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Protection of the environment in relation to armed conflicts

Comments and observations received from Governments, international organizations and others

Contents

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I. Introduction

1. At its seventy-first session (2019), the International Law Commission adopted, on first reading, the draft principles on protection of the environment in relation to armed conflicts.[1] In accordance with articles 16 to 21 of its statute, the Commission decided to transmit the draft principles, through the Secretary-General, to Governments, international organizations and others for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2020.[2] The Secretary-General circulated a note dated 16 September 2019 to Governments transmitting the draft principles on protection of the environment in relation to armed conflicts, with commentaries thereto, and inviting them to submit comments and observations in accordance with the request of the Commission. The draft principles and commentaries were also sent to international organizations and others by letters dated 30 October 2019, inviting them to provide comments and observations.

2. In September 2020, the deadline was extended to 30 June 2021, in light of the General Assembly's decision (74/566) to postpone the seventy-second and seventy-third sessions of the Commission to 2021 and 2022, respectively. The Secretary-General circulated a note dated 24 September 2020 to Governments reiterating the invitation to submit comments and observations and informing Governments of the extension of the deadline. International organizations and others were informed of the extension of the deadline by letters dated 19 November 2020. By its resolution 75/135 of 15 December 2020, the General Assembly drew the attention of Governments to the importance for the Commission of having their comments and observations on the draft principles adopted on first reading by the Commission at its seventy-first session, and took note of the extension of the deadline.

3. As of 17 January 2022, written comments and observations had been received from Belgium (29 June 2021), Canada (30 June 2021), Colombia (30 June 2021), Cyprus (30 June 2021), the Czech Republic (19 January 2021), El Salvador (30 June 2021), France (30 June 2021), Germany (28 June 2021), Ireland (9 July 2021), Israel (27 July 2021), Japan (29 June 2021), Lebanon (14 May 2021), the Netherlands (30 December 2020), Portugal (12 July 2021), Spain (9 July 2021), Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (31 August 2021), Switzerland (30 June 2021), the United Kingdom of Great Britain and Northern Ireland (30 June 2021), and the United States of America (6 October 2021).

4. As of 17 January 2022, written comments and observations had also been received from the following international organizations and other entities: the Environmental Law Institute (30 June 2021), the Fund for the Development of Indigenous Peoples of Latin America and the Caribbean (29 November 2019), the Food and Agricultural Organization of the United Nations (1 July 2021), the International Atomic Energy Agency (30 June 2021) (IAEA), the International Committee of the Red Cross (2 July 2021) (ICRC), the International Union for the Conservation of Nature (20 September 2021) (IUCN), the Office of the United National High Commissioner for Human Rights (19 July 2021) (OHCHR), the Office of the United Nations High Commissioner for Refugees (4 December 2020) (UNHCR), the Organisation for the Prohibition of Chemical Weapons (4 March 2021) (OPCW), the United Nations Economic Commission for Latin America and

[1] Report of the International Law Commission on the work of its seventy-first session, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 66.

[2] *Ibid*., para. 68.

the Caribbean (13 January 2021) (ECLAC), the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) (22 November 2019), the United Nations Environment Programme (23 November 2020), and the United Nations Office for Disarmament Affairs (29 June 2021) (ODA).[3]

5. The comments and observations of Governments are reproduced in chapter II, while the comments and observations of international organizations and others are reproduced in chapter III. [4] The comments and observations are organized thematically as follows: general comments and observations and specific comments on the draft principles.[5]

II. Comments and observations received from Governments

A. General comments and observations

Belgium

[Original: French]

Belgium would like first of all to thank the International Law Commission for its report and to congratulate its members on the work done. It wishes in particular to thank the Special Rapporteur for the topic of protection of the environment in relation to armed conflicts, Ms. Marja Lehto, and welcomes the adoption on first reading of the draft principles.

[…]

In paragraph (5) of the commentary to Part One (Introduction), the Commission states 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".[6] Belgium wonders whether the broader term "environment" might not be preferable to the narrower term "natural environment". Open landscapes with, for example, agricultural land (a semi-natural environment) often play an important role for adjacent environmental protection zones (or nature reserves).

Canada

[Original: English]

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.

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[3] The European and Mediterranean Major Hazards Agreement of the Council of Europe, the Organization of American States, the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory, and the United Nations Relief and Works Agency for Palestine Refugees in the Near East each submitted replies indicating that they had no substantive comments.

[4] Abbreviations (e.g., UN, ILC) have been spelled out where necessary for clarity, and quotations of the draft principles and commentaries thereto in the comments and observations as submitted have been omitted where appropriate. The comments and observations as submitted are available on the website of the Commission at https://legal.un.org/ilc/guide/8_7.shtml#govcoms.

[5] In each of the sections below, comments and observations received are arranged by States, international organizations and others, which are listed in English alphabetical order.

[6] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I) (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 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 treaty obligations applicable during international armed conflict should not be presented as customary rules applying during non-international armed conflict.

Canada therefore strongly recommends the Commission include clear statements that:

(a) the draft principles and the commentary neither codify existing international law nor reinterpret long-standing and well-understood treaties;

(b) international humanitarian law 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.

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.

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 international humanitarian law treaties, principally those found in Additional Protocol I to the Geneva Conventions.

Canada regrets that several draft principles go beyond existing legal obligations, and therefore, fail to accurately reflect current customary norms, their status, and content.[7] These draft principles use mandatory verbs, which are only appropriate to characterize draft principles constituting *lex lata*.

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.

Colombia

[Original: Spanish]

Colombia reaffirms the importance of this topic for the country and recognizes the great work that the International Law Commission has done so far, which has enabled it to complete its first reading of the draft principles and the commentaries thereto.

Colombia reiterates the points made in the statements it delivered at the seventy-third and seventy-fourth sessions of the General Assembly, in which it addressed the topic of the report of the Commission regarding the protection of the environment in relation to armed conflicts, and recognizes that the environmental effects generated during and after an armed conflict could pose a serious threat to human beings and the surrounding ecosystems. In addition, the environmental damage caused by an armed conflict has long-term, potentially irreparable

[7] See, for example, draft principles 9, 12, 13.2, 15, 20, 21, 24, and 27.

consequences, and it might undermine the reconstruction of societies and destroy large expanses of wilderness and ecosystems.

To date, laws enacted around the world to prevent, reduce and repair damage to the environment caused by armed conflict have been neither sufficient nor effective. In that connection, Colombia is well aware that international humanitarian law needs to be integrated into other branches of law, such as environmental law, human rights law and treaty law.

As mentioned in its last statement delivered at the seventy-fourth session of the General Assembly, Colombia continues to identify two gaps which, in its view, should be taken into consideration at this stage of the draft principles:

First, the draft principles make no reference to the responsibility of non-State armed groups. As the history of Colombia, and the growing number and impact of such actors in other parts of the world show, they must also take responsibility for any damage to the environment. Colombia therefore suggests that the Commission include a principle emphasizing the responsibility of non-State armed groups for the protection of the environment.

Second, a provision should be included in the draft principles requesting States and non-State armed groups to review the environmental impact of weapons they were considering using, to determine whether such use would be prohibited by any norm of international law.

Although Colombia is well aware that the draft principles are not intended to be binding, it suggests that the wording and form of the document be reviewed, because several of the draft principles seem to be intended to reflect a legally binding obligation.

Indeed, as currently drafted, they appear to contain mandatory wording in some sections that is more in line with an agreement, a treaty or other binding instrument. Many of them are drafted using formulations that are more suited to undertakings, such as “shall take”, “shall seek”, “shall exercise”, “is prohibited” and “shall not engage in … use”. These expressions contrast with enunciative wording that is more in line with a soft law instrument, such as “should”, “shall be taken” or “is encouraged”. Although the reference that the Commission makes in the commentaries is generally whether a given provision is an obligation or a recommendation, it is important to be able to refer more to the nature of the draft principles as a whole. Colombia therefore suggests that the draft principles be more enunciative and that they be drafted using formulations that do not imply obligations – which will also have to be accepted by States – and that they be phrased as recommendations.

Cyprus

[Original: English]

The Republic of Cyprus welcomes the commendable work of the International Law Commission on the protection of the environment in relation to armed conflicts and the adoption of draft principles on first reading at the Commission’s seventy-first session.

It is noteworthy that this set of draft principles has been elaborated in an era where the implementation of measures aiming at the protection of the environment is of utmost necessity in light of rapid developments causing deterioration of our planet’s natural environment.

The draft principles address many pressing issues, such as the designation of significant environmental and cultural areas as protected zones, the protection of the

environment of indigenous peoples, the prevention and mitigation of environmental degradation in areas where persons displaced by armed conflict are located, corporate due diligence and liability, as well as the environmental obligations of an occupying power. The Republic of Cyprus underlines the structural organization of the draft principles into parts arranged by the type of phase of conflict: those which apply in all circumstances, those which apply during armed conflict, during occupation and post-conflict.

The Republic of Cyprus is of the view that the environment requires enhanced protection in times of armed conflict given that it is put under heavy stress owing to the use of an array of weapons and ammunition. Bearing in mind the above, the Republic of Cyprus supports the work of the Commission on this topic and pledges to contribute to the further development of the draft principles under discussion.

By way of general comment, the Republic of Cyprus agrees with the inclusion of non-international armed conflicts within the scope of the draft principles, given that hostilities in a non-international context may also have a detrimental effect on the environment; they thus require regulation. Moreover, the Republic of Cyprus welcomes and strongly supports the application of these draft principles in situations of belligerent occupation (especially draft principles 9, 12, 18 and 20-22), which is an aspect of and signifies the existence of an ongoing armed conflict.

Moreover, it should be made clear that under no circumstances should any discussion concerning the responsibilities of an occupying power concerning the natural environment of the territory it occupies be construed as legitimizing the illegal use of force or any form of occupation, or recognize or legalize any effect thereof.

Czech Republic

[Original: English]

The Czech Republic would like to express its appreciation and gratitude to the Commission and the Special Rapporteur, Ms. Marja Lehto, for their work on this topic, and commend the Special Rapporteur for her scholarly guidance in this undertaking.

[…]

As the Czech Republic already stated in its oral interventions in the Sixth Committee, the topic chosen by the Commission is very relevant. It is undisputable that today the protection of environment is a more pressing issue than ever before and that armed conflicts always have negative impact on the environment, not only where they take place, but also in other areas. However, the main problem of today's armed conflicts is enforcing the basic rules of international humanitarian law, especially among non-State actors. In general, the Czech Republic expects that the outcome of this topic will be, in particular, a summary of the rules of international law in relation to the use and the protection of the environment and natural resources during an armed conflict, rather than an ambitious and innovative list of recommendations based on very general concepts.

The Czech Republic has certain doubts concerning the lack of clarity about the overall orientation and goal of Commission's work on this topic, i.e., whether the "principles" are intended to reflect the current state of international law, whether they are intended to provide guidance without pretending to be firmly founded in positive law, or whether they are a combination of both approaches. In the draft, sometimes there seems to be no clear dividing line between the accepted rules of international law and the efforts of the Commission to contribute to the progressive development of international law. The normative status of some of the rules cited by

the Commission as accepted international rules is not beyond doubt (see below for more details).

The Czech Republic also wishes to point to the fact that legal obligations concerning protection of the environment in relation to armed conflicts cannot be properly interpreted and understood in an abstract manner, in isolation from other provisions applicable in armed conflicts. As regards the draft principles, sometimes it is not clear what is the criterion allowing a line to be drawn – within the law of armed conflicts – between the rules aiming at protection of the environment and other rules, and whether the rules on protection of the environment could be taken out of the context of other rules applicable to armed conflicts without a risk of altering their meaning. The Czech Republic is also concerned with the approach consisting in selection of rules from various areas of international law and their discussion in connection with armed conflicts. Some of these rules may be applicable in all situations, including those of armed conflicts, and raising them specifically in the context of the present topic may give an incorrect impression that it is not yet the case. For other rules, however, the mere fact that they relate to the protection of the environment does not make them automatically suitable for the purpose of the present topic. In this regard, the risks arising from a selective or incomplete compilation should be also duly considered.

The draft aims to formulate principles that would apply to international as well as non-international armed conflicts without any distinction. It is to be noted that existing treaty law relevant to non-international armed conflicts does not address the natural environment in any way. On the other hand, the ICRC study on customary international humanitarian law[8] (2005) does identify some general principles that should apply to the natural environment in both international and non-international armed conflicts. However, the Commission's draft seems to go beyond this range and brings into play notions that do not otherwise occur in the corpus of international law relevant to non-international armed conflicts.

The Czech Republic has doubts about the principles addressed to "other relevant actors" (according to the draft, these include, *inter alios*, "international donors, and international non-governmental organizations"). These actors lack the capacity to assume obligations under international law. It is also not clear how these actors should follow suggested recommendations in practice, including their cooperation with the representatives of States and international organizations.

There are no definitions of the basic terms including, most importantly, the natural environment. This is the core notion and the absence of its definition may significantly limit the effectiveness (and use) of the draft. Another problem is the notion of "area[s] of major ... cultural importance" in principles 4 and 17. It seems to be conceived too broadly, and is therefore likely to become a source of ambiguities, namely with regard to the fact that international humanitarian law already contains detailed rules for the protection of cultural property during armed conflicts.

El Salvador

[Original: Spanish]

Armed conflicts cause direct and indirect harm to the environment that can endanger health and quality of life to such an extent that it threatens the survival of humankind, since the effects endure beyond the end of the conflict. In that regard,

[8] Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. I, *Rules* (Cambridge, Cambridge University Press, 2005) ("ICRC study").

the international community needs a framework of principles that will help to strengthen existing instruments in order to ensure that victims receive reparations and to promote the necessary measures in the areas of environmental prevention, conservation and restoration in the context of hostilities.

France

[Original: French]

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.

[…]

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."[9]

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 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,

[9] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. (3) of the commentary to Part One (Introduction) of the draft principles on protection of the environment in relation to armed conflicts.

"no distinction is generally made [in the draft principles] between international armed conflicts and non-international armed conflicts."[10]

However, France considers that the existence of separate legal regimes for international and 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 "[t]he draft principles were prepared bearing in mind the intersection between the international law relating to the environment and the law of armed conflict."[11]

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".[12]

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*.[13]

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-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

[10] Ibid., para. (3) of the commentary to draft principle 1.

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

[12] *Yearbook of the International Law Commission*, vol. II (Part Two), chap. VI, sect. E, draft article 7 (Continued operation of treaties resulting from their subject matter) of the draft articles on the effects of armed conflicts on treaties.

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

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.

Germany

[Original: English]

Germany expresses great appreciation for the Commission's work in adopting on first reading the comprehensive draft principles and commentary on the complex and timely issue of "protection of the environment in relation to armed conflicts".

The biggest challenge of this project is the identification of norms for the protection of the environment in different legal regimes and their interpretation, in order to develop a comprehensive approach for the formulation of general rules and principles. Germany commends the Commission for its preparatory work formulating the draft principles and its commentary.

Germany welcomes the fact that the two special rapporteurs have shed light on the subject from many different angles in their reports and that they have included complex issues such as the role of non-State actors, the extraction of raw materials in areas of armed conflict and the environmental impact of camps of displaced people. They have thus addressed the particular challenges and complexities of today's armed conflicts and their impact on and threat to the environment.

We believe, however, that the amalgamation of different legal regimes, including on culture, indigenous people and displaced persons, in certain instances carries the risk of overburdening the principles and may lead to potential challenges in practical implementation. Narrowing the principles more strictly to the matter at hand may therefore help promote future adherence and implementation.

These draft principles are, to a large extent, not a codification of existing law, but aim to develop it further. The international community should promote legal development in this area in order to prevent future environmental disasters resulting from armed conflicts. Germany appreciates the Commission's transparent communication about its intention to further develop the law as well as the Commission's effort to make a distinction between those principles that are a reflection of established international law and those which apply *de lege ferenda*. In this regard, the commentaries are certainly useful. However, it deems it important that the principles themselves be formulated in an unambiguous manner. Recognizing the approach of highlighting progressive development by utilizing the verb "should" and codification efforts by the more imperative "shall", Germany believes that, in some instances, where the principles indicate the existence of a rule of customary international law, further discussion on the legal quality of the rule in question is needed, including regarding principles 7, 20, 24 and 27. […]

A further challenge stems from the missing distinction between rules applicable to international and/or non-international armed conflict. While alignment of the legal regimes has been achieved in many instances, Germany believes that a

differentiated analysis of the legal rules applicable to non-international armed conflict is still needed.

[…]

Germany would like to thank the Commission for its excellent work on a difficult, but timely and very important topic. […]

Ireland

[Original: English]

Ireland supports the Commission's elaboration of draft principles on protection of the environment in relation to armed conflicts, which is a very welcome exercise on an important topic. Ireland notes that some of the draft principles are presented as codifying applicable law while others are recommendatory and intended to contribute to the progressive development of the law. Ireland supports strongly the efforts of the Commission to distinguish clearly between these two elements in this exercise and also more generally. Ireland particularly appreciates the broad scope of the exercise, in covering the protection of the environment before, during and after armed conflict.

Ireland particularly welcomes the Commission's analysis of how certain aspects of international humanitarian law apply in relation to the protection of the environment, and of how other areas of international law, including international human rights and environmental law, complement international humanitarian law in relation to the protection of the environment in situations of armed conflict and occupation. While recognizing that the draft principles set out in Parts Three and Four are presented as customary international law, Ireland believes that certain aspects of these draft principles and their accompanying commentaries would benefit from further consideration and explanation by the Commission.

