

Comments of Portugal to the Draft Principles on Protection of the Environment in relation to Armed Conflicts adopted on first reading by the International Law Commission

Portugal welcomes the opportunity to present its written comments and observations to the twenty-eight Draft Principles on Protection of the Environment in relation to Armed Conflicts, adopted, on first reading, by the International Law Commission (hereinafter, "the Commission") at its Seventy-First session (2019).

Portugal salutes and renews its tribute to the Commission and the Special Rapporteur, Ms. Marja Lehto, for their work on this topic.

The human right to a healthy and sustainable environment calls for positive action on the part of States in the different stages of the armed conflict cycle and this endeavour by the Commission is an effective contribution for such positive action.

The Draft Principles strike an interesting balance between the codification of International Law and elements of its progressive development, while clearly distinguishing each instance (in the use of "should" and "shall", as appropriate).

The Draft Principles are in line with relevant customary rules identified in the 2005 Study of the International Committee of the Red Cross (ICRC) on Customary International Humanitarian Law: "Rule 43. Application of General Principles on the Conduct of Hostilities to the Natural Environment", "Rule 44. Due Regard for the Natural Environment in Military Operations" and "Rule 45. Causing Serious Damage to the Natural Environment".

Portugal notes that the Draft Principles of **Part Three [Two] (Principles applicable during armed conflict)** and **Part Four (Principles applicable in situations of occupation)** are aligned with applicable rules of International Humanitarian Law established under (i) the 1907 Hague Regulations – Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land –, (ii) the 1949 Convention (IV) relative to the Protection of Civilian Persons in Time of War, (iii) the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts and (iv) the 1978 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD).

Although this foundational consideration of International Humanitarian Law is paramount to the Draft Principles, Portugal is also pleased that the work of the Commission on this topic confirms and strengthens the view that armed conflicts are not exclusively ruled by International Humanitarian Law, by also incorporating rules and recommendations stemming from International Human Rights Law, the Law of the Sea, International Criminal Law and International Environmental Law.

Moreover, Portugal greets the reference in the Draft Principles to actors other than States – encompassing, as explained in the commentaries to the Draft Principles, non-State actors –, as a recognition of their relevant role, responsibility, and liability in relation to humanitarian assistance and the protection of the environment.

With regards to the *ratione temporis* scope of the Draft Principles, Portugal acknowledges the choice of the Commission to address this topic before, during and after an armed conflict, through preventive and remedial measures. This approach is similar to the one characterising the international legal framework on the protection of cultural heritage in relation to armed conflicts. In this regard,

Draft Principle 4 [I-(x), 5] (Designation of protected zones) and **Draft Principle 17 [II-5, 13] (Protected zones)** bring together the concepts of “environmental importance” and “cultural importance”. Portugal sees this approach as favouring a systematic and integrated international legal framework on the protection of values and objects that are of significant interest and need to all of Humanity – and not only to the people inhabiting the sites where those objects are located at.

On the *ratione materiae* scope of the Draft Principles, Portugal notes that most of the current armed conflicts are of a non-international nature and, according to the United Nations Environment Programme, many of these conflicts are linked to the exploitation of natural resources. Acts prohibited in international armed conflicts should not be tolerated in non-international armed conflicts either. Avoid distinction between the two type of armed conflict to harmonise the legal framework applicable to armed conflicts in general is a clear current tendency in International Humanitarian Law. As such, Portugal welcomes the choice of the Commission to make no distinction – especially with regards to preventive measures – between international and non-international armed conflicts for purposes of the Draft Principles.

Yet, a suitable concept of “environment” should not be reduced to the natural resources available at a given area and at a given time. The Commission has made this clear, for example in **Draft Principle 19 (Environmental modification techniques)**. Portugal considers crucial to reiterate that the environment is a common good of all Humanity. It should hence be a common endeavour of States, international organisations, corporations and individuals to fight environmental degradation and to cooperate in the protection of the environment everywhere and at all times, including in relation to armed conflicts, whatever their nature or how long they last.

Portugal acknowledges that absolute protection of the environment is not feasible, as conditional protection is necessary to guarantee a balance between military, humanitarian, and environmental concerns. In this regard, Portugal finds the Draft Principles as a reflection of the possible balance.

Nonetheless, Portugal wishes for a more ambitious text in **Draft principle 17 [II-5, 13] (Protected zones)**. This Draft Principle states that an area of major environmental and 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.

On the other hand, **Draft principle 4 [I-(x), 5] (Designation of protected zones)**, on the “designation of protected zones”, provides that States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones. In addition, **paragraph 3 of Draft principle 13 [II-1, 9] (General protection of the natural environment during armed conflict)** states that “no part of the natural environment may be attacked, unless it has become a military objective”.

When these three Draft Principles are read together, the conclusion is that, should a major environmental and culturally important area be designated by a mean other than an agreement between the parties at war, under **Draft principle 17** such zone would no longer be protected against attacks, even if it was not a military object. Even if the term “agreement” is understood in a broad sense, **Draft Principle 17** could still impair the protection of a site that would otherwise be protected under **Draft Principle 4** or pursuant to **Draft Principle 13**.

Hence, and differently from the view of the Commission, Portugal is not convinced that the current text in **Draft Principle 17** enhances the protection conferred

under **Draft Principle 13**. Instead, Portugal would recommend the harmonization of all three Draft Principles, in order to reflect the position that the status and protection of a site under international law is respected as long as it is not used as a military object and regardless of how that designation as a protected zone took place, whenever such site has been designated as being of major environmental and cultural importance.

Portugal kindly invites the Commission to consider the following additions (in **bold** and underlined) to the text of the Draft Principles mentioned below:

a) In **Draft 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 **avoiding and** minimizing damage to the environment during armed conflict and through **restoration and** remedial measures.”

b) Considering the recommendatory nature of **Draft principle 6 [7] (Agreements concerning the presence of military forces in relation to armed conflict)**:

“Agreements concerning the presence of military forces in relation to armed conflict 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, **mitigation,** restoration and clean-up measures.”

c) In **Draft Principle 7 [8] (Peace operations)**:

“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,

restore, and remediate the negative environmental consequences thereof.”

d) In paragraph 1 of Draft Principle 24 [18] (Sharing and granting access to information):

“1. To facilitate restoring and 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 conclusion, Portugal reiterates its sincere appreciation for the work of the Commission so far on the topic of Protection of the Environment in relation to Armed Conflicts and looks forward to a fruitful outcome by the Commission.