Principle 5 is deleted for these reasons.

#### **Draft Principle 10**

18. Draft Principle 10 provides: "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 [...]." [our emphasis added]
19. It is unclear why it is necessary for States to take "legislative [...] measures". States may be able to achieve the desired impact without legislation.
20. The UK proposes Draft Principles 10 is amended to: "States should take appropriate legislative ~~and~~ or other measures [...]".

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<sup>2</sup> UK Statement at the UNGA, Sixth Committee, Sixty-ninth session, 3-5 November 2014.

## Draft Principle 12

21. The UK welcomes the important recognition in the Commentary that differing views exist on the legal consequences of the Martens Clause. However, the Commentary looks to interpret the Martens Clause with reference to “the principles of humanity”, asking whether the environment can remain under the protection of “the principles of humanity”, given that the function of such principles is to specifically serve human beings. The UK notes that in the context of international humanitarian law (IHL), “the principle of humanity” has a specific meaning, which is not reflected in the Commentary. In IHL, the principle of humanity forbids the infliction of all suffering, injury or destruction not necessary for achieving the legitimate purpose of a conflict. While the UK does not disagree that the environment is a concern of human beings, the application of the IHL principle in this context would, at the very least, need to address the question of how this is linked to the core interpretation of the principle as pertaining to the prohibition of means and methods of war which are not necessary for the attainment of a definite military advantage, and the causing of unnecessary suffering.
22. The UK notes that the Commentary states, “the phrase ‘principles of humanity’ can be taken to refer more generally to humanitarian standards that are found not only in international humanitarian law but also in international human rights law, which provides important protections to the environment.” This is overly expansive and does not recognise the *lex specialis* nature of IHL; instead it subordinates the principles of IHL to all other international standards, which are not specifically designed to address the conditions of armed conflict.
23. The UK suggests that the Commentary is revised to reflect the IHL-specific nature of the principle of humanity.

## Draft Principle 13

24. The Commentary to draft principle 13 refers to the Advisory Opinion of the ICJ on the *Legality of the Threat or Use of Nuclear Weapons* for the proposition that states have a duty to take environmental considerations into account in assessing necessity and proportionality. The extract taken from the Advisory Opinion is only a partial reference. The context of the ICJ’s position is important. The ICJ was considering whether treaty obligations towards the environment were obligations of total restraint during military conflict. The ICJ recognised that while states have a duty to take these obligations into account, they cannot deprive states of their right to self-defence.

25. The UK requests that the Commentary is amended to make this context clear as it is important for understanding the implications of the Advisory Opinion for the environmental obligations applicable to States in relation to armed conflict.
26. Further, the UK suggests that the discussion of the use of the terms 'international humanitarian law' and 'the law of armed conflict' be removed. Views vary on these terminological issues and it is not necessary to reach a definitive view in the present context.

#### **Draft Principle 15**

27. As set out above in relation to Draft Principle 13, the extract from the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* is again not taken in its full context. The ICJ recognised that while environmental obligations cannot deprive states of their right to self-defence, states must take environmental considerations into account.
28. The UK requests that the Commentary is clarified in line with the comment for Draft Principle 13.

#### **Draft Principle 16**

29. The UK notes the divergent views within the Commission on the inclusion of this principle. As the commentary acknowledges, the UK does not accept the blanket prohibition against reprisals in Draft Principle 16. In the UK's view, this does not reflect the current state of customary international law and reservations by States to Article 55(2) of Additional Protocol I to the Geneva Conventions.<sup>3</sup>

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<sup>3</sup> The UK notes the following two reservations it made to Article 55:

**ARTICLE 35, paragraph 3 and ARTICLE 55:** *The United Kingdom understands both of these provisions to cover the employment of methods and means of warfare and that the risk of environmental damage falling within the scope of these provisions arising from such methods and means of warfare is to be assessed objectively on the basis of the information available at the time.*

**ARTICLE 51 – 55:** *The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the*

- 30.** In accordance with its reservations, the UK's view is that: (a) Article 55 is a rule introduced by Additional Protocol I and it applies exclusively to conventional weapons without prejudice to any other rules of international law applicable to other types of weapons; and (b) where an adverse party makes serious and deliberate attacks, in violation of Article 55, the UK may undertake reprisals as necessary to, and for the sole purpose of, compelling the adverse party to cease committing violations.
- 31.** The UK maintains that the doctrine of *allowing* belligerent reprisal is part of customary international law, and that the constituent elements of that doctrine are as described in the UK's statement to the ICJ in 1995. While the International Criminal Tribunal for the former Yugoslavia asserted that there was a customary international law prohibition of reprisals against all civilians and civilian property, the UK maintains that this is contrary to state practice (as evidenced by the UK's reservations to Additional Protocol I) and the UK has publicly rejected these findings which are, in any event, non-binding. It is noted that the ICRC Study on Customary International Law acknowledged it is difficult to conclude that a rule of customary international law prohibiting reprisals against civilians or civilian objects has crystallised because of existing contrary state practice.
- 32.** The UK therefore requests that Draft Principle 16 is deleted or amended to reflect the above.

#### **Draft Principle 19**

- 33.** Noting that the definition of environmental modification techniques concerns the deliberate manipulation of natural processes or the use of the environment as a weapon, the UK reiterates its position that this is to be differentiated from the effects of the use of a weapon on the environment. Weapons use, including nuclear weapon use, may have considerable effects on the environment, but it is unlikely that it would be used for the deliberate manipulation of natural processes. The relevant principles concerning the effects on the environment are contained elsewhere in the Principles.
- 34.** The UK therefore requests that Draft Principle 19 is amended accordingly

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*violations giving rise there to and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.*

### **Draft Principles 27 and 28**

- 35.** The Commentary to Draft Principle 27 provides: “The obligation “to seek to” is one of conduct and relates to “toxic and hazardous remnants of war” that are “causing or risk causing damage to the environment””. The Commentary does not elaborate on the active steps which “seek to” requires.
  
- 36.** Therefore, the UK would welcome further clarification on the standard being applied in the requirement to “seek to”.