[…]

As for those of the draft principles applicable outside situations of armed conflict and occupation (Parts Two and Five) that are expressed as binding rules of international law, it is not clear from the commentaries on draft principles 7 and 27 that these draft principles have the status of customary international law. Ireland therefore suggests that further consideration be given to whether these are in fact binding rules of international law and to amending the wording of these draft principles and/or updating the accompanying commentaries as appropriate. Ireland understands that draft principle 24 does not assert a general obligation under customary international law to share and grant access to information, but rather confirms that States and international organizations must comply with any relevant obligations that they may have under international law; Ireland suggests that the Commission confirm this to be the case in the commentary

As for the draft principles of a recommendatory nature, Ireland supports draft principles 6, 8, 23, 25, 26 and 28. Ireland does not at this stage take a position in relation to any of the remaining recommendatory draft principles.

Israel

[Original: English]

Israel appreciates the efforts of the Special Rapporteur, Ms. Marja Lehto, as well as the extensive deliberations held within the Commission on this complex topic.

Israel attaches great importance to the protection of the natural environment, both in times of peace and in times of armed conflict, for the benefit of present and future generations. Israel is a party to numerous international and regional treaties concerning the protection of the natural environment, and adheres to the existing rules and standards that regulate this field, including through relevant domestic legislation. It is in light of the significance that Israel attaches to the protection of the natural environment and to international law, that Israel wishes to comment on the draft principles on the protection of the environment in relation to armed conflicts, as adopted on first reading, with a view to guaranteeing that the existing law is accurately reflected therein.

[…]

Before commenting on particular issues, Israel would like to make three general observations in relation to the methodology and basic approach of the draft principles as a whole. These observations concern: (a) the status and purported object of the propositions set out in the draft principles; (b) the conflation of the law of armed conflict, international human rights law and international environmental law that pervades the draft principles; and (c) the basic approach under existing law of armed conflict towards the protection of the natural environment.

The status and purported object of the propositions set out in the draft principles

The commentary to the introduction to the draft principles stipulates that "[t]he present 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".[14] Israel welcomes this important clarification, but wishes to emphasize that a number of the draft principles that purport or may appear to restate existing law (in particular, by employing mandatory language) do not, in fact, do so.

The inaccuracies concerning the state of the law in draft principles that employ mandatory language appear, in places, to owe to the Commission's desire to "make the topic more manageable and easier to delineate".[15] This intention may seem commendable, but must not come at the cost of legal precision. The following methodological choices raise particular concern:

(a) The draft principles borrow from formulations found in recognized legal obligations, or merge together different rules from different legal contexts, in a way that alters or misrepresents the substance or scope of application of those rules;

(b) Moreover, some draft principles conflate rules belonging to the law of armed conflict together with international human rights law and/or international environmental law, as elaborated below;

(c) The draft principles set aside the important distinction between law of armed conflict applicable to international armed conflicts and non-international armed conflicts;[16]

(d) The draft principles adopt several positions on matters that are unsettled or highly controversial, without adequately acknowledging their status as such or offering sufficient substantiation.

[14] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. (3) of the commentary to the introduction to Part One of the draft principles.

[15] Ibid., para. (2) of the commentary to draft principle 1.

[16] Ibid., para. (3) of the commentary to draft principle 1.

The methodology employed by the Commission has made the Commission amalgamate in the draft principles legal obligations together with suggestions for practical implementation, progressive development of the law and non-binding standards. This is also suggested by the stated "fundamental purpose" of the draft principles, which is described as "*enhancing* the protection of the environment in relation to armed conflict".[17] Accordingly, and in light of the critical distinction between law and non-law, Israel is of the view that the draft principles should explicitly describe, at the outset, their overall status as recommended guiding principles.

Conflation of law of armed conflict, international human rights law and international environmental law

As mentioned above, the draft principles declaredly blur the boundaries between different branches of international law, including the law of armed conflict, international human rights law and international environmental law: paragraph (2) of the commentary to draft principle 1 explicitly lays out the methodological choice of "addressing the topic from a temporal perspective rather than from the perspective of various areas of international law, such as international environmental law, the law of armed conflict and international human rights law". Abandoning the distinctions between the different branches of international law creates several significant difficulties.

First, as is well known, the relationship between law of armed conflict and international human rights law is highly contested in international law. The longstanding position of Israel is that armed conflicts are governed by the law of armed conflict. International human rights law is a body of law which was not intended to regulate the conduct of States in armed conflicts, as it was designed for other purposes, involves its own considerations and includes a unique set of rules. Israel reiterates its previous statements on this matter.[18]

Second, even those who assume that international human rights law is in principle applicable during armed conflicts, would agree that "in the same legal system, there cannot at the same time exist two rules relating to the same facts and attaching to these facts contradictory consequences".[19] In this respect, the rule of *lex specialis derogat legi generali* is of great relevance. In the context of armed conflict, rules of the law of armed conflict – whether based in treaty or in customary international law – constitute the applicable *lex specialis*.

Importantly, the methodological technique employed throughout the draft principles of drafting standards that aim to encapsulate together the law of armed conflict and international human rights law goes even further than the traditional debate on the relationship between the two bodies of law. The traditional debate focuses on whether and how international human rights law rules apply in times of armed conflicts, but even the keenest advocates of the applicability of international human rights law in this context do not seem to suggest the textual merging of rules from different regimes. Such merging of law of armed conflict rules with

[17] Ibid., draft principle 2 (emphasis added). This is also apparent from several elements in the draft principles, such as the chronological structure of the document in accordance with the phases of an armed conflict, rather than by legal classifications (ibid., para. (2) of the commentary to draft principle 1), and perhaps also the choice to identify the outcome as a compilation of "principles" (ibid., para. (3) of the commentary to the introduction to Part One of the draft principles).

[18] CCPR/C/ISR/5; E/C.12/ISR/4.

[19] *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria), Preliminary Objection, Judgment, 4 April 1939, P.C.I.J. Reports, Series A/B, No. 77*, at p. 90 (Judge Anzilotti, Separate Opinion).

international human rights law rules is not valid under both the rules regarding identification of customary law and the rules of treaty interpretation, as the case may be.

Similarly, Israel does not agree with the manner in which the applicability of international environmental law to situations of armed conflict is presented in the draft principles and with the justifications provided in this context. While the draft principles do not deal with the exact interplay between the law of armed conflict and international environmental law, the conflation between the law of armed conflict and international environmental law is mistaken. Israel emphasizes here, too, that any forced integration of international environmental law rules with the customary rules of the law of armed conflict or interpretation of law of armed conflict treaties is incorrect.

To take a central example, the draft principles repeatedly invoke certain passages in the International Court of Justice's *Nuclear Weapons* advisory opinion[20] as a primary source purportedly supporting the general relevance of international environmental law to armed conflicts.[21] However, in Israel's view, the analysis and presentation of these passages in the draft principles is lacking. Significantly, the draft principles fail to mention the Court's important emphasis at the outset of its analysis, that it is refraining from opining on the general question of international environmental law applicability: "… the court is of the view that the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict".[22] The Court does not address international environmental law sources in the remainder of this discussion.[23] When the Court addresses law of armed conflict in the passages that follow, it merely examines whether environmental factors are taken into account *within* law of armed conflict obligations, rather than whether international environmental law as a body of law applies in relation to armed conflict (the same is true for the Court's discussion of *jus ad bellum*).[24] Israel therefore finds that the *Nuclear Weapons* advisory opinion cannot be taken as "support to the claim that customary international environmental law and treaties on the protection of the environment continue to apply in situations of armed conflict", as submitted in the draft principles.[25]

The Commission's choice to conflate the law of armed conflict, international human rights law and international environmental law is among the reasons warranting the classification of the draft principles as recommended guiding principles. Israel will nonetheless suggest below removing some expressions of this conflation, both from the language of the draft principles themselves and from particularly controversial passages in the appended commentaries.

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[20] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 226, at paras. 27-33 (hereinafter, "*Nuclear Weapons* advisory opinion").

[21] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. (3) and (5) of the commentary to draft principle 13; para. (2) of the commentary to draft principle 15; paras. (3) and (4) of the commentary to draft principle 20.

[22] *Nuclear Weapons* advisory opinion (footnote 20 above), para. 30.

[23] The Court does briefly mention the Rio Declaration, but this is not a legally binding source, and moreover, the Court only mentions a provision therein which specifically addresses armed conflict – rather than the document or IEL as a whole. See *ibid,* paras. 30-32.

[24] The part in the Court's opinion which discusses *jus ad bellum* is mistakenly presented in the draft principles as referring to the law of armed conflict. In this regard, see elaboration of Israel below in the comments regarding draft principle 15.

[25] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. (3) of the commentary to draft principle 20.

The basic approach under law of armed conflict towards the protection of the natural environment

It is the position of Israel that the protection of the natural environment under customary law of armed conflict is anthropocentric in nature, in the sense that under customary international law, an element of the natural environment constitutes a civilian object only when it is used or relied upon by civilians for their health or survival.

It follows that there are elements of the natural environment which will constitute neither civilian objects (where such elements are not used by civilians or relied upon by them for their health or survival) nor military objectives (where such elements do not qualify as such under the law of armed conflict). The following examples are instructive for the delineation of different status of objects: trees bearing fruit in a farmer's orchard constitute by default civilian objects; where such orchard trees are used by forces of a party to an armed conflict as sniper posts, they would constitute military objectives; and wild shrubbery in the vicinity of the orchard trees would constitute neither civilian objects nor military objectives.

Importantly, the anthropocentric approach finds ample support in State practice. Thus, States generally do not treat elements of the natural environment that are not used or relied upon by civilians for their health or survival as they would treat civilian objects. For example, Israel is unaware of any State which, upon attacking a military base in a remote area, would consider expected damage to surrounding bushes, rocks or soil as damage to civilian objects that ought to be incorporated in the proportionality assessment relating to the attack.

In treaty law, a prominent expression of the anthropocentric approach is found in article 2, paragraph 4, of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) of 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.[26] This provision acknowledges that certain elements of the natural environment may be made the object of attack even when they are not military objectives, and it is safe to assume that all 115 States parties to Protocol III consider article 2, paragraph 4, to accord with rules relating to distinction in law of armed conflict.

The anthropocentric approach also stems from the interchangeable name of the law of armed conflict – international *humanitarian* law. Noteworthy in this regard is the International Court of Justice's *dictum* in its *Nuclear Weapons* advisory opinion: "the environment is not an abstraction but represents the living space, the quality of life and the very health *of human beings*, including generations unborn".[27]

The alternative "intrinsic value" approach, which considers each and every element of the natural environment to be a civilian object unless it is a military objective and regardless of whether it is used or relied upon by civilians for their health or survival, does not reflect customary law of armed conflict. In practice, States do not act as if they consider pits of sand or rocks to be civilian objects. That would simply be untenable from an operational perspective.

[26] Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) annexed 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 (Geneva, 10 October 1980), United Nations, *Treaty Series*, vol. 1342, No. 28911, pp. 171 and 137, respectively.

[27] *Nuclear Weapons* advisory opinion (see footnote 20 above), para. 29 (emphasis added).

In this regard, it has been suggested that article 35, paragraph 3, of Additional Protocol I is an expression of the "intrinsic value" approach (as opposed, according to the argument, to article 55, paragraph 1, which reflects the anthropocentric approach). Regardless of Israel's views on this particular argument, it should be stressed that article 35, paragraph 3, is confined to the specific context of means and methods of warfare (rather than being applicable to every act in warfare) and, in any case, it is a treaty provision which does not reflect customary international law.[28]

The draft principles and appended commentaries do not dedicate any discussion to the debate concerning these alternative approaches. Rather, they implicitly embrace the "intrinsic value" approach without acknowledging the traditional anthropocentric approach that does reflect customary international law. This attitude is reflected in multiple instances throughout the text, some of which are referred to below.

Therefore, Israel strongly recommends that a passage be added to the commentary noting the different approaches to this issue (preferably in the commentary to draft principle 1 or draft principle 13). This passage should describe the anthropocentric approach; acknowledge its status as the traditional approach in the law of armed conflict that is reflected in State practice and customary international law; and present the "intrinsic value" approach as an alternative that does not reflect existing law (or refrain from taking a position on the issue).

It should be stressed that the position laid out above, including the rejection of the "intrinsic value" approach, solely concerns the law of armed conflict context. It is without prejudice and does not have any bearing on Israel's fundamental approach to the natural environment outside law of armed conflict – in either other legal or non-legal contexts.

Finally, a related point is that the draft principles frequently treat the natural environment as a single concept or object, whereas it would be more accurate to refer to it as a collection of individual elements. A more elaborate comment on this matter is included under draft principle 13 below.

Comments on specific draft principles

[…]

Israel will focus its comments primarily on those principles that purport to fully or partially reflect existing legal obligations. These comments are non-exhaustive; the absence of a comment regarding a certain draft principle or passage of the commentary should not, therefore, be construed as agreement with the content thereof.

Israel would further emphasize that any argument below according to which a certain draft principle goes beyond the requirements of existing international law, should not be understood as an indication that Israel necessarily rejects it as an advantageous policy.

Japan

[Original: English]

Japan appreciates the efforts of the Commission, in particular the previous Special Rapporteur, Ms. Marie Jacobsson, and the current Special Rapporteur, Ms. Marja Lehto, and is thankful for their work devoted to the topic of protection of the environment in relation to armed conflicts. Japan attaches utmost importance to

[28] See further in this regard in the comments below in relation to draft principle 9.

this issue, as it expressed at the Sixth Committee of the seventy-fourth session of the General Assembly.

Japan has no doubt that protection of the environment in relation to armed conflicts has become an urgent issue and fully recognizes the need for a new approach for strengthening its protection. On the other hand, it should not be overlooked that the appropriate and effective protection of the environment cannot be achieved with the abstract content of norms and rules. Japan is of the view that there still remains room for discussions to clarify the concrete content of the new approach introduced by the Commission and the Special Rapporteur, in which they try to provide a way for the appropriate and effective protection of the environment.

Lebanon

[Original: Arabic]

The issue of environmental protection during armed conflicts is of great importance at the level of both individuals and States. Conflicts and wars can cause long-term and irreparable harm to the environment, especially considering the tremendous developments in means and methods of warfare.

Lebanon has ratified a large number of relevant agreements, including Additional Protocols I and II to the Geneva Conventions of 1949.[29]

The provisions of the draft, applied consistently, would ensure environmental justice in times of armed conflict.

Netherlands

[Original: English]

The Kingdom of the Netherlands would like to express its appreciation to the Special Rapporteurs, Ms. Marie G. Jacobsson and Ms. Marja Lehto, as well as the Commission as a whole, for their work on the topic of the protection of the environment in relation to armed conflicts.

The Kingdom of the Netherlands has requested and received a report of the Advisory Committee on Issues of Public International Law on the draft principles. The Kingdom of the Netherlands would like to invite the Secretary-General and the Commission to take note of that report […].[30]

The Kingdom of the Netherlands understands that the stated objective of the draft principles is to include both provisions to set forth principles of international law with a customary international law status, and to include non-binding declarations intended to contribute to the progressive development of international law. The draft principles should provide appropriate guidance to States. The Kingdom of the Netherlands endorses this general approach to the topic. However, as it has expressed on earlier occasions, the Kingdom of the Netherlands is of the view that the distinction between binding rules of international law (“shall”) and principles of a more recommendatory nature (“should”) is not always clear or in line

[29] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17513, p. 609 (Additional Protocol II).

[30] The report of the Advisory Committee on Issues of Public International Law is on file with the Codification Division of the Office of Legal Affairs of the Secretariat and the full text is available at www.advisorycommitteeinternationallaw.nl/publications/advisory-reports/2020/07/09/protection-of-the-environment-in-relation-to-armed-conflicts (last accessed on 13 January 2022).

with what the Kingdom of the Netherlands sees as the generally accepted status of a specific draft principle in international law. Furthermore, the customary international law status of articles included in the Geneva Conventions of 1949[31] or Additional Protocol I thereto could be further clarified where they are considered to be applicable both in international armed conflict and in non-international armed conflict.

[…]

The Kingdom of the Netherlands supports the temporal approach to the draft principles. One inconsistency, however, should be noted in this regard. Draft principle 13 is relevant for all temporal phases, but it is included only in Part Three [Two] ("during armed conflict").

[…]

Some of the draft principles focus on environmental damage external to hostilities. The Kingdom of the Netherlands welcomes the focus on two forms of environmental damage during armed conflicts, being damage to vulnerable nature areas resulting from the reception of displaced persons (draft principle 8) and damage resulting from the illegal exploitation of natural resources (draft principles 10, 11, 18 and, indirectly, 21). These draft principles play an important role in the development of law in this area. The Kingdom of the Netherlands has consistently supported the inclusion of a reference to due diligence in draft principle 10.

Portugal

[Original: English]

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 to 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 ICRC study on customary international humanitarian law: "Rule 43. Application of the general rules on the conduct of hostilities to the natural environment", "Rule 44. Due regard for the natural environment in military operations" and "Rule 45. Serious damage to the natural environment".

Portugal notes that the draft principles of Part Three […] and Part Four […] are aligned with applicable rules of international humanitarian law established under *(i)* the 1907 Hague Regulations – Convention (IV) respecting the Laws and Customs

[31] Geneva Conventions for the protection of war victims (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, Nos. 970–973: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I) (Geneva, 12 August 1949), *ibid*., No. 970, pp. 31 et seq.; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II) (Geneva, 12 August 1949), *ibid.*, No. 971, p. 85; Geneva Convention relative to the Treatment of Prisoners of War (Convention III) (Geneva, 12 August 1949), *ibid*., No. 972, p. 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) (Geneva, 12 August 1949), *ibid*., No. 973, pp. 287 et seq.

of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land,[32] *(ii)* the 1949 Geneva Convention IV, *(iii)* the 1977 Additional Protocol I, and *(iv)* the 1978 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.[33]

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 regard 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 characterizing the international legal framework on the protection of cultural heritage in relation to armed conflicts. In this regard, draft principle 4 […] and draft principle 17 […] 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.

