

Comments and Observations of Canada on The Draft Principles on Protection of the Environment in relation to Armed Conflicts and the commentary on the Draft Principles adopted, on first reading, by the Commission at its seventy-first session (2019).

1. Canada thanks the International Law Commission for its important work 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).¹ Canada sincerely thanks the Special Rapporteur, Ms Maria Lehto, for her work, and is grateful for the progress accomplished so far.

General Remarks

2. Canada has reviewed the Draft Principles and the Commentary, and wishes to share the following comments and views in a constructive and collaborative spirit. Please note that silence on other points does not imply agreement.
3. The approach taken in a number of the Draft Principles and the Commentary generates ambiguity. In some instances, the Draft Principles attempt to create new norms or extend well-settled rules constituting *lex lata*. In the absence of corresponding State practice and *opinio juris*, international humanitarian law (IHL) treaty obligations applicable during international armed conflict should not be presented as customary rules applying during non-international armed conflict.
4. Canada therefore strongly recommends the Commission include clear statements that:
 - a. the Draft Principles and the Commentary neither codify existing international law nor re-interpret long-standing and well understood treaties;
 - b. IHL is *lex specialis* in situations of armed conflict; and
 - c. each Draft Principle either reflects an obligation or is a recommendation aimed at the progressive development of the law.

¹ 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.'

5. Similarly, where the Commission considers that a Draft Principle represents an international legal rule, Canada encourages the Commentary to state whether it is based on treaty law, customary international law, or both.
6. Canada notes that the Commission decided not to distinguish between international armed conflicts and non-international armed conflicts with respect to the applicability of the Draft Principles. Canada is concerned that this impacts the coherence of the Draft Principles, especially in Part Three, where they are based on specific provisions of IHL treaties, principally those found in Additional Protocol I to the Geneva Conventions.
7. Canada regrets that several Draft Principles go beyond existing legal obligations, and therefore, fail to accurately reflect current customary norms, their status, and content.² These Draft Principles use mandatory verbs, which are only appropriate to characterize Draft Principles constituting *lex lata*.
8. Several Draft Principles and the Commentary use a wide range of sources, with varying degree of authority, that do not constitute State practice or *opinio juris*. Canada finds that this practice adds to interpretive confusion and hampers the ability of the Draft Principles to provide guidance.
9. Canada's comments on specific Draft Principles are set out below.

Draft Principle 3

10. Canada is concerned about the reference to Common Article 1 of the Geneva Conventions in the Commentary to Draft Principle 3. The Commentary asserts that Common Article 1 "is interpreted to require" States to "exert their influence" to prevent and stop violations of the Geneva Conventions in conflicts to which they are not a party.³ Canada does not accept and has never accepted that Common Article 1 contains a duty to ensure respect by other States or armed groups during armed conflicts to which Canada is not a party. This language is long-standing and well-understood.
11. Canada requests that the Commentary is amended to recognize that there is considerable debate over the ICRC position and does not simply accept it as a correct statement of law.

² See, for example, Draft Principle 9, 12, 13.2, 15, 20, 21, 24, and 27.

³ See Draft Principle 3, Commentary 6.

12. The Commentary to Draft Principle 3 also references an obligation on States to “effectively exercise jurisdiction and prosecute persons suspected of certain war crimes.”⁴ States have international obligations to ensure that prosecutions are possible, not that jurisdiction is exercised, effectively or otherwise. This would entail the following change:

Commentary 10: States also have the obligation to effectively exercise jurisdiction and prosecute persons suspected of certain war crimes that have a bearing on the protection of the environment in relation to armed conflict, to the extent that such crimes fall within the category of grave breaches of the Geneva Conventions.

Draft Principle 7

13. Canada does not accept that Draft Principle 7 concerning peace operations reflects customary international law. The Commentary is based on non-binding policy documents adopted by the EU, the UN, and NATO. Canada recommends that the verb “shall” be amended to “should” in Draft Principle 7.

Draft Principles 10 and 11

14. With respect to Draft Principles 10 and 11, Canada has not accepted an obligation to ensure that national corporations exercise due diligence with respect to the protection of the environment when operating in a foreign jurisdiction. Issues of corporate liability are governed by private international law and applicable domestic law.

Draft Principle 12

15. Draft Principle’s 12 proposed expansion of the Martens Clause to include protection for the environment requires more reflection. Canada does not recognize this restatement of the Martens Clause as customary international law. Canada understands that “the principle of humanity” forbids the infliction of all suffering, injury or destruction not necessary for achieving the legitimate purpose of a conflict. It is unclear how the prohibition of means and methods of war which are not necessary for the attainment of a definite military advantage is linked to protecting the environment in the context of this Draft Principle. As such, Canada would remove reference to the Martens Clause from this Draft Principle.

⁴ See Draft Principle 3, Commentary 10.

Draft Principle 13

16. Draft Principle 13 would apply to international armed conflicts and non-international armed conflicts.⁵ Draft Principle 13(2) is derived from Article 55 of Additional Protocol I, to which Canada is party. This treaty obligation has not obtained customary status. Canada is of the view that this distinction should be clarified, and Draft Principle 13(2) should clearly articulate that it only applies during international armed conflict.

Draft Principle 14

17. Draft Principle 14 would expand the customary IHL rules of distinction, proportionality, military necessity, and precautions in attack to apply to the natural environment. Draft Principle 14 does not reflect the current state of international law. Canada would revise Draft Principle 14 to state:

“The law of armed conflict, including the principles and rules on distinction, proportionality, military necessity and precautions in attack, ~~shall~~ *should* be applied by parties to a conflict with a view to protect the natural environment.”

Draft Principle 15

18. Canada has concerns about Draft Principle 15. The Commentary states that it is “closely linked” to Draft Principle 14, it adds value by providing “specificity” to the application of proportionality and military necessity, and it “aims to address military conduct and does not deal with the process of determining what constitutes a military objective as such.”⁶ Canada finds this rationale ambiguous, as these rules only apply during operations against military objectives. Draft Principle 15 does not add anything significant that is not already addressed by Draft Principle 14. Canada recommends that Draft Principle 15 be removed.

Draft Principle 16

19. Draft Principle 16 restates the prohibition of reprisals contained in article 55(2) of Additional Protocol I. At many points, the Commentary highlights the debate on whether the prohibition of reprisals is a customary rule or a treaty obligation applicable only during international armed conflict.⁷ Canada recommends that the Commentary to Draft Principle 16 clearly indicate that the

⁵ See Draft Principle 13, Commentary 7.

⁶ See Draft Principle 15, Commentary 3 and 4.

⁷ See Draft Principle 16, Commentary 4, 5, and 7.

prohibition against reprisals is a treaty based obligation applicable only during international armed conflict.

Draft Principle 17

20. Draft Principle 17 does not reflect the current state of international law. In its current formulation, the Draft Principle is overly broad. The Draft Principle implies that a whole area may become a target if it contains a military objective. The military objective might be targetable but not automatically the area it is in.

Draft Principles 20, 21, and 22

21. The Draft Principles applicable in situations of occupation (20, 21, and 22) would be more expansive than is required by the law of occupation. Canada recommends that these principles be rephrased or removed.