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. Avoiding distinction between the two types of armed conflict to harmonize 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 regard 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 […]. Portugal considers it crucial to reiterate that the environment is a common good of all humanity. It should hence be a common endeavour of States, international organizations, 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.

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[32] Convention (IV) Respecting the Laws and Customs of War on Land (Hague Convention IV) (The Hague, 18 October 1907) and Regulations respecting the laws and customs of war on land (the Hague Regulations), J.B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1915), p. 100.

[33] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976), United Nations, *Treaty Series*, vol. 1108, No. 17119, p. 151.

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 a reflection of the possible balance.

Nonetheless, Portugal wishes for a more ambitious text in draft principle 17 […]. 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 […], 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 […] states that "[n]o 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 means 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.

Spain

[Original: Spanish]

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 principles 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 organizations, non-State actors, corporations and other business enterprises) and the situations addressed (belligerency, the presence of military forces, peace operations, human 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.

[…]

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 principles 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.

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.[34] 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 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.

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").[35] 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

[34] 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), pp. 67-75, at p. 74.

[35] 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.

the draft principles).[36] 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, paragraph 2; 6; 7; 24 and 25), and that the term "*reparar*" be used in references to responsibility and compensation for damage (draft principles 9, paragraph 1; and 26).

A circular legislative technique is used in parts of the draft text. The "in accordance with"/"pursuant to"[37] and "without prejudice"[38] 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 the text.**

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.**

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.

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.

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries would once again like to express appreciation for the speed and quality with which the Commission has advanced the work on this important and timely topic. They would like to use this opportunity to thank again the Special Rapporteur, Ms. Marja Lehto, for her outstanding work. They also reiterate their deep appreciation for the excellent contribution of the previous Special Rapporteur, Ms. Marie Jacobsson, to the work on this topic.

The Nordic countries are pleased with the broad temporal scope of the draft principles. The Commission has not limited its focus to conflict situations, but has

[36] The mismatch between the terminology used in the English version ("should") and the Spanish version ("*debe*") occurs in draft principles 3, paragraph 2; 4; 5, paragraph 2; 6; 8; 10; 23, paragraph 1; 23, paragraph 2; and 28.

[37] The "in accordance with"/"pursuant to" international law clauses occur in draft principles 3, paragraph 1 […]; 13, paragraph 1 […]; 19 […]; 20, paragraph 1 […]; and 24, paragraph 1 […].

[38] The "without prejudice" clause is used in draft principles 9, paragraph 2 […] and 27, paragraph 3 […].

adopted an all-encompassing approach, covering the whole conflict cycle, including the protection of environment before, during and after armed conflicts. This methodology seems particularly well suited for management and systematization of rules and principles pertaining to the protection of environment in relation to armed conflicts. The broad temporal scope of the draft principles means that their focus is not solely on the obligations of the warring parties but that they also seek to clarify what other, non-belligerent States, or other actors could and should do to enhance environmental protection in relation to armed conflicts.

They are content to note that the draft principles recognize a strong link between the protection of civilians and the protection of the environment. This connection is essential in understanding how international humanitarian law protects the environment. The Nordic countries also agree with the material scope of the draft principles, that they apply, in principle, to both international and non-international armed conflicts, which is logical as both types of conflict can have equally severe environmental consequences. Importantly, the draft principles address the conduct of not only States, but also of secondary international legal subjects, such as international organizations as well as other "relevant actors", including non-State armed groups, corporations and civil society organizations.

The Nordic countries note that the draft principles largely reflect, but are not limited to, existing international law. In addition, they are wide-ranging, covering, for example, corporate due diligence and corporate liability for environmental damage in a conflict area. The draft principles draw on other areas of international law in addition to international humanitarian law, particularly international human rights law and international environmental law. Both these areas of law are obviously relevant in pre- and post-conflict phases and retain relevance during armed conflict.

The Nordic countries note that the draft principles have different normative value under international law, reflecting a range from legally binding rules to recommendations. Thus, in addition to systematizing existing international law in the area, the principles also contain many recommendations for the purpose of the progressive development of international law. The language of each provision gives an indication of the normative value attached to it. The commentaries add clarity and explain where a principle is based on existing international law and where it is *lex ferenda*. Many delegations have called for clarity from the Commission regarding under which part of its mandate – codification or progressive development – it operates. Against this background, they are particularly pleased with the Commission's transparent and forward-looking approach in this respect.

Regarding terminology, the Nordic countries note that the Commission has left open the question whether to use the term "environment" with or without the qualifier "natural". Given the broad temporal scope of the draft principles, it would seem to make sense to use consistently the broader term "environment" throughout the draft principles. In the commentaries, however, whenever reference is made to the Additional Protocol I, the use of the term with the qualifier "natural" seems warranted.

The Nordic countries suggest adding a draft principle that underlines that environmental damage in relation to armed conflicts may have profoundly different impact on women and men, boys and girls, due to biological factors and their societal role. Effective responses to such environmental damage should consider the different needs and capacities of women and men, boys and girls, where a gender-analysis is a useful tool to designing gender-responsive measures to effective response.

The Nordic countries encourage the Commission to consider including a new draft principle that recommends the establishment of an international mechanism to monitor the implementation of the draft principles.

They further recommend strengthening the language of the principles on remedial measures. Cooperation, assistance and relief are crucial in order to establish an effective legal framework. There is strong precedent in disarmament treaties for requiring cooperation in remedial measures. They therefore suggest stronger language than "is encouraged" in draft principle 25. It also recommends an explicit reference to assistance.

[…]

The Nordic countries welcome the adoption by the Commission of the 28 draft principles and commentaries on the protection of the environment in relation to armed conflicts on first reading. They hope that this will lead to the completion of the work on the draft principles on second reading in 2022. It can already be said that these draft principles are a major step forward in the systematization of the law relating to the protection of environment in armed conflicts. In addition, the draft principles complement the important work of the United Nations Environment Programme and the International Committee of the Red Cross and Red Crescent (ICRC) in this area, including the new ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict.[39] The environmental consequences during and after an armed conflict have become even more clear to the international community as is shown by the work done by non-governmental organizations such as the Conflict and Environment Observatory and the Geneva Water Hub. The Nordic countries believe that because of the high quality of the principles and their all-encompassing nature and because they have been developed in close consultations with States and relevant international and expert organizations, the principles will become a legal instrument of reference in the protection of environment in armed conflicts.

Switzerland

[Original: French]

Switzerland takes note of the text of the draft principles on protection of the environment in relation to armed conflicts, adopted by the International Law Commission […] on first reading and transmitted for comments and observations. Switzerland supports the general purpose of the draft principles, which is to enhance the protection of the environment in relation to armed conflicts.

International humanitarian law must be adequately reflected in the development of new specific protection regimes. Switzerland welcomes any clarification aimed at enhancing the protection of the natural environment in armed conflicts.

Overall, it recommends that the Commission indicate more clearly and more systematically whether a draft principle reflects *lex lata*, whether it is formulated *de lege ferenda,* or whether it is a recommendation. The protection of the environmental during armed conflicts should be enhanced in order to fill gaps on the subject without changing existing obligations, including those flowing from

[39] ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary* (ICRC Guidelines) (Geneva, 2020), available from https://shop.icrc.org/guidelines-on-the-protection-of-the-natural-environment-in-armed-conflict-pdf-en.html.

international humanitarian law. It should appear clearly that the draft principles do not affect treaty (or customary) obligations. While some of the draft principles refer to the applicable international law (for example "in accordance with their obligations under international law"), Switzerland believes that such reference should be more systematic. It would be preferable to introduce a general "without prejudice" clause in draft principle 1 or 2, specifying that the draft principles do not alter existing obligations.

Consideration should also be given to including more human rights wording in the draft principles, even if such wording already appears in the commentaries.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom expresses its sincere appreciation to the Special Rapporteur, Ms Marja Lehto, for her work, and is grateful to the Commission for its careful consideration of the topic.

[…]

As a general point, the United Kingdom recognizes 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 United Kingdom 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 United Kingdom 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.

The United Kingdom 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.

The United Kingdom 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 United Kingdom 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 United Kingdom remains unconvinced that there is a need for new treaty provisions on the matters covered by the draft principles.

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 United Kingdom's view is that the term "natural environment" should not be replaced with the term "environment". The phrase "protection of the natural environment" 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 Additional Protocol I 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."

United States of America

[Original: English]

The United States considers the International Law Commission's work in the codification and the promotion of the progressive development of international law

to be of vital interest, and the Commission is to be congratulated for its hard work over several years in developing these draft principles. The United States thanks the Special Rapporteurs [...].

The United States is deeply committed to the protection of the environment and compliance with the international law of armed conflict (also known as international humanitarian law or the law of war). The United States military has a robust program to implement the law of war during military operations, including those rules and principles that provide protection to the natural environment.[40] The United States military also has adopted a number of policies and practices to protect the environment in relation to military operations and activities.[41] The United States, therefore, welcomes the opportunity to provide comments on the draft principles on the protection of the environment in relation to armed conflicts presented by the International Law Commission and provisionally adopted by the Drafting Committee on first reading in 2019.

[…]

The absence of specific comments on any particular draft principle or commentary does not necessarily indicate United States endorsement or an absence of concerns.

General comments

Legal status of the principles

As the United States has indicated throughout discussions of these draft principles, the International Law Commission should be clear about the intended legal status of the specific principles addressed. Individual principles should be clear as to whether they are intended to codify existing law, or to reflect the Commission's recommendations for progressive development of the law.

In its view, phrasing in terms of what States "should" do with respect to environmental protection clearly indicates a recommendation. Phrasing that indicates what States "shall" or "must" do indicates legal obligation. Language indicating binding obligation is only appropriate with respect to well-settled rules that constitute *lex lata*. However, in many draft principles, the language of legal obligation is used where it does not reflect requirements of existing international law. Therefore, United States has recommended a number of changes to the draft principles to more accurately reflect existing legal obligations and more clearly

[40] United States Department of Defense (DoD) Directive 2311.01, "DoD Law of War Program", (2 July 2020). Available at https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231101p.pdf?ver=2020-07-02-143157-007.

[41] See, e.g., Department of Defense Instruction 4715.22, "Environmental Management Policy for Contingency Locations" (18 February 2016; change 31 August 2018), available at https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/471522p.pdf?ver=2019-03-07-133843-183 ("It is DoD policy in accordance with DoDDs 4715.1E and 3000.10 that the DoD Components managing contingency locations: … b. Minimize adverse environmental impact and avoid damage to recognized cultural, historic, and natural resources. c. Apply environment, safety, and occupational health management systems in mission planning and execution across all military operations and activities. d. Plan, program, and budget to manage the environment, safety, and occupational health risks that their activities generate. e. Implement, to the maximum extent reasonable, pollution prevention and sustainable practices. f. Avoid, whenever possible, using locations that have pre-existing environmental degradation. g. Integrate cultural property protection concerns early in the planning process. h. Comply with applicable U.S. federal laws, international law, or binding international agreements.").

distinguish such obligations from recommendations for progressive development or best practices related to *lex lata* or progressive development. In addition, "should" or similar language should be used when the principles are intended to promote the progressive development of the law, including through "enhancing" the protection of the environment in relation to armed conflict beyond existing legal requirements.

Methodology

The International Law Commission's draft principles seem in many places to accept uncritically the assertions of the study of the International Committee of the Red Cross (ICRC) regarding customary international humanitarian law. The United States and others have expressed concerns with the methodology and certain conclusions of this ICRC study.[42] The United States recommends that the references to the ICRC study be reconsidered, as further elaborated below.

Consistent with the concerns that the United States expressed regarding the ICRC's study on customary international humanitarian law, the United States also recommends that the International Law Commission engage in a more in-depth analysis of State practice and incorporate more references to operational practice in the commentary to the draft principles. The International Law Commission has made clear on several occasions that its work product, including with respect to progressive developments of international law, would be grounded in State practice.[43] Indeed, considering operational practice can also be helpful in assessing whether particular practices are useful to promote as progressive legal development. For example, proposals that have not been successfully implemented or are inconsistent with existing practices might warrant reconsideration. Adding citations to military issuances, such as military manuals, and other official government statements would also help give the principles and commentary a more balanced presentation, as the commentary seems to rely more on academic and ICRC interpretations of the law of war, rather than State practice or interpretations offered by States.

To that end, the below comments cite extensively to the United States *Department of Defense Law of War Manual*. These citations are offered only as examples; a full study of military issuances published by a variety of States would be an important step to establish State practice. It notes, however, that while such manuals set forth State policies, such policies may not necessarily reflect practice that is taken out of a sense of legal obligation (*opinio juris*) and, as such, do not in themselves indicate the existence of customary international law rules on any particular issue.

International humanitarian law as the lex specialis *applicable to armed conflict*

The United States appreciates the recognition in the commentary that international humanitarian law is the *lex specialis* applicable to armed conflict. However, the United States remains concerned that some of the draft principles could conflict with the requirements of existing international law, in particular, international humanitarian law. Although there are different interpretations of the *lex specialis* principle, and its operation may depend on the specific context and the

[42] See, e.g., *Department of Defense Law of War Manual* (June 2015, updated December 2016), § 19.25 and sources cited therein. Available at https://ogc.osd.mil/Portals/99/law_war_manual_december_16.pdf.

[43] See, e.g., *Yearbook of the International Law Commission, 1997*, vol. II (Part Two), p. 72, para. 238 (indicating that ILC topics "should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification").

relevant legal rules,[44] it would be helpful for the draft principles themselves, in addition to the commentary, to acknowledge expressly that that international humanitarian law is the *lex specialis* applicable to armed conflict.

In this regard, international humanitarian law, as reflected by the term "humanitarian," is an anthropocentric body of law, which prescribes duties, rights, and liabilities for human beings and prioritizes the protection of human life. Attempts to apply international humanitarian law to the environment that deviate from this traditional focus could conflict with existing international humanitarian law requirements or diminish existing international humanitarian law protections for civilians, detainees, or other persons protected by international humanitarian law.

The United States therefore recommends that a principle be added (either as a stand-alone principle or a subparagraph under draft principle 2):

> **These principles should be construed consistent with the State's obligations under international law, in particular, international humanitarian law, which is the *lex specialis* applicable to armed conflict. These principles should not be applied insofar as they might diminish the protection afforded civilians, civilian objects, combatants placed *hors de combat*, and other persons and objects protected by international humanitarian law.**

B. Specific comments on the draft principles[45]

1. Draft principle 1 – Scope

Colombia

[Original: Spanish]

Multilateral environmental agreements refer to protection before an armed conflict, which means that there is already an international legal structure in place for the protection of the environment during an armed conflict. Colombia therefore suggests that the emphasis in the terms of environmental protection in the draft principles be reviewed to ensure that they do not duplicate or contradict the principles already enunciated in international environmental law.

As a country with limited operational, financial or logistical capacities and significant national defence and public security challenges, Colombia is concerned[46] about the difficulties and complexity of complying with all these principles in the "during" phase of a conflict, and the limited scope of action of countries with such characteristics.

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[44] For further discussion, see *Department of Defense Law of War Manual*, § 1.3.2 and sources cited.

[45] Quotations of the draft principles and commentaries thereto in the comments and observations as submitted have been omitted where appropriate. The full text of the draft principles and commentaries is contained in document A/74/10.

[46] Colombia, Ministry of Defence, Policy Department, Assessment of the draft principles on protection of the environment in relation to armed conflicts, adopted by the Commission on first reading (received by email on 16 June 2021).

Israel

[Original: English]

Current text: Paragraph (3) of the commentary to draft principle 1 notes in relation to the draft principles: "No distinction is generally made between international armed conflicts and non-international armed conflicts."

Comment: It is uncontested that the law of armed conflict does distinguish between the law applicable to international and non-international armed conflicts. However, the text above may be inaccurately construed as indicating that there is no such distinction in the context of protection of the natural environment, or that the differences between the applicable legal frameworks are negligible.

Suggested change: *Add* the following text: "This is done for practical reasons, and is not intended to imply that there are no differences between the legal regimes that apply to either type of conflict. As a matter of policy, States are encouraged to apply legal protections and other protective policies relating to the natural environment regardless of the type of conflict in question".

Japan

[Original: English]

Regarding the introduction of a new approach, Japan proposed in 2019 that, taking into consideration the dynamics of the law governing armed conflict, and in order not to overload the task of the Commission, the protection of the environment during an armed conflict, as opposed to before or after an armed conflict, should be focused on.

This does not mean that Japan denies the importance of the protection of the environment before or after an armed conflict. Rather, Japan fully appreciates, as stated above, the introduction of a new approach in order to create a new foundation to strengthen the protection of the environment in relation to armed conflicts.

In particular, Japan understands the intention and efforts of the Commission and the Special Rapporteur to bridge the two traditional distinctions. The one is between the law of armed conflict and the law of peace. The other is between international armed conflicts and non-international armed conflicts.

Japan does not oppose that the Commission takes this progressive approach. However, it should be emphasized that the discussion about international law regulating international armed conflicts has been accumulated by taking a balance between military necessity and humanity. Distinctions of applicable rules in relation to international armed conflict as stated above have been developed as the result of such discussion. Therefore, these distinctions should be fully respected and considered if the Commission takes the integrative approach for the progressive development of international law in this subject.

In addition, the draft principles should clarify how the law of armed conflict and other branches of international law, such as international environmental law and international human rights law, are applied to armed conflicts, whereas Japan understands that these draft principles do not alter the rights and obligations under existing international law.

Switzerland

[Original: French]

In general, Switzerland welcomes the temporal approach adopted, which makes it possible to distinguish between the draft principles applicable before, during or after an armed conflict. However, it considers that these temporal phases cannot be clearly delineated in all cases and that they are interrelated. This observation calls for deeper reflection. It would be useful to further clarify the possible links and overlaps between the different parts of the draft principles, in particular between the principles applicable during an armed conflict and those applicable in situations of occupation. The linkages and overlaps between the draft principles applicable after an armed conflict should also be examined. The draft principles concerning remedial measures, for example, may apply not only after an armed conflict, but also immediately upon the cessation of active hostilities.

Switzerland welcomes the application of these draft principles to both international and non-international armed conflicts.

Switzerland believes that it should be clarified whether the draft principles also apply to organized armed groups or to other non-State actors, such as private military and security companies. It welcomes the discussion in the commentaries about non-State actors, in particular private sector actors, and corporate due diligence. It believes that the current draft principles should address in more detail the responsibility and accountability of non-State armed groups concerning damage to the environment.

[See also comments under general comments and on draft principle 9.]

United States of America

[Original: English]

The United States notes that this draft principle seems to propose a very broad scope for the draft principles as a whole, which it states "apply to the protection of the environment before, during or after an armed conflict." By this wording, the principles apparently would apply to the conduct of both State and non-State actors with respect to the protection of the environment at all times, regardless of whether the harm or potential harm was related to an armed conflict. It recommends that the principle be revised to reflect more accurately the intended scope of the draft principles:

> The present draft principles apply to **measures that States can take before, during, and after armed conflict, for** the protection of the environment **in relation to** ~~before, during or after an~~ armed conflict.

This would clarify that, for example, the measures taken before an armed conflict would relate to the protection of the environment in relation to an armed conflict.[47]

[47] *Cf.* Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954), United Nations, *Treaty Series*, vol. 249, No. 3511, p. 240, art. 3 ("The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.").

2. Draft principle 2 – Purpose

France

[Original: French]

[See comment under general comments.]

Colombia

[Original: Spanish]

According to that text, the draft principles are aimed at enhancing the protection of the environment in relation to armed conflicts. Nonetheless, in order not to conflict with other obligations under international environmental law, it could be specified in this principle that preventive measures are meant to protect the environment in the event of an armed conflict. It could also be clarified that these principles will not run counter to other obligations of States under other international conventions or the principles of international environmental law. The aim would be to make it clear that the draft principles will not duplicate existing protection regimes.

Portugal

[Original: English]

Portugal kindly invites the Commission to consider the following additions (in **bold** and underlined) […]:

"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."

Switzerland

[Original: French]

Switzerland believes that the protection of the natural environment during armed conflicts is an issue that should be clarified and developed further with a view to its enhancement. The draft principles should be aimed at "avoiding, and in any event to minimizing" [48] incidental damage to all or parts of the natural environment in times of armed conflict, whether direct or indirect, and not only at minimizing it. The establishment of protected zones is an example of a measure designed to avoid such damage.

Switzerland welcomes the Commission's willingness to take action to protect the environment through preventive measures, the ideal objective being to avoid any damage.

[See also comment under general comments.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

In respect of draft principles 2, 6, 7 and 8, the United Kingdom suggests that the State's aims, obligations or commitments in relation to the environment in those

[48] Additional Protocol I, art. 57, para. 2 (a) (i).

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."

United States of America

[Original: English]

This principle expresses the goal of the principles, which is to "enhance" the protection of the environment, rather than to codify existing law. The United States urges that the remaining principles be drafted with that purpose in mind.

Moreover, what measures should be taken can depend on the specific circumstances. The United States therefore recommends adding "appropriate" to this principle, to reflect more accurately that this principle expresses a policy objective and that the measures to be selected would entail a degree of discretion and potentially, for example, the weighing of other relevant considerations and the circumstances. The principle would read:

> The present draft principles are aimed at enhancing the protection of the environment in relation to armed conflict, including through **appropriate** preventive measures for minimizing damage to the environment during armed conflict and through **appropriate** remedial measures.

3. Draft principle 3 – Measures to enhance the protection of the environment

Canada

[Original: English]

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 also 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.[49] 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.

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.

The commentary to draft principle 3 also references an obligation on States to "effectively exercise jurisdiction and prosecute persons suspected of certain war crimes."[50] 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, paragraph (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.

Colombia

[Original: Spanish]

The wording of draft principle 3 [4] does not provide clarity between the different measures that should be adopted under paragraphs 1 and 2. In the commentaries to the draft principle, the Commission says that the measures referred to in paragraph 1, which States are required to adopt, derive from international law, while paragraph 2 addresses other voluntary effective measures and is less prescriptive than paragraph 1, as reflected in the use of the word "should". However, Colombia suggests that the wording be made more precise, or that examples of measures to be taken be included in paragraph 2, in order to provide greater clarity as to their scope.

Israel

[Original: English]

Draft principle 3 and paragraphs (1) and (2) of the commentary

[…]

Comment: International law imposes upon States certain obligations concerning the protection of the natural environment. The word "enhance" seems to go further than merely calling upon States to comply with such obligations. If it is not to be read as being directed at States that do not properly comply with their obligations, the word "enhance" should be dropped. Alternatively, if draft principle 3 is to be read as a call for all States to take upon themselves additional commitments which are not legally obligated, then the mandatory language of the draft principle ("shall") would not be appropriate.

[49] See, for example, draft principles 9; 12; 13, paragraph 2; 15; 20; 21; 24; and 27.
[50] See para. (10) of the commentary to draft principle 3.

Suggested changes:

a. *Change* draft principle 3 to read: "States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to ~~enhance the~~ protect~~ion of~~ the natural environment in relation to armed conflict". Paragraphs (1) and (2) of the appended commentary would then be amended as required.

b. Alternatively, if the current text of draft principle 3 is retained, *change* paragraph (1) of the appended commentary so that it reads: "Draft principle 3 recognizes that States are required to take effective measures to enhance the protection of the natural environment in relation to armed conflict, as necessary to fulfil their respective obligations under international law".

c. *Change* paragraph (2) of the appended commentary so that it reads: "Paragraph 1 reflects that States have obligations under international law to ~~enhance the protection of~~ protect the natural environment in relation to armed conflict and addresses the measures that States are obliged to take to this end".

Paragraph (6) of the commentary

Current text: […] "Common article 1 [of the Geneva Conventions] 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".

Comments: The view cited above is a highly controversial academic proposition contested by States. This proposition, recently put forth by ICRC in its updated commentaries on the Geneva Conventions of 1949, is unsubstantiated as a matter of customary international law or treaty interpretation. It is not reflected in State practice – if anything, State practice demonstrates the contrary – and it is not reflected in the *travaux préparatoires* of the Conventions. It is the position of Israel that the duty to "ensure respect" in common article 1 of the Geneva Conventions only applies *vis-à-vis* entities whose actions are attributable to the State (such as the State's armed forces).

In recent years, a number of States expressed fierce opposition to the ICRC proposition, resulting in the ICRC itself emphasizing in its most recent publication on the matter – the commentary to Geneva Convention III from 2020 – the opposition to its own view.[51] Furthermore, it is noteworthy that in the 33rd International Conference of the Red Cross and Red Crescent (2019), this issue proved so contentious, that a reference to the obligation under common article 1 was removed from a draft resolution due to the insistence of States who explicitly opposed the ICRC view.[52] Israel believes that, in light of its insufficient legal basis and extremely controversial nature, this suggested interpretation of common article 1 should be omitted from the draft principles, or at the very least that the draft principles reflect the diverging views on this issue.

[51] ICRC, Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War, art. 1, para. 202 (2020).

[52] The debate at the conference has been briefly described here: Verity Robson, "Ensuring respect for the Geneva Convention: a more common approach to article 1" (2020), available at http://opiniojuris.org/2020/07/17/ensuring-respect-for-the-geneva-conventions-a-more-common-approach-to-article-1/ (last visited 26 June 2021). This debate resulted in Resolution 1 (33IC/19/R1), *in* 33rd International Conference of the Red Cross and the Red Crescent (2019), available at https://rcrcconference.org/about/33rd-international-conference/documents/ (last visited 26 June 2021).

Suggested changes: *Delete* paragraph (6) of the commentary. The second sentence of that paragraph should be moved to the end of paragraph (13) of the commentary – which is a more suitable location, given that it specifies recommended practices for cooperation between States, rather than any existing legal obligation.

Paragraph (9) of the commentary

Current text: […] "These rules [concerning indiscriminate weapons and superfluous injury] are not limited to international armed conflict. It follows that new weapons as well as methods of warfare are to be reviewed against all applicable international law, including the law governing non-international armed conflicts …"

Comment: While some rules in the field of weaponry, including the ones mentioned in the cited passage, indeed apply equally to international and non-international armed conflicts, this is not the case with regard to all rules concerning weapons.

Suggested changes: *Change* the words "including the law governing non-international armed conflicts" to "including those rules which are applicable to both international and non-international armed conflicts".

Switzerland

[Original: French]

Switzerland welcomes the measures to enhance the protection of the environment in relation to armed conflicts set out in the commentary to draft principle 3. It welcomes in particular the reference to common article 1 of the Geneva Conventions, in which the States parties undertake to "respect and ensure respect for"[53] international humanitarian law in all circumstances. Although there is a link between the obligation to disseminate international humanitarian law and common article 1 of the Geneva Conventions, common article 1 requires a broader range of (legal and practical) measures to ensure respect for international humanitarian law. It has both a domestic and an international dimension. At the domestic level, it requires States to take measures to ensure respect for international humanitarian law by their armed forces, other persons and groups acting on their behalf, and their population in general. At the international level, it requires States not to encourage or facilitate violations of international humanitarian law by the parties to an armed conflict. It also requires them to do everything reasonably within their power to prevent and stop violations of international humanitarian law.

Switzerland also welcomes the reference to the obligation to conduct a "weapons review". That obligation can also be linked to the obligation of all States to "respect and ensure respect for" international humanitarian law and the prohibition of the use of means and methods of warfare that are contrary to international humanitarian law. Consequently, due application of international humanitarian law involves first verifying whether the use of means and methods of warfare is consistent with international humanitarian law, before such weapons can be employed in international and non-international armed conflicts.

Many serious violations of international humanitarian law that have an impact on the protection of the environment in relation to armed conflicts violate rules applicable to both international and non-international armed conflicts. With regard to the obligation to prosecute war crimes, Switzerland wishes to point out that States have an obligation to investigate all war crimes, not only serious breaches allegedly

[53] Common article 1 of the Geneva Conventions.

committed by their nationals or armed forces, or on their territory, and, if appropriate, to prosecute the suspects.[54] They also have an obligation to investigate other relevant war crimes over which they have jurisdiction and, if appropriate, to prosecute the suspects. Furthermore, States have the right to confer on their national courts universal jurisdiction over war crimes.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom 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" (emphasis added). The United Kingdom does not accept this interpretation, nor that common article 1 contains such an obligation.

The United Kingdom 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.

United States of America

[Original: English]

Paragraph 1 of this principle purports to reflect international obligations of States to take categories of measures to "enhance" the protection of the environment in relation to armed conflict. It is not clear what international legal instruments may impose such obligations; the United States is not subject to, nor does customary international law impose, such obligations. This paragraph should be revised to reflect existing legal obligations of States, as the use of "shall" versus "should" in paragraph 2 indicates was intended. The word "enhance" suggests an augmentation beyond existing requirements and thus is in tension with "shall" and the intent to reflect existing requirements. The examples of international humanitarian law obligations given in the commentary (obligations to disseminate international humanitarian law or to conduct the legal reviews of weapons) are not actually obligations to take measures to enhance the protection of the nature environment. Paragraph 1 could be revised as follows to reflect accurately existing law:

> 1. States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures **that provide** ~~to enhance the~~ protection ~~of~~ **to** the environment ~~in relation to~~ **from the harmful effects of** armed conflict.

Corresponding changes should also be made in paragraphs 1 and 2 of the commentary to this principle. "[T]hat provide" is consistent with the formulation used in paragraph (3) of the commentary to draft principle 9, which accurately refers to "one or more of the substantive rules of the law of armed conflict providing protection to the environment." The United States has suggested "from the harmful effects of" instead of "in relation to" in order to clarify what "in relation to" is intended to mean. This change would also be a useful clarification other places, such as draft principles 1 and 2, although the United States has not made the suggestion wherever "in relation to armed conflict" appears.

[54] See inter alia art. 49 of the Geneva Convention I; art. 50 of the Geneva Convention II; art. 129 of the Geneva Convention III; and art. 146 of the Geneva Convention IV. See also rule 158 of the ICRC study on customary international humanitarian law.

Paragraph (6) of the commentary to draft principle 3 notes that "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." Although ICRC has offered this interpretation of common article 1, a number of States have not accepted it, including the United States.[55] The Commission should remove this reference in the commentary or at a minimum note that although ICRC has advocated for this interpretation, it has been rejected by a number of States Parties to the 1949 Geneva Conventions.

4. Draft principle 4 – Designation of protected zones

Colombia

[Original: Spanish]

[…] Colombia suggests that the wording be made more precise. It understands that the Commission uses the expression "by agreement or otherwise" only in order to maintain some flexibility, and that in the commentaries, it indicates that the types of situations contemplated may include an agreement concluded verbally or in writing, reciprocal and concordant declarations, as well as those created through a unilateral declaration or designation through an international organization. However, Colombia considers it necessary to clarify with what types of actors the State would have to "designate by agreement" areas of environmental or cultural importance. Would it be a bilateral agreement between the State and the United Nations? Is it between the opposing parties? Is it a unilateral declaration by the State?

Cyprus

[Original: English]

The Republic of Cyprus deems the call for the establishment of protected zones envisaged in draft principles 4 and 17 essential for the enhancement of the protection afforded to areas of environmental and cultural importance. However, it believes that additional examples should be given with respect to the scope of the term "areas of … cultural importance" (draft principle 4 and para. (8) of the commentary). For instance, the term could include local population, such as enclaved people residing in illegally occupied areas and depending on the environment for their livelihood (see also comment on draft principle 20 below).

[55] *See, e.g.*, Brian Egan, Legal Adviser, Department of State, Remarks at the American Society of International Law: International Law, Legal Diplomacy, and the Counter-ISIL Campaign, 1 April 2016, available at https://2009-2017.state.gov/s/l/releases/remarks/255493.htm ("Some have argued that the obligation in Common Article 1 of the Geneva Conventions to 'ensure respect' for the Conventions legally requires us to undertake such steps and more vis-à-vis not only our partners, but all States and non-State actors engaged in armed conflict. Although we do not share this expansive interpretation of Common Article 1, as a matter of policy, we always seek to promote adherence to the law of armed conflict generally and encourage other States to do the same. As a matter of international law, we would look to the law of State responsibility and our partners' compliance with the law of armed conflict in assessing the lawfulness of our assistance to, and joint operations with, those military partners."); *Department of Defense Law of War Manual*, § 18.1.2.1 ("Parties to the 1949 Geneva Conventions undertake to respect and ensure respect for the conventions in all circumstances. This is a general obligation to take the measures that the State deems appropriate in order to fulfill its obligations under the conventions. Although this provision does not reflect an obligation to ensure implementation of the conventions by other States or parties to a conflict, the United States, as a matter of policy, often seeks to promote adherence to the law of war by others.").

Czech Republic

[Original: English]

The Czech Republic considers this principle questionable for two reasons. The commentary does not rule out agreements with non-State actors; however, the principle itself contains no reference to such actors. Further, the principle says nothing about the status of the zones and the rules governing them during armed conflict (this is only partly addressed in principle 17). The zones are a new notion not yet defined in international humanitarian law.

[See also comment under general comments.]

Germany

[Original: English]

We welcome the call to establish protected areas in draft principles 4 and 17. These principles provide encouragement to work together on this issue in the future. As pointed out by the Commission, generally a bilateral or multilateral treaty on the designation of protected areas would be necessary to have binding effect on all parties under international law and only in specific instances would other forms of designation, such as unilateral declarations, have legally binding effects for other States, such as in cases of non-defended localities. Germany hence believes the addition "or otherwise" requires qualification by adding "in accordance with international law".

Furthermore, Germany suggests revisiting the aspect of "cultural importance" in this principle. First, if read as a cumulative requirement ("and") it raises questions about zones that fulfil only one of the criteria. Further clarification would be useful. Second, the inclusion of the aspect of "cultural importance" goes beyond the scope of the principle and might entail further challenges at the stage of application. Germany welcomes the clarification in the commentary on principle 4 that the cultural aspect is subordinate and of derivative meaning and believes that the principle would benefit from also clarifying this relationship in the text itself. It could be considered, in this regard, employing the concept of "natural heritage" of the United Nations Educational, Scientific and Cultural Organization World Heritage Convention[56] in addition to "major environmental importance", instead of "cultural importance".

Japan

[Original: English]

Japan is of the view that the concept of "protected zones" needs further discussion in order to strike an appropriate and effective balance between the two needs: the protection of environment and practical military operations.

The Commission should clarify in the commentary how States should manage and operate "protected zones". In particular, the risk of abuse should be taken into consideration. In this regard, a principle which prohibits States from locating military objectives within or near protected zones, such as those stipulated in article 58 of Additional Protocol I regarding "Precautions against the effects of attacks", unless parties to armed conflict agree otherwise, should be added.

[56] Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) (Paris, 16 November 1972), *United Nations Treaty Series*, vol. 1037, No. 15511, p. 151.

Furthermore, it should be stipulated that the status of protected zones will be deprived if States violate such principle.

If the Commission is to provide further clarification to the definition and the criteria of protected zones, the impact on military operations should be taken into account.

It is understandable that environmental importance sometimes overlaps with cultural importance. However, the intention of the Commission to include the term "cultural" is not clear under the terms of the present principle 4. In order to clarify the precise intention (as the commentary to this principle stated that "[t]he draft principle does not extend to cultural objects *per se*"), it should add before the term "cultural importance" such word as "related".

The phrase "as long as it does not contain a military objective" in principle 17 could be interpreted as ruling out a situation in which parties to an armed conflict agree to designate an area which contains a military objective as a protected zone. If the intention is not to rule out such a situation but to provide that such area designated by agreement as a protected zone shall not be protected against an attack if a military objective that was not present nor made known when such agreement was made is newly introduced or found in the protected zone, a phrase such as "which was not present nor made known when such agreement was made" should be added after the term "military objective".

Furthermore, as mentioned below in the comment on principle 13, paragraph 3, a sentence such as "Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage" (art. 52, para. 2 of Additional Protocol I) should be added in principle 17 for clarification.

Portugal

[Original: English]

[See comment under general comments.]

Spain

[Original: Spanish]

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".

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

Draft principle 4 (and its corresponding draft principle 17) have a great potential to enhance environmental protection. With regard to the designation of protected zones in draft principle 4, the Nordic countries encourage the Commission to consider rephrasing the provision to avoid the impression that an area should be both of major environmental and cultural importance in order to be designated as a

protected zone. However, this should be done without compromising protection of the environment of the indigenous peoples, as reflected in principle 5.

Switzerland

[Original: French]

In general, Switzerland welcomes the inclusion of "protected zones" in the draft principles. However, the complementarity and possible overlapping of draft principle 4 with draft principle 17 should be further clarified.

Switzerland considers that article 60 of Additional Protocol I, on demilitarized zones, governs the establishment of "protected zones", and therefore notes that any area could be the subject of a demilitarization agreement. As the Commission points out in the commentary to the draft principle, "particular weight should be given to the protection of areas of major environmental importance". In the view of Switzerland, while the priority is indeed to designate areas of "major" environmental importance as "protected zones", the two draft principles could also allow other areas, perhaps considered of lesser importance, to be designated as "protected zones".

It might also be useful to clarify the possible extent of the protection, by indicating for example whether the protected zones encompass only the surface or other parts as well, such as the subsoil.

Article 60 of Additional Protocol I requires that the status of demilitarized zone be conferred by an express agreement, which can also be concluded in peacetime. It seems important to conclude such an agreement in order to ensure the acceptance of these zones, and thus their protection. The draft principle provides for the possibility of designating protected zones other than by agreement. Switzerland encourages the Commission to clarify that form of designation and to establish the means of ensuring the effectiveness of such a protective measure. It would be useful in particular to clarify how and under what circumstances a zone can be unilaterally designated as protected, with binding effects on a third State or other parties to an armed conflict. In addition, the draft principle should better reflect the fact that agreements may be concluded with or between non-State actors.

Further clarification seems to be needed on the inclusion of the term "cultural", and on how to articulate the relationship between natural environment and cultural areas. While protection of the environment and the draft principles had to include some cultural issues, Switzerland is of the opinion that a draft principle containing a definition of these issues and a corresponding commentary should be added. In any event, the definition of the term "environment" should be included in the introductory draft principles.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom agrees that, as recognized under this draft principle 4, it is positive to have a mechanism for conferring special protection on zones of major environmental importance.

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".

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".

United States of America

[Original: English]

The United States notes that, under the law of war, specially protected zones are established by agreement of the parties to the conflict, rather than merely by unilateral designation.[57] A State's designation of the natural environment as protected under its domestic law would not be effective in providing protection under international humanitarian law, unless the adverse party agrees to recognize the zone.[58]

Paragraph (3) of the commentary to draft principle 4 recognizes that such agreements are not binding on States not party to the agreements, but it would also be helpful to note in the commentary that the same principle applies with regard to the unilateral designation of an area as protected by one State. Moreover, although a State's ordinary domestic law could be applied to non-State armed groups within its jurisdiction, in non-international armed conflict, the State might not be in a position to enforce its domestic law designation of an area as protected due to activities of the non-State armed group, diminishing the practical effect of such unilateral designations.

Although existing international humanitarian law does not provide for areas of major environmental and cultural importance to receive special protection through unilateral designations, it does provide a mechanism for undefended villages, towns, and cities to receive protection from attack through a party's unilateral declaration, provided that relevant conditions are met.[59]

Thus, it recommends "or otherwise" be deleted or that the draft principle be revised as follows:

> States should designate, by agreement ~~or otherwise~~, areas of major environmental and cultural importance as protected zones **or should otherwise seek to afford such areas of particular importance protection under international humanitarian law, where feasible, by removing all military objectives from such areas, declaring that they will not place any military objectives in those areas, use them for military purposes, use them to support military operations, attack forces of the adversary present in such areas, or oppose the capture of such areas by the adversary in armed conflict**.

This would clarify the steps that would need to be taken to afford protection to such areas unilaterally by analogizing to existing international humanitarian law rules governing the declaration of villages, towns, or cities as undefended.[60]

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[57] See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 15 ("When the Parties concerned have agreed upon the geographical position, administration, food supply and supervision of the proposed neutralized zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict. The agreement shall fix the beginning and the duration of the neutralization of the zone.").

[58] See *Department of Defense Law of War Manual*, § 5.14.3.1 ("The establishment of a zone only binds an adverse party when it agrees to recognize the zone.").

[59] *Ibid*., § 5.15.

[60] *Ibid*., § 5.15.4.

The designation of large areas as protected under this principle could be in tension with the obligation of a State to take feasible precautions to separate its military objectives and the civilian population. Location of military bases and facilities in remote areas in the natural environment can be helpful in promoting the protection of the civilian population, because the location of military objectives within concentrations of civilians is one of the major challenges that increases the risk of harm to civilians in armed conflict.[61] The United States recommends adding "where feasible" to address this and other circumstances where it would not be appropriate to seek to afford such areas protection under international humanitarian law.

Paragraph (8) of the commentary to draft principle 4 states that "[t]he Commission underlines that the 1954 Hague Convention and its Protocols are the special regime that governs the protection of cultural property both in times of peace, and during armed conflict." This overstates the applicability of the 1954 Convention, which is not equally applicable in peacetime and during armed conflict.[62] As reflected in the title, the 1954 Convention relates to "the Protection of Cultural Property in the Event of Armed Conflict." The 1954 Convention imposes peacetime obligations on its States Parties, but these obligations are to help ensure the effective implementation of the 1954 Convention in the event of armed conflict.[63] The United States therefore suggests this sentence be revised along the following lines:

> The Commission underlines that the 1954 Hague Convention and its Protocols are the special regime that ~~governs~~ **establishes obligations both in times of peace and during armed conflict for** the protection of cultural property ~~both in times of peace, and during~~ **in the event of** armed conflict.

5. Draft principle 5 – Protection of the environment of indigenous peoples

Czech Republic

[Original: English]

The recommendation in this principle could be addressed, as a contribution to the progressive development of international law, also to non-State actors which exercise control over territory inhabited by indigenous peoples.

Further, the draft principle addresses protection of the environment of indigenous peoples as a category of particularly vulnerable people. The question is whether indigenous people are the only category of particularly vulnerable people, which have special relationship with their environment.

In terms of practical application, it is to be noted that the principle is placed in the part concerning the pre-conflict stage although its second paragraph deals with post-conflict situations.

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[61] *Ibid*., § 5.14 (explaining that "military commanders and other officials responsible for the safety of the civilian population must take reasonable steps to separate the civilian population from military objectives and to protect the civilian population from the effects of combat").

[62] See, e.g., Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 18, para. 1 ("Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them.").

[63] *Ibid*., art. 3 ("The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.").

El Salvador

[Original: Spanish]

Given that this principle is founded on protection of the environment and of indigenous peoples, El Salvador considers it necessary to establish that States have an obligation to direct efforts and financial resources towards the promotion of cultural and ecological restoration, understanding the cultural dimension with respect to indigenous peoples to be a central and inseparable element between culture and the environment.

France

[Original: French]

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.[64]

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.

[See also comment under general comments.]

Germany

[Original: English]

While Germany supports the addition in principle 5 of a specific rule with regard to a group of especially vulnerable persons in political terms, it nevertheless sees potential legal and operational challenges when emphasizing a specific and privileged protection among protected persons in particular in times of active hostilities.

[64] International Labour Organization, Convention concerning Indigenous and Tribal Peoples in Independent Countries (Geneva, 27 June 1989) (Indigenous and Tribal Peoples Convention, 1989 (No. 169)), which revised the Indigenous and Tribal Populations Convention, 1957 (No. 107); United Nations Declaration on the Rights of Indigenous Peoples, General Assembly resolution 61/295 of 13 September 2007, annex.

Netherlands

[Original: English]

[…] [U]pon further reflection, the Kingdom of the Netherlands considers that the intention is to highlight the special relationship between indigenous peoples and their living environment. This relationship fits well with the dynamic integrated approach taken by the Commission which recognizes that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties.

Spain

[Original: Spanish]

[…] 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.

[See also comment under general comments.]

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries agree that the protection of the environment of the indigenous peoples merits its own draft principle (5) due to the special relationship of the indigenous peoples with their environment. Indigenous peoples have a particular internationally recognized legal status and rights that flow from that status. The Nordic countries emphasize in particular the participatory rights of indigenous peoples relating to their lands, territories, and resources, which means that consultations shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent, before adopting measures that may affect them directly. This right to be consulted is well reflected in paragraph 2 of this draft principle with regards to the post conflict stage, and is also generally applicable at other stages. As the rights of indigenous peoples have a larger temporal application than the post-conflict stage, the Nordic countries would suggest including, in the commentary to this draft principle, a reference to paragraph (9) of the commentary to draft principle 4.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The commentary provides that the wording of draft principle 5, paragraph 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 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.

The commentary appears to suggest that the land of indigenous people has some special protection under the law of armed conflict. 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 applies to all objects which are not military objectives.

As stated in the 2014 comment of the United Kingdom at the Sixth Committee of the General Assembly, the Commission 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.[65] Questions concerning the status of indigenous land in the context of armed conflict fall outside the topic.

The United Kingdom would propose that draft principle 5 is deleted for these reasons.

United States of America

[Original: English]

The United States appreciates the use of the word "should" and "appropriate" as well as the goals of this draft principle.

6. Draft principle 6 – Agreements concerning the presence of military forces in relation to armed conflict

Colombia

[Original: Spanish]

[…] Colombia suggests adding the word "environmental", to circumscribe the scope of the impact assessments mentioned. It proposes that the amended text read as follows: "Such provisions may include preventive measures, [environmental] impact assessments, restoration and clean-up measures". Otherwise, the concept of impact assessments would be very broad and could encompass many components from other areas.

Colombia also suggests reviewing the wording of the rest of the draft principle, taking into consideration the fact that, these days, military forces are not necessarily the central actors in an armed conflict, nor are they the main and only party responsible for environmental damage. The battlefields of today tend to be dominated by a broad spectrum of organizations operating asymmetrically and engaging in hybrid warfare. The same would apply to the battlefields of tomorrow.

Leaving the proposed actions up to "military forces" is understandable, since they are the easiest actors to identify and on whom demands could be made. However, this does not imply that they are necessarily the main actors responsible for environmental impacts. The wording should therefore be carefully reviewed to

[65] United Kingdom statement to the Sixth Committee of the General Assembly, Sixty-ninth Session, 3 November 2014.

identify the responsibility of actors in an armed conflict with regard to restoration and preventive and clean-up measures.

Cyprus

[Original: English]

The Republic of Cyprus welcomes the exhortation to include provisions on environmental protection in agreements governing the presence of military forces in relation to armed conflict (draft principle 6). Nevertheless, it is the position of the Republic of Cyprus that clauses on the protection of the environment should be incorporated in agreements/arrangements regulating the presence of foreign armed forces in a country for the purposes of military drills, training or any other conduct not necessarily related to an armed conflict (paras. (3)-(4) of the commentary). As a matter of fact, it is the intention of the Republic of Cyprus to include environmental provisions in future status-of-forces agreements concluded with allied States.

France

[Original: French]

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.

[See also comment under general comments.]

Ireland

[Original: English]

[See comment under general comments.]

Israel

[Original: English]

[…]

Comment: The reference to "the presence of military forces in relation to armed conflict" raises issues concerning the applicability of this draft principle in practice. In most current status-of-forces agreements that Israel is aware of, there is no distinction between situations pertaining to armed conflicts and situations that occur outside armed conflicts.

Suggested change: *Amend* draft principle 6 so that it would be applicable only to status-of-forces agreements that explicitly refer to armed conflict situations.

Japan

[Original: English]

[…] Japan and the United States concluded the Supplementary Agreement on Cooperation in the Field of Environmental Stewardship relating to the United States

Armed Forces in Japan[66] on 28 September 2015. In this agreement, both parties acknowledged the importance of environmental stewardship and its contribution to managing risks to public safety in relation to the presence of the United States armed forces, including the prevention of pollution in, adjacent to, or in the vicinity of the facilities and areas in Japan the use of which is granted to the United States (hereinafter referred to as "the facilities and areas").[67] This agreement also has provisions on cooperation to provide available and appropriate information between Japan and the United States regarding situations that could affect public safety, including human health and safety, in, adjacent to, or in the vicinity of the facilities and areas[68] as well as on the commitment of the United States to issue and maintain governing standards for the environment that provide environmental compliance standards, including provisions for spill response and prevention, for the activities of the United States Armed Forces within the facilities and areas.[69] It also stipulates that such standards generally adopt the more protective of applicable United States standards, Japan standards, or international agreement standards.[70]

Additionally, this agreement also provides the parties' obligation to establish and maintain procedures so that specified Japan authorities have appropriate access to the facilities and areas following a contemporaneous environmental incident, i.e., a spill.[71]

Portugal

[Original: English]

Portugal kindly invites the Commission to consider the following additions (in **bold** and underlined) […]:

Considering the recommendatory nature of **draft principle 6** […]:

"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."

Spain

[Original: Spanish]

[See comment under general comments.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

[See comment on draft principle 2.]

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[66] Agreement between Japan and the United States on Cooperation in the Field of Environmental Stewardship relating to the United States Armed Forces in Japan, Supplementary to the Agreement under Article VI of the Treaty of Mutual Cooperation and Security between Japan and the United States, regarding Facilities and Areas and the Status of United States Armed Forces in Japan (Washington, D.C., 28 September 2015).

[67] Supplementary Agreement, preamble.

[68] *Ibid.*, art. 2.

[69] *Ibid.*, art. 3, para. 1.

[70] *Ibid.*, art. 3, para. 2.

[71] *Ibid.*, art. 4, subpara. (a).

United States of America

[Original: English]

The United States appreciates the use of "should" and "as appropriate" in this draft principle. However, the phrase "in relation to armed conflict" seems misplaced and inconsistent with existing State practice in concluding status-of-forces agreements, which generally do not use this phrase. The phrase seems intended to reflect the limited scope of the draft principles rather than to describe certain categories of status-of-forces agreements. Reflecting the scope of the draft principles would be better accomplished by moving the phrase "in relation to armed conflict" after "environmental protection". In addition, the United States recommends clarifying the second sentence of this draft principle.

> States and international organizations should, as appropriate, include provisions on environmental protection **in relation to armed conflict** in agreements concerning the presence of military forces ~~in relation to armed conflict~~. Such provisions may ~~include~~ **address, *inter alia*,** preventive measures, impact assessments, restoration and clean-up measures.

7. Draft principle 7 – Peace operations

Canada

[Original: English]

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 European Union, the United Nations, and the North Atlantic Treaty Organization. Canada recommends that the verb "shall" be amended to "should" in draft principle 7.

Germany

[Original: English]

Contrary to the indication that principle 7 constituted a rule of customary international law ("shall"), Germany believes this to be a non-legally binding principle, which is reflected in non-binding policy documents adopted by the European Union, the United Nations, and the North Atlantic Treaty Organization, which in this particular instance do not reflect customary international law. Germany therefore suggests reformulating the principle utilizing the verb "should". Despite the explanation in paragraph (6) of the commentary, Germany suggests that further clarification on the definition of "peace operations" could help to avoid undue ambiguity.

[See also comment under general comments.]

Ireland

[Original: English]

[See comment under general comments.]

Japan

[Original: English]

Japan considers that the contents of this principle should not be regarded as normative in view of past practice of relevant actors in peace operations. Therefore, the term "shall" should be changed to "are encouraged to".

Multiple actors, not limited to States and international organizations, may be involved in armed conflict and have some effect on the environment. Therefore, the phrase "States and international organizations" should be modified to "States, international organizations and other relevant actors".

Netherlands

[Original: English]

[…] [T]he Kingdom of the Netherlands does not believe that this reflects customary international law. The draft principle is based on non-binding policy documents adopted by the European Union, the United Nations and the North Atlantic Treaty Organization. Although such documents make an important contribution to the development of customary international law and often reflect customary international law, there is no conclusive proof that this is already the case in this particular instance. Therefore, the Kingdom of the Netherlands proposes to amend "shall" to "should" in draft principle 7.

Portugal

[Original: English]

Portugal kindly invites the Commission to consider the following additions (in **bold** and underlined) […]:

"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."

Spain

[Original: Spanish]

[See comment under general comments.]

Switzerland

[Original: French]

The Commission could consider further clarifying the legal basis for the obligations underlying draft principle 7.

It would also seem appropriate to include a "without prejudice" clause with respect to other international obligations. As the Commission indicates in its commentary, this would be all the more appropriate in the light of the full range of "peace operations" that could be included in the draft principle.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

[See comment on draft principle 2.]

United States of America

[Original: English]

This draft principle, through the use of "shall," purports to reflect an existing legal requirement. However, there is no treaty provision cited in the commentary, nor does the commentary explain how this obligation reflects customary international law. The United States views this principle as reflecting a good

practice, rather than an existing legal obligation, and therefore recommends that the principle be revised by replacing “shall” with “should”. Furthermore, while the commentary cites to reports published by various international organizations, it is unclear whether this draft principle is intended to recommend a progressive development of international law. If it is proposed neither as codifying customary international law nor as a recommendation for progressive development, the Commission should consider deleting or revising it because the Commission’s mandate does not extend to recommending policy or “best practices”.

8. Draft principle 8 – Human displacement

Czech Republic

[Original: English]

The Czech Republic has doubts about the inclusion of the category of “other relevant actors”. It is not clear what these actors should do to comply with this principle in practice and how their cooperation with the representatives of the given State should take place.

France

[Original: French]

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.

[See also comment under general comments.]

Ireland

[Original: English]

[See comment under general comments.]

Lebanon

[Original: Arabic]

Draft principle 8 on human displacement would help to prevent environmental degradation in areas where displaced persons have sought shelter. However, it would be preferable to include reference to the right of States to relocate such displaced persons from areas where they themselves might pose harm to the environment, with legal evacuation of populations contingent on police availability, military needs and the security of the civilian population.

Netherlands

[Original: English]

[See comment under general comments.]

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

Draft principle 8 […] is a provision that is addressed to States, international organizations and other "relevant actors". Paragraph (7) of the commentary lists, in a non-exhaustive manner, what the "relevant actors" could be. The Nordic countries suggest considering mentioning non-State armed groups in that paragraph.

Switzerland

[Original: French]

Draft principle 8, on human displacement, is important before, during and after an armed conflict. Human displacement is a phenomenon that needs to be addressed not only "during and after an armed conflict", but also before.[72] Switzerland believes that it is just as important to consider *ex ante* measures to reduce the environmental impact of conflict-related human displacement, as it is to address environmental issues during and after an armed conflict. This is indeed the inference than can be drawn from the wording used in draft principle 8 ("prevent and mitigate"). Past experiences should be taken into account in the adoption of these *ex ante* measures. These measures should also help to better anticipate conflict-related human displacements.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

[See comment on draft principle 2.]

United States of America

[Original: English]

The wording of draft principle 8 might be interpreted to prioritize the protection of the environment over efforts to provide relief to persons displaced by armed conflict. The United States recommends rephrasing this draft principle in light of the anthropocentric character and humanitarian objectives of international humanitarian law:

> **While providing relief and assistance for war victims, persons displaced by armed conflict, and local communities,** States, international organizations and other relevant actors should **also consider taking** ~~take~~ appropriate measures to prevent 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~~.

"Consider taking" seems more appropriate, as in some cases, the persons displaced will not cause environmental degradation, and thus no additional measures would be warranted.

Paragraph (10) of the commentary to draft principle 8 helpfully notes that "relief and assistance" should be understood in light of the Commission's work on the topic "Protection of persons in the event of disasters". The United States recommends also highlighting that relief activities are contemplated under

[72] Para. (11) of the commentary to draft principle 8, where the Commission refers only to the phases "during and after an armed conflict".

international humanitarian law. For example, the 1949 Geneva Conventions contemplate relief activities for war victims, such as prisoners of war and civilian internees.[73] In addition to the revisions suggested above to draft principle 8, additional explanation along these lines could be added to the commentary.

9. Draft principle 9 – State responsibility

Colombia

[Original: Spanish]

[…] [T]he scope of the concept of full reparation needs to be clarified. Accordingly, it would be important to mention the constituent elements of the concept of reparation, as well as the criteria that would need to be included for it to have that character, which are absent from the commentaries to the draft principle.

Colombia also suggests that the rest of the wording be reviewed, taking into consideration the fact that the establishment of the responsibility of a "State" for an act is a highly complex process, especially when it comes to asymmetrical and degraded conflict scenarios involving organizations of different types and scopes.

It should be borne in mind that, to establish the responsibility of the party that will have to repair any damage to the environment, it is necessary to take into account the actors involved, including considering the presence of a variety of (non-State) actors and/or organizations, which may be the principal causes of the damage to natural resources.

Cyprus

[Original: English]

The Republic of Cyprus shares and supports the view that State responsibility can be triggered in cases of environmental harm within the context of belligerent occupation on the basis of several legal frameworks, including the law of armed conflict and the law of international human rights (draft principle 9 and para. (4) of the commentary).

Czech Republic

[Original: English]

The commentary might give the impression that it leads to certain modification of the rules of responsibility of States for internationally wrongful acts. The elements of responsibility consist in a breach of an international obligation of the State and the fact that the breach is attributable to the State under international law. Therefore, the two conditions mentioned in paragraph 3 of the commentary (violation of relevant substantive rules of international law and the fact that such rules are binding on the State) are rather misleading.

Further, paragraph (4) of the commentary seems to indicate that the law of armed conflict represents *lex specialis* with respect to the rules on the responsibility of States for internationally wrongful acts. However, the rules on the responsibility of States, including the rules on the attribution of conduct, are fully applicable with respect to the breaches of the law of armed conflict.

[73] See, e.g., the provisions of the 1949 Geneva Conventions discussed in §§ 5.19.3, 7.4.5.2, 9.20.3, 9.33.2, 10.23.3, 10.33.2 of the *Department of Defense Law of War Manual*.

In addition, draft principle 9 deals with the rules on the responsibility of States for internationally wrongful acts; yet, the commentary refers also to the rules on the international liability for transboundary harm caused by activities not prohibited by international law. Thus, it would be useful to clarify the scope of the draft principle.

El Salvador

[Original: Spanish]

A contemporary approach should be taken when explaining the conditions in which an act or omission attributable to a State is wrongful. In the area of environmental protection, verification of environmental harm is not the sole factor, since, in accordance with the general principles of international environmental law, responsibility may be engaged even when acts are not prohibited, if those acts have the potential to cause harm to third parties. The sense of prevention should be retained here, in addition to due fulfilment of the principle of intergenerational equity, by virtue of which environmental sustainability must be preserved.

France

[Original: French]

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.

[See also comment under general comments.]

Germany

[Original: English]

Germany welcomes principle 9 on State responsibility based on the assumption that it codifies customary international law and does not alter the rules of State responsibility for internationally wrongful acts. Germany underlines its understanding that a precondition to liability is an internationally wrongful act that is (a) attributable to the State under international law, and (b) constitutes a breach of an international obligation of the State, as codified in article 2 of the draft articles on responsibility of States for internationally wrongful acts. It is suggested to clarify

the commentary to principle 9 accordingly to prevent the potential misconception of an attempted modification of the rules on State responsibility. Additionally, Germany holds the rules governing the responsibility of States for internationally wrongful acts as *per se* applicable to breaches of the law of armed conflict. Paragraph (4) of the commentary, stipulating that the rules governing armed conflicts represent *leges speciales*, might be misleading in this context, as the rule cited rather seems an application of the general rule of State responsibility for internationally wrongful acts.

Germany especially welcomes the reference to damage to the "environment in and of itself" as it highlights the intrinsic value of nature.

Israel

[Original: English]

Paragraph (3) of the commentary, footnote 1084

[…]

Comment: Israel is not a party to Additional Protocol I, and – like other States not party to the Protocol – does not consider articles 35, paragraph 3, and 55 of the Protocol to reflect customary international law, due to the lack of general State practice accepted as law to that effect.[74] An indication that these provisions do not reflect customary international law may also be found in the International Court of Justice's *Nuclear Weapons* advisory opinion, where the Court noted in relation to these provisions that "[t]hese are powerful constraints for all the States having subscribed to these provisions".[75]

Suggested change: *Delete* the words "and their customary counterparts".

Lebanon

[Original: Arabic]

Draft principle 9 on State responsibility provides for the responsibility of States and the obligation to make full reparation specifically for damage to the environment during armed conflict. It would be preferable to include in the draft principle a reference to damages that cannot be calculated financially.

Spain

[Original: Spanish]

[See comment under general comments.]

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

Draft principle 9 […] is in line with the general law on State responsibility, allowing, however, room for development regarding, for instance the channelling of reparations to the affected individuals and communities.

[74] See statement of Israel to the Sixth Committee of the General Assembly, October 2020, regarding agenda item 83. Available at https://www.un.org/en/ga/sixth/75/pdfs/statements/protocols/12mtg_israel.pdf.

[75] *Nuclear Weapons* advisory opinion (footnote 20 above), para. 31.

Switzerland

[Original: French]

Draft principle 9 addresses the specific case of damage to the environment. The Commission could clarify the added value of draft principle 9 in relation to the draft articles on responsibility of States for internationally wrongful acts.

As the Commission indicates in its commentary to the draft principle, a State is responsible for "all acts committed by persons forming part of its armed forces".[76] This responsibility includes acts committed by its organs and by other persons or entities empowered to act on its behalf, even if those organs or persons exceed their powers or defy instructions. If this responsibility is to extend to other "private acts",[77] Switzerland would appreciate further clarification from the Commission.

The Commission could clarify why it was necessary to introduce a "without prejudice" clause in paragraph 2 of draft principle 9. As mentioned earlier, it seems preferable to include a general "without prejudice" clause in the introductory draft principles.

The Commission could consider further the circumstances precluding wrongfulness in connection with an armed conflict, the relationship between draft principle 1 (scope before, during and after the armed conflict) and draft principle 9, as well as the form of reparation for injury.[78]

Switzerland seeks clarification as to a State's obligation to "make full reparation". In some cases, compensation or environmental remediation would not fully satisfy the needs of the victims. Full reparation, according to the concept of dealing with the past followed by Switzerland, takes into account other types of reparation, such as moral or symbolic reparations. The commentary to this draft principle is currently unclear as to what this obligation entails, especially in the case where remediation of the environment is wholly or partially impossible, or in the case of damage to protected areas of cultural importance.

United States of America

[Original: English]

Damage to the environment in and of itself is not necessarily an internationally wrongful act for which full reparations would be required. To clarify this point, "such" could be added before "damage to the environment in and of itself." Alternatively, the paragraph could be revised as follows:

> 1. An internationally wrongful act of a State, in relation to an armed conflict, that causes damage to the environment of another State entails the international responsibility of the first State, which is under an obligation to make full reparation for such damage, including damage to the environment in and of itself **that was caused by such act**.

This insertion would be in accord with the Commission's draft articles on the responsibility of States for internationally wrongful acts, which address "injury" from an international wrongful act and an "injured State".

[76] Art. 91 of Additional Protocol I and art. 3 of Convention (IV) respecting the laws and customs of war on land and its annex, Regulations respecting the laws and customs of war on land (the Hague Regulations), arts. 46 and 56.

[77] Para. (4) of the commentary to draft principle 9.

[78] Art. 34 of the draft articles on responsibility of States for internationally wrongful acts.

Footnote 1084 in paragraph (3) of the commentary to draft principle 9 refers to "articles 35, paragraph 3, and 55 of Additional Protocol I and their customary counterparts." The reference to "and their customary counterparts" should be deleted. As discussed below, these rules are not found in customary international law.

In addition, this footnote suggests "principles" and "rules" are interchangeable, when "principles" are usually viewed as more general than "rules". Specific rules are often developed to implement legal principles. Moreover, distinction, military necessity, and proportionality are generally described as "principles".[79] To address these concerns, the United States recommends revising the footnote as follows:

> This includes articles 35, paragraph 3, and 55 of Additional Protocol I ~~and their customary counterparts~~ **as applicable**, **rules emanating from** the principles of distinction, proportionality, **and** military necessity**, such as** ~~and~~ precautions in attack, as well as other rules concerning the conduct of hostilities, and **rules found in** the law of occupation, also reflected in the present draft principles.

10. Draft principle 10 – Corporate due diligence

Canada

[Original: English]

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.

Colombia

[Original: Spanish]

On draft principle 10 […], and draft principle 11 […], it would be important to have greater clarity as to what may or may not be required of a private party operating in an armed conflict zone.

Czech Republic

[Original: English]

It is not clear why the principle of due diligence, one of the fundamental principles of international environmental law, is mentioned only in connection with corporations (and occupation - principle 22).

France

[Original: French]

France notes that the Commission's commentaries highlight that these draft principles [10 and 11] do not reflect customary international law.

[See also comment under general comments.]

[79] See, e.g., chapter II of the *Department of Defense Law of War Manual*. On the other hand, "precautions in attack" in the *Manual* is discussed as a rule implementing the principle of proportionality. See *Department of Defense Law of War Manual*, § 5.11.

Germany

[Original: English]

In view of draft principles 10 and 11, Germany generally supports the aim of addressing the growing ramifications of corporate activity in areas of armed conflict, with the understanding that draft principles 10 and 11 currently do not reflect customary international law. Germany submits that these principles as currently drafted would, inter alia, benefit from further examination and elaboration in particular with regard to the foundation and boundaries of potential further obligations on business enterprises.

Talking into account these general remarks, it is submitted that paragraph (3) of the commentary on draft principle 10 could be clarified by further elaboration on the analogous application of due diligence considerations stemming from the United Nations Guiding Principles on Business and Human Rights[80] in the context of the protection of the environment. A clarification on the element of "human health" in draft principle 10, as outlined in paragraph (10) of the commentary might be helpful in this regard. With respect to draft principle 11, further elaboration on liability provisions in the international instruments referred to in the commentary on draft principle 10 would be helpful. In this regard, it should be noted that the United Nations Guiding Principles on Business and Human Rights do not contain provisions on liability but rather provide in generic terms that States should ensure through judicial, administrative, legislative or other appropriate means that affected persons have access to effective remedy.

Israel

[Original: English]

Draft principles 10 and 11

[…]

Comments: Israel agrees with the phrasing of these principles as recommendations and acknowledges the clear statement concerning their non-binding status in paragraph (1) of the commentary to draft principle 10. Israel also recognizes the desirability of ensuring that companies do not cause environmental damage within a State's borders. Israel is concerned, however, that the draft principles might imply that corporate due diligence and liability may include extraterritorial elements.

The international community has repeatedly emphasized the need for a voluntary and consensus-based approach when addressing the broader issue of human rights in the context of corporate activity. The same approach should be taken when discussing protection of the natural environment. Given the preliminary stage of the debate on these issues and the fact that a complete consideration of the matter is beyond the scope of the Commission's present project, Israel suggests that these draft principles be deleted.

Suggested change: *Delete* draft principles 10 and 11. If the present text is to be retained, it should be made clear that the draft principles only apply to domestic environmental damages.

[80] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31, annex). The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

Japan

[Original: English]

Principle 10 concerns corporate due diligence. However, the relationship between this duty and the law of armed conflict is not clear. Japan would like to invite the Commission to clarify the differences from other frameworks mentioned in the commentary.

The term "environment" used in principles 10 and 11 appears to include human health, whereas this notion does not seem to be embraced in article 55 of the Additional Protocol I stipulating the "Protection of the natural environment". Therefore, the Commission should clarify why only these principles explicitly refer to "human health" with regard to corporate due diligence and liability.

Netherlands

[Original: English]

[See comment under general comments.]

Spain

[Original: Spanish]

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.

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

Draft principles 10 […] and 11 […] belong to the area of law that is under rapid development. The Nordic countries welcome the inclusion of these provisions that may serve as catalysts for legislative measures and good practices. They wonder whether it would make sense to use the term "business enterprises" instead of "corporations and other business enterprises", in line with the Guiding Principles on Business and Human Rights.

Switzerland

[Original: French]

Switzerland recommends that the scope of draft principles 10 and 11 be set out more precisely. In particular, the Commission could clarify which type of companies are concerned. It proposes that the scope of these two draft principles is not extended to companies whose activities are not related to armed conflicts, and that the focus be placed on private military and security companies.

Draft principles 10 and 11 should apply to private military and security companies. The Montreux Document identifies, inter alia, the relevant international legal obligations for private military and security companies as follows:

- Private military and security companies are obliged to comply with international humanitarian law or human rights law imposed upon them by applicable national law, as well as other applicable national law such as criminal law, tax law, immigration law, labour law, and specific regulations on private military or security services.

- The personnel of private military and security companies are obliged to respect the relevant national law, in particular the national criminal law, of the State in which they operate, and, as far as applicable, the law of the States of their nationality.[81]

Switzerland recommends that the Commission consider a separate draft principle on private military and security companies: "States and international organizations that use private military and security companies shall ensure that measures are taken to protect the environment, in accordance with their international obligations in relation to armed conflicts."

Since certain obligations and certain normative frameworks, including international humanitarian law, may directly engage companies performing certain activities related to armed conflicts, such international obligations and normative frameworks should be taken into consideration, or at least not prejudiced, in the draft principle.

Switzerland also recommends the inclusion in the draft principle of the idea of individual criminal responsibility for certain violations of international humanitarian law in relation to the environment.[82]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

It is unclear why it is necessary for States to take "legislative … measures". States may be able to achieve the desired impact without legislation.

The United Kingdom proposes draft principles 10 is amended to: "States should take appropriate legislative ~~and~~ *or* other measures …".

United States of America

[Original: English]

Draft principles 10 and 11

Draft principles 10 and 11 include two specific recommendations on corporate due diligence and liability. It is unclear to us why the Commission has singled out "corporations and other business enterprises" for special attention. The draft principles do not address any other non-State actors such as insurgencies, militias, criminal organizations, and individuals, who have obligations under international humanitarian law. This has the effect of stigmatizing corporations and business enterprises as the most relevant potentially bad non-State actors in the context of protection of the environment in relation to armed conflict. It also appears to signal that corporations have a heightened duty to protect the environment compared to other entities, such as non-State armed groups, that might be in a better position to implement many of the protections for the environment in relation to armed conflict. The United States suggests these principles could be deleted or, alternatively, the International Law Commission should revise them in order to take into account other relevant actors.

[81] Paras. 22 and 23 of the Montreux Document on pertinent legal obligations and good practices for States related to operations of private military and security companies during armed conflict (Montreux, ICRC, 2008).

[82] See in particular art. 8, para. 2 (b), of the Rome Statute of the International Criminal Court ((Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3).

The scope of principles 10 and 11 could reflect more closely the scope of the draft principles. Principle 10 refers to "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". Principle 11 refers to "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". Because conduct "in an area of armed conflict or in a post-armed conflict situation" might not necessarily relate to armed conflict, the United States recommends that this phrase be revised to "in relation to armed conflict."

The connection between principles 10 and 11 could also be made more clear and internally consistent. Liability for harm does not generally attach unless there has been a breach of legal duty, but principle 11 does not refer to breaches of "due diligence" as mentioned in principle 10. Moreover, principle 11 refers to "victims", which suggests human beings are the subject of harm, while principle 11 elsewhere refers to "harm . . . to the environment," rather than to victims.

These draft principles also call upon States to exercise extraterritorial jurisdiction over their corporations in all cases and without any qualification, such as whether the territorial State is already regulating the activity in question. There is no support for this approach in State practice and it could lead to considerable inter-State friction.

11. Draft principle 11 – Corporate liability

Canada

[Original: English]

[See comment on draft principle 10.]

Colombia

[Original: Spanish]

[See comment on draft principle 10.]

Cyprus

[Original: English]

[…] [T]he Republic of Cyprus recommends the inclusion of "affiliate entities" in addition to subsidiaries, to the extent that any such affiliate acts are under the direction or control of another affiliate entity. That is, if a corporation is acting at the direction or control of another, its position in the corporation organizational structure is not important. This is consistent with legal regimes recognizing circumstances of piercing the corporate veil may extend to affiliate entities as opposed to only parent and subsidiary entities. Moreover, an entity may act under the direction of another without necessarily being controlled by that entity. Thus, the Republic of Cyprus proposes the following amendment: "*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* [**addition:** *and any other affiliate entity*] *under its* [**addition:** *direction or control*] ~~*de facto control*~~". Of course, this is without prejudice to the rights of the territorial State to pass laws and issue decisions with respect of acts or omissions of corporations operating in an occupied territory that have an effect on the territorial State.

Czech Republic

[Original: English]

This is the only principle addressing the liability of non-State actors, which makes it seem somewhat disconnected from rest of the draft. Moreover, as in the case of principle 10, it is not clear why it deals exclusively with business corporations.

France

[Original: French]

[See also comments under general comments and on draft principle 10.]

Germany

[Original: English]

[See comment on draft principle 10.]

Israel

[Original: English]

[See comment on draft principle 10.]

Japan

[Original: English]

[See comment on draft principle 10.]

Netherlands

[Original: English]

[See comment under general comments.]

Spain

[Original: Spanish]

[See comment on draft principle 10.]

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

[See comment on draft principle 10.]

Switzerland

[Original: French]

Switzerland notes that the Montreux Document reaffirms the obligations of States under international law with regard to the activities of private military and security companies. In the first part of the Document, a distinction is made between Contracting States, territorial States, home States and all other States. The relevant international legal obligations under international humanitarian law and human rights law are set out for each of these categories.

[See also comment on draft principle 10.]

United States of America

[Original: English]

[See comment on draft principle 10.]

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

Canada

[Original: English]

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.

Colombia

[Original: Spanish]

[…] Colombia suggests bearing in mind that, as the context here is that of hybrid wars, more elements could be provided as to the variables contemplated in this draft principle, how to estimate such variables, and the consequent actions expected of States during armed conflicts, especially with regard to the dictates of public conscience.

Czech Republic

[Original: English]

The Martens Clause normally applies to combatants and civilians. Here the Commission seeks to expand its scope of application to include the natural environment, which seems to represent an element of progressive development of international law. This aspect should be explained in more detail in the commentary.

France

[Original: French]

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.

[See also comment under general comments.]

Germany

[Original: English]

Germany takes note of the adoption of draft principle 12, referred to as "Martens Clause with respect to the protection of the environment in relation to armed conflict". It is indeed necessary to confirm the existence of rules on the protection of the environment in times of armed conflict that transcend explicit treaty provisions. With the inclusion of the term "principles of humanity", however, the concepts of humanity and nature might become blurred. It might be useful to clarify (e.g. in the commentary) that the inclusion of the principle of humanity shall not lead to a humanization of the concept of "nature", but cover cases where the destruction of the environment endangers vital human needs. This could be achieved by clarifying paragraph (7) of the commentary, that the "principle[] of humanity" is understood as encompassing recognition of the importance of protecting the natural environment only inasmuch as it relates to the anthropocentric view, i.e. to the intrinsic link between the survival of civilians and combatants and the state of the environment in which they live. The "dictates of public conscience", commented in paragraph (6), may on the other hand refer to the need to protect the natural environment in and of itself.

Israel

[Original: English]

Paragraph (2) of the commentary

Current text: "The function of the Martens Clause is generally seen as providing residual protection in cases not covered by a specific rule. … 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."

Comments: Israel shares the view that the Martens Clause precludes the argument that any means or methods of warfare that are not explicitly prohibited by *a treaty* are permitted, and therefore concurs with the first prong of the second sentence in the passage cited above. Additionally, Israel shares the view mentioned in paragraph (3) of the commentary appended to draft principle 12, according to which the Martens Clause can be viewed as a reminder of the role of customary international law in the absence of applicable treaty law. Furthermore, Israel appreciates the comment in paragraph (3) of the commentary appended to draft principle 12, that it does not reflect a position by the Commission regarding the legal consequences of the Martens Clause, considering the controversial character of the issue.

However, the current text of the commentary is still likely to be understood as supporting a controversial interpretation regarding the consequences of the Martens Clause, in at least two ways. First, the words "a specific rule" in the passage cited

above are misleading, as the Martens Clause explicitly refers to the lack of *treaty* rules, rather than to a lack of *any* kind of rule.[83] Second, the same problem arises – much more bluntly – from the text "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 argument that the Martens Clause is triggered by the lack of any rule implies that it serves as another independent source of international law, and thus has serious repercussions. This is a controversial approach which is inconsistent with the language of the Martens Clause and which Israel does not share. It is submitted that the Commission's wish to avoid taking a position and remaining within the consensus in this context, requires textual modifications to that end.

Suggested changes:

a. *Replace* the words "a specific rule" in paragraph (2) of the commentary, with the words "a specific treaty rule".

b. *Delete* the text which begins in the words "or, in a general manner", until the end of the paragraph.

Paragraph (7) of the commentary

Current text: "Additionally, 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".

Comments: Israel refers to its general comment, in Part I of the present document, concerning the applicability of international human rights law in relation to armed conflict. Additionally, and more specifically, Israel disagrees with the suggestion that the "principles of humanity" in the Martens Clause refer to international human rights law. This suggestion is unsubstantiated and contradicts the historical context of this provision and its commonly accepted meaning. It may also be recalled that the International Court of Justice in the *Nuclear Weapons* advisory opinion stated that the Martens Clause constitutes "an affirmation that the principles and rules of *humanitarian law* apply to nuclear weapons".[84] The inclusion in the commentary of the passage cited above is therefore also incompatible with the Commission's goal of avoiding controversy in the context of the Martens Clause.

Suggested change: *Delete* the passage cited above.

Lebanon

[Original: Arabic]

Draft principle 12 on the Martens Clause with respect to the protection of the environment in relation to armed conflict uses the term "principles of humanity" in the draft formulation, with the traditional understanding of that clause and its general objectives. It would be preferable to reformulate it in a manner appropriate to the context of environmental protection.

[83] The International Law Commission's works which are referred to in footnote 1164 of the draft principles indeed use language similar to the language used here ("a specific rule") but immediately thereafter clarify it as follows: "In cases not covered by a specific rule, certain fundamental protections are afforded by the 'Martens Clause'… In essence, it provides that even in cases not covered by specific *international agreements*, civilians and combatants remain under the protection …" (emphasis added). See *Yearbook of the International Law Commission, 1994*, vol. II (Part Two), p. 131, para. (3); *Yearbook of the International Law Commission*, *2008*, vol. II (Part Two), p. 43, para. (3).

[84] *Nuclear Weapons* advisory opinion (see footnote 20 above), para. 87 (emphasis added).

Netherlands

[Original: English]

[…] [T]he Kingdom of the Netherlands is of the view that expanding the Martens Clause warrants great caution. The Kingdom of the Netherlands does not oppose the text of this draft principle. However, it should not be given the title "Martens Clause" which, understandably, has been considered controversial by some members of United Nations in the Sixth Committee of the General Assembly.

Spain

[Original: Spanish]

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.

[See also comment under general comments.]

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries appreciate the confirmation by the Commission in principle 12 that the Martens Clause applies to the protection of the environment as well.

Switzerland

[Original: French]

Switzerland welcomes the reference to the Martens Clause, which forms part of customary international law and provides considerable residual protection to the extent that the "laws of humanity, and the requirements of the public conscience" serve as reference when international humanitarian law is not sufficiently precise or rigorous. It follows, therefore, that not everything that is not explicitly forbidden can be considered legal if that goes against the principles set out in the Martens Clause. Indeed, the Martens Clause can be seen as prescribing positive obligations when a proposed military action would have disastrous consequences for the environment.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom 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 United Kingdom notes that in the context of international humanitarian law, "the principle of humanity" has a specific meaning, which is not reflected in the commentary. In international humanitarian law, 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 United Kingdom does not disagree that the environment is a concern of human beings, the application of the international humanitarian law 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.

The United Kingdom 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 recognize the *lex specialis* nature of international humanitarian law; instead it subordinates the principles of international humanitarian law to all other international standards, which are not specifically designed to address the conditions of armed conflict.

The United Kingdom suggests that the commentary is revised to reflect the international humanitarian law-specific nature of the principle of humanity.

United States of America

[Original: English]

The United States recommend deleting the reference to "general principles of law" in the last sentence of paragraph (2) of the commentary to draft principle 12 because the Martens Clause refers to "principles of international law."

Paragraph (6) of the commentary to draft principle 12 states "The Commission agreed that in particular the reference to 'the dictates of public conscience', as a general notion not intrinsically limited to one specific meaning, justified the application of the Martens Clause to the environment." The Martens Clause does not provide for the "dictates of the public conscience" to apply and operate as a form of international law. In the view of the United States, the application of the Martens Clause to the environment is warranted because principles of international law may provide protection to the natural environment and may also authorize actions that could affect the natural environment.

Similarly, the last sentence of paragraph (7) of the commentary seems to imply that the phrase "principles of humanity" in the Martens Clause refers to rules of international humanitarian law and international human rights law. Although international humanitarian law includes principles, the Martens Clause does not provide for "principles of humanity" to operate directly as international law, and the Martens Clause does not modify whether particular principles are applicable to armed conflict.

13. Draft principle 13 – General protection of the natural environment during armed conflict

Canada

[Original: English]

Draft principle 13 would apply to international armed conflicts and non-international armed conflicts.[85] Draft principle 13, paragraph 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

[85] See para. (7) of the commentary to draft principle 13.

be clarified, and draft principle 13, paragraph 2, should clearly articulate that it only applies during international armed conflict.

Colombia

[Original: Spanish]

[…] Colombia suggests that the wording be reviewed, especially paragraphs 2 and 3, since there seems to be a contradiction between them, given that paragraph 2 refers to the prevention of severe damage and paragraph 3 refers to a general prohibition of attacks against the natural environment. Although the Commission notes in the commentaries to the draft principle that the purpose of paragraph 3 is to highlight the rule that a distinction must be made between military objectives and civilian objects, phrasing paragraph 2 as a recommendation and paragraph 3 as a prohibition is confusing and does not reflect a clear relationship.

Colombia also suggests taking into consideration the fact that this principle has the limitation of assuming a linearity or full control of war activities during wars and on battlefields, a difficult assumption to be made in the light of recent conflicts. Here it is useful to remember that, despite the will of the actors involved, war events can evolve in unpredictable directions, as recent armed conflicts have shown. Also, taking such a principle into account requires the absolute commitment of the major world and regional powers, which have the forces that can destroy vast territories with various types of weapons.

Czech Republic

[Original: English]

Principle 13, in conjunction with principle 14, provides core rules for environmental protection during armed conflict. The principle is cast in very general terms. In paragraph 1 it recalls the general obligation to comply with the existing rules of international humanitarian law and other areas of international law concerning protection of the natural environment in armed conflict. Then, however, it goes on to confirm some of these existing rules on a selective basis. This raises the question of the criteria for the selection: was it the importance of these rules or the fact that they are already well established, or was it something else? Are the omitted rules (e.g. the limited choice of the methods and means of warfare causing damage to the natural environment) seen as less important? Moreover, why does principle 14 confirm that general rules of international humanitarian law are to be applied to the natural environment with a view to its protection, when the specific rules that translate these general ones into practice appear already in principle 13?

The commentary states that “draft principle 13 strikes a balance: creating guiding principles for the protection of the environment in relation to armed conflict without reformulating rules and principles already recognized by the law of armed conflict”. However, this goal does not seem to be achieved. The principle appears inconsistent and sketchy, and may weaken, rather than improve, the standards of environmental protection in armed conflict. In addition, the first paragraph does not mention armed conflict at all; it would be appropriate to include such reference.

The second and third paragraphs are based on Additional Protocol I (art. 55, para. 1) and on the ICRC study on customary international humanitarian law (rule 43 A). In both cases, the source texts contain some additional rules that, however, are not included in the principle. This again raises the question of the selection criteria. Further, the second paragraph might be difficult to apply in practice, since the above provision of Additional Protocol I (art. 55, para. 1) belongs

among criticized international humanitarian law provisions with an unclear scope of interpretation.

El Salvador

[Original: Spanish]

With regard to paragraph 3 of the draft principle, El Salvador considers that, in order to ensure that the purpose of the draft principles is not lost, it is important to establish that only conventional weapons may be used against military objectives in a natural environment. Such weapons must not be of a biological or chemical nature, since they have the capacity to cause biological and ecological imbalance in the natural environment.

As pointed out on previous occasions, the nature of the environment as a transnational and even universal public good must not be forgotten. The same scope must therefore be applied to its protection.

France

[Original: French]

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.

[See also comment under general comments.]

Germany

[Original: English]

[…] Germany appreciates that draft principles 13 and 16 imply an intrinsic value of the natural environment in and of itself, recognizing that attacks against the natural environment are prohibited unless it has become a military objective, as are reprisals against the natural environment. However, as it understands it, this prohibition is not based on article 55, paragraph 2, of Additional Protocol I to the Geneva Conventions, despite the use of the same wording in draft principle 16, because article 55, which concentrates on the survival of the population and thus follows an anthropocentric approach, provides for the protection of the environment in order to protect the health and survival of the civilian population. It is rather article 35, paragraph 3, of Additional Protocol I on methods of warfare, which reflects an intrinsic approach and supports the view that environmental protection in

international humanitarian law has an intrinsic value. Furthermore, this is without prejudice to recognizing an intrinsic value of the natural environment or nature in legal regimes other than international humanitarian law.

Ireland

[Original: English]

The commentary on draft principle 13, paragraph 2, does not in its view demonstrate that the obligation to take care to "protect the natural environment against widespread, long-term and severe damage" is applicable in situations of non-international as well as international armed conflict; Ireland therefore suggests that the Commission consider whether this obligation applies in situations of non-international armed conflict and provide further information in the commentary.

Ireland also suggests, in relation to draft principle 13, paragraph 2, that the Commission consider and explain how the "widespread, long-term and severe" threshold is to be interpreted and applied, and particularly whether relevant scientific knowledge and/or areas of international law other than international humanitarian law are relevant in this respect.

Israel

[Original: English]

Draft principle 13, paragraph 1, and paragraph (3) of the commentary

Current text: draft principle 13 states that "[t]he natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict". Paragraph (3) of the appended commentary states: "The International Court of Justice in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* held that 'respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principle of necessity' and that States have a duty 'to take environmental considerations into account in assessing what is necessary and proportionate in the pursuit of legitimate military objectives'".

Comment: The framing of draft principle 13, paragraph 1, in that it refers generally to the "natural environment", is inappropriate. It is the position of Israel that under customary international law, the "natural environment" in the abstract is not the subject of protection under the law of armed conflict, and treating it as such will be incorrect both legally and practically. As several members of the Commission have also pointed out, it is specific elements of the environment that may be the subject of protection. The protection afforded to these elements depends on the applicable rule concerned.

In the view of Israel, there are a number of reasons why the words "respected and protected" should be avoided, and replaced with a more general phrasing concerning compliance with the law. First, these words concern particular obligations under the law of armed conflict, while draft principle 13, paragraph 1, is supposed to serve as a more general statement regarding compliance with existing law. Second, these words are commonly used and identified with special protections granted to certain types of persons, units and establishments (such as medical personnel and units); there is no source of existing law supporting the use of this particular phrase, or the granting of the same treatment, also in relation to the

natural environment.[86] Finally, the text in the *Nuclear Weapons* advisory opinion that paragraph (3) refers to is irrelevant in the present context, as it discusses *jus ad bellum* and not the law of armed conflict (see also the comments below on draft principle 15).

Suggested changes:

(a) *Amend* paragraph 1 of draft principle 13, so that it reads: "~~The~~ Elements of the natural environment shall ~~be respected and protected~~ enjoy protection in accordance with applicable international law and, in particular, the law of armed conflict".

Such a change is likely to require similar changes in paragraphs (1) and (2) of the appended commentary.

(b) *Delete* the inaccurate reference to the International Court of Justice's advisory opinion from paragraph (3).

Paragraph (5) of the commentary

Current text: "… but that other rules of international law providing environmental protection, such as international environmental law and international human rights law, remain relevant". This text ends with a footnote referring to paragraphs 25 and 27–30 in the International Court of Justice's *Nuclear Weapons* advisory opinion.

Comment: […] the applicability of international human rights law and international environmental law in relation to armed conflicts is controversial. Furthermore, as already noted, in the cited paragraphs of the *Nuclear Weapons* advisory opinion, the International Court of Justice did not pronounce on the applicability of international environmental law to armed conflicts. With regard to international human rights law, the International Court of Justice referred to a specific convention, rather than to this whole body of law.

Suggested change: *Delete* the words "such as international environmental law and international human rights law" from the cited passage, as well as the reference to the International Court of Justice's *Nuclear Weapons* advisory opinion.

Draft principle 13, paragraph 2

[…]

Comments: Israel is committed to the protection of the natural environment in accordance with its obligations under the law of armed conflict. The current text of draft principle 13, paragraph 2, is based on article 55, paragraph 1, of Additional Protocol I, which Israel and other States are not parties to, and Israel does not consider to reflect customary international law. Accordingly, draft principle 13, paragraph 2, should be read as granting civilian elements in the natural environment the same protection provided to any civilian object, particularly in the context of the

[86] References to respecting and protecting certain classes of persons or objects can be found, for example, in: Geneva Convention I, arts. 12 and 19 (military medical establishments and units); Geneva Convention IV art. 18 (civilian hospitals); Additional Protocol I, arts. 15 (civilian medical personnel and religious personnel), 33, para. 4 (search teams), 62 (civil defence organizations), 71 (relief personnel). While a similar phrasing is used also in article 48 of Additional Protocol I in relation to civilians and civilian objects more generally, the phrasing is not commonly used in this context (at the very least under customary law of armed conflict), and, in addition, it is recalled that elements of the environment are not necessarily either civilian objects or military objectives (see general comment of Israel on the issue in chapter II, section A, of the present document).

implementation of the rules concerning proportionality and precautions in attack. Needless to add, that is not to say that States may not adopt policies that focus on the protection of the natural environment in relation to armed conflicts in ways that exceed their legal obligations, as Israel itself does.

Israel also reiterates that it would be more accurate and appropriate to address *elements* of the natural environment, rather than the natural environment as a whole.

Suggested change: *Add* the words "in accordance with the respective obligations of States under the law of armed conflict" at the end of the draft principle.

Draft principle 13, paragraph 3

[…]

Comments: […] Israel considers that under customary law of armed conflict the legal status of elements in the natural environment is to be examined from an anthropocentric perspective. Regrettably, draft principle 13, paragraph 3, and its appended commentary are inconsistent with this approach and with customary international law.

In addition, it would be more precise to describe the prohibition against attacking civilians and civilian objects under the law of armed conflict by referring to making them *the object of attack*. This wording would be more consistent with the language commonly used in the law of armed conflict, and would better distinguish between intended and incidental harm to the environment.[87]

Suggested changes:

a. *Amend* paragraph 3 of draft principle 13, so that it reads: "No part of the natural environment constituting a civilian object may be made the object of attack".

b. Far-reaching changes to the commentary of draft principle 13 are necessary in order to accurately reflect customary international law. At the very least, (i) in paragraph 10 it is suggested to *delete* the text "[i]t underlines the inherently civilian nature of the natural environment" and the text "[t]he term 'civilian object' is defined as 'all objects which are not military objectives'; (ii) in paragraph 11, it is suggested to *replace* the words "the environment" with the words "an element of the natural environment constituting a civilian object"; and (iii) in paragraph 12, it is suggested to *delete* the first two sentences.

c. The text of the commentary to draft principle 13, paragraph 3, should acknowledge the existence of the anthropocentric view as well as its consistency with customary international law. Furthermore, Israel suggests that the Commission embrace the anthropocentric approach, or, at the very least, avoid any appearance of portraying the "intrinsic value" approach as existing law.

[See also comment on draft principle 20.]

Japan

[Original: English]

While principle 13, paragraph 3, states that "No part of the natural environment may be attacked, unless it has become a military objective", the principle by itself does not provide that the natural environment corresponds to civilian objects (art. 52, para. 2, of the Additional Protocol I). Hence, a sentence

[87] See Additional Protocol I, art. 51, para. 2, and 52, para. 1.

such as “Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” should be added to principle 13, paragraph 3, for further clarification, although the commentary to that principle refers to article 52, paragraph 2, of the Additional Protocol I.

[See also comment on draft principle 4.]

Netherlands

[Original: English]

Considering draft principle 13, paragraph 2, the Kingdom of the Netherlands notes that, in 2009, the United Nations Environment Programme requested the development of a more specific definition of the phrase “widespread, long-term and severe”. The commentaries to the draft principles merely refer to Additional Protocol I to the Geneva Conventions of 1949. The Kingdom of the Netherlands would like to suggest interpreting the standard of “widespread, long-term and severe” in light of the most recent academic discourse with regard to the different functions of ecosystems, taking into account recent case law. For example, the commentary could refer to the need to interpret this phrase in accordance with the latest scientific insights into the various functions of ecosystems, as the International Court of Justice did in *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua, Compensation Judgment).[88]

On the decision not to make a distinction between international armed conflict and non-international armed conflict, the Kingdom of the Netherlands has expressed its support on earlier occasions. As noted above, it would have been useful if the Commission had included arguments in the commentaries as to the status of certain elements in the draft principles that thus far have been considered to apply solely to international armed conflicts, including in the view of the International Committee of the Red Cross. The status of draft principle 13, paragraph 2, which is derived from article 55 of Additional Protocol I, is simply referred to as applicable in a situation of non-international armed conflict. The Kingdom of the Netherlands is of the view that a substantiated argument is missing to support this notion.

[See also comment under general comments.]

Portugal

[Original: English]

[See comment under general comments.]

Spain

[Original: Spanish]

[…] 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

[88] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Reports 2018*, p. 15.

the approach taken in draft principle 19.[89] 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.

[See also comment under general comments.]

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries are pleased that the paragraph (5) of the commentary to draft principle 13 lays out that in addition to international humanitarian law, which is the *lex specialis* in armed conflicts, other rules of international law, such as international environmental law and international human rights law remain relevant.

Switzerland

[Original: French]

Switzerland believes that, in its commentary, the Commission does not need to elaborate on the distinction between the "law of armed conflict" and "international humanitarian law". In the commentary, it is clear that the Commission merely repeats the traditional distinction between "Hague law" and "Geneva law". Indeed, the rules and obligations relating to occupation are clearly part of international humanitarian law and "Geneva law".

The Commission could, however, consider explaining the relationship between the law of armed conflict and international environmental law.

With regard to paragraph 2 of draft principle 13, Switzerland believes that there is a more general obligation to take due account of the natural environment during military operations. Care shall be taken to protect the natural environment against widespread, long-term and severe damage. This approach coincides, for example, with the obligation that "in the conduct of military operations constant care shall be taken to spare the civilian population, civilians and civilian objects".[90] As Switzerland indicated in its comments for the sixty-eighth session of the Commission in 2016, the natural environment, consisting of its various parts, enjoys the general protection accorded to civilian objects under international humanitarian law.[91] In addition, those who plan or decide upon an attack must "take all feasible precautions in the choice of means and methods of attack with a view to avoiding,

[89] 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).

[90] Art. 57, para.1, of Additional Protocol I.

[91] Observations on the practice and instruments of Switzerland to protect the environment in relation to an armed conflict, as well as the additional observations on the draft principles (hereinafter: observations of Switzerland 2016).

and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects",[92] including damage to the environment.

Switzerland would welcome an explicit reference to the customary prohibition to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.[93]

Switzerland also reiterates its view that "the inclusion of a definition of the term 'armed conflict' is not necessary to clarify the scope of the draft principles and could even lead to an overlapping of different definitions and application thresholds".[94] Given their general nature, the draft principles should not impair either *lex lata* or existing case law.

The draft principles applicable during armed conflicts are very much focused on "attacks". Although military necessity is invoked in draft principle 14, Switzerland wishes to point out that the destruction of any part of the natural environment is prohibited, except in cases of imperative necessity of war. It proposes that this basic rule, which applies both during hostilities[95] and during an occupation,[96] be captured in the draft principle. This rule prohibits any destruction of an adversary's property, including the natural environment, whether the damage is extensive, long-lasting and severe or results from an "attack".

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The commentary to draft principle 13 refers to the Advisory Opinion of the International Court of Justice 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 Court's position is important. The Court was considering whether treaty obligations towards the environment were obligations of total restraint during military conflict. The Court recognized that while States have a duty to take these obligations into account, they cannot deprive States of their right to self-defence.

The United Kingdom 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.

Further, the United Kingdom 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.

United States of America

[Original: English]

As a general matter, a key question presented by the draft principles is the extent to which the natural environment falls under existing law of war rules.

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[92] Art. 57, para. 2 (a) (ii), of Additional Protocol I.

[93] See arts. 35, para. 3, and 55, para. 1, of Additional Protocol I.

[94] Observations of Switzerland 2016.

[95] See in particular art. 23 (g) of Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the laws and customs of war on land (the Hague Regulations).

[96] See in particular art. 53 of Geneva Convention IV.

Several general rules of warfare may have the incidental effect of protecting the natural environment. First, at minimum, the entirety of the natural environment would receive protection against wanton destruction or against destruction as an end in itself. Similarly, it seems clear that in certain cases, parts of the natural environment may be regarded as "enemy property" (i.e., natural property[97]) that may not be seized or destroyed unless imperatively demanded by the necessities of war.[98] Similarly, in certain cases, features of the natural environment, such as natural resources,[99] would constitute a civilian object that would be protected from being made the object of attack, unless it became a military objective under the circumstances.[100]

In contrast, the United States has expressed the view that certain treaty provisions directed expressly at the protection of the natural environment – such as provisions of Additional Protocol I to the 1949 Geneva Conventions that prohibit "methods or means of warfare intended or expected to cause widespread, long-term and severe damage to the environment" – are too broad and ambiguous and not part of customary international law.[101]

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[97] Department of Defense, Report to Senate and House Appropriations Committees on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, *reprinted as* appendix VIII to Patrick J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1993), p. 202 ("The United States considers the obligations to protect natural, civilian, and cultural property to be customary international law.").

[98] Regulations Respecting the Laws and Customs of War on Land, art. 23 (g), Annex to the Hague IV Convention Respecting the Laws and Customs of War on Land("In addition to the prohibitions provided by special Conventions, it is especially forbidden: … To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war").

[99] Department of Defense, Report to Senate and House Appropriations Committees on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War , p. 202 ("Cultural property, civilian objects, and natural resources are protected from intentional attack so long as they are not utilized for military purposes. Each also is protected from collateral damage that is clearly disproportionate to the military advantage to be gained in the attack of military objectives.").

[100] See, e.g., John B. Bellinger, III, Legal Adviser, Department of State & William J. Haynes, General Counsel, Department of Defense, Letter to Dr. Jakob Kellenberger, President, International Committee of The Red Cross, Regarding ICRC's Customary International Humanitarian Law Study, dated 3 November 2006, reprinted in *International Legal Materials* (2007) , vol. 46, p. 514, at p. 520 ("Additionally, it is clear under the principle of discrimination that parts of the natural environment cannot be made the object of attack unless they constitute military objectives, as traditionally defined, and that parts of the natural environment may not be destroyed unless required by military necessity."); Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), art. 2, para. 4, ("It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.").

[101] *See* John B. Bellinger, III, Legal Adviser, Department of State & William J. Haynes, General Counsel, Department of Defense, Letter to Dr. Jakob Kellenberger, President, International Committee of The Red Cross, Regarding ICRC's Customary International Humanitarian Law Study, pp. 520-521 ("The first sentence of rule 45 states: 'The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited.' … However, the weight of the evidence — including the fact that ICRC statements prior to and upon conclusion of the Diplomatic Conference acknowledged this as a limiting condition for promulgation of new rules at the Conference; that specially affected States lodged these objections from the time the rule first was articulated; and that these States have made them consistently since then – clearly indicates that these three States are not simply persistent objectors, but rather that the rule has not formed into a customary rule at all."); see also Michael J. Matheson, Deputy Legal Adviser, Department of State, Remarks

In addition, by referring to international humanitarian law as only one of several (unspecified) bodies of law that may be applicable in armed conflict, this principle raises issues of whether other international law would be applicable to the "respect" and "protection" of the environment during armed conflict. The concurrent application of other bodies of law in armed conflict can be an exceedingly difficult and controversial topic. Notably, in 1995, the United States took the following position before the International Court of Justice:

> No international environmental instrument is expressly applicable in armed conflict. No such instrument expressly prohibits or regulates the use of nuclear weapons. Consequently, such an international environmental instrument could be applicable only by inference. Such an inference is not warranted because none of these instruments was negotiated with the intention that it would be applicable in armed conflict or to any use of nuclear weapons. Further, such an implication is not warranted by the textual interpretation of these instruments.[102]

In line with these general comments, the United States provides specific recommendations regarding draft principle 13 and commentary.

Regarding paragraph 1, although "respect and protect" has been used in international humanitarian law treaties to regarding certain categories of individuals, it has not been applied to the natural environment. The United States recommends rephrasing the sentence slightly and including additional clarification in the commentary to paragraph 1.

> The natural environment shall ~~be respected and protected~~ **receive respect and protection** in accordance with applicable international law and, in particular, the law of armed conflict.

Paragraphs (1) and (2) of the commentary would be revised accordingly. For example, "the obligation to respect and protect the natural environment" could be changed to "obligations that afford respect and protection to the natural environment." The first sentence of paragraph (3) of the commentary could be supplemented with the addition at the end of the following: "although care was taken to avoid the misimpression that existing international humanitarian law contains an obligation to respect and protect the environment and to reflect a distinction between protections received by the natural environment and existing international humanitarian law protections afforded to persons." Footnote 1183 also misstates paragraph 1 of article 48 of the 1977 Additional Protocol I. The United States recommends reproducing the text of that provision. The phrase "respect and protect" is often used in international humanitarian law instruments, including the 1977 Additional Protocol I, but actually is not used in article 52 outlining the protection afforded civilian objects the way that the phrase "respect and protect" is used in describing the protections of individuals in that instrument (e.g., arts. 10, 15,

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on the United States position on the relation of customary international law to the 1977 Protocols Additional to the 1949 Geneva Conventions at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law (22 January 1987), *American University Journal of International Law and Policy*, vol. 2 (1987), p. 419, at p. 424 ("We, however, consider that another principle in article 35, which also appears later in the Protocol, namely that the prohibition of methods or means of warfare intended or expected to cause widespread, long-term and severe damage to the environment, is too broad and ambiguous and is not a part of customary law.").

[102] Letter dated 20 June 1995 from the Acting Legal Adviser to the Department of State, together with Written Statement of the Government of the United States of America, International Court of Justice, Request by the General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, p. 34.

62, 71, 76, and 77). Although the United States is not a party to the 1977 Additional Protocol I, in its view, this difference in language in that instrument properly reflects an intention to prioritize the protection afforded civilians and certain other protected persons and objects over the general protection provided to civilian objects.

Paragraph 2 is drawn from the 1977 Additional Protocol I to the 1949 Geneva Conventions, which applies in relation international armed conflicts. As noted above, not all States have ratified this instrument, and the United States, among others, has objected to this provision. It therefore recommends that this principle be revised in line with the approach taken in draft principle 19:

> Care shall be taken to protect the natural environment against widespread, long-term and severe damage**, in accordance with the State's international obligations**.

The commentary does not provide any examples of what constitutes the required care, nor are examples given of what constitutes a lack of care. The United States recommends that the commentary provide examples drawn from existing State practice, as such examples could help clarify the intention of the principles and would make them more useful to States.

Paragraph 3 of draft principle 13 is overly broad because parts of the natural environment not constituting military objectives are routinely adversely affected by lawful attacks against military objectives. This type of environmental damage (e.g., small craters in the earth formed from the use of artillery) is generally not considered as part of the implementation of the principle of proportionality.

Therefore, the United States recommends revising paragraph 3 as follows:

> No part of the natural environment may be ~~attacked~~ **made the object of attack**, unless it has become a military objective.

Along the same lines, it would be useful to clarify in paragraph (10) of the commentary to draft principle 13 that the natural environment is not always a "civilian object" but receives the protection afforded civilian objects insofar as it constitutes a civilian object. The last sentence of paragraph (10) of the commentary on draft principle 13 could be usefully supplemented:

> There are several binding and non-binding instruments which indicate that this rule is applicable to parts of the natural environment **that constitute civilian objects**.

This language would also be more consistent with the sources cited in footnote 1199. This footnote references United States military manuals cited in the ICRC study on customary international humanitarian law. However, these references were quoted selectively by the ICRC customary international humanitarian law study, which omitted key aspects of the relevant sections cited. The United States recommends citing original sources directly instead of as characterized by the International Committee of the Red Cross. If the draft text of the commentary is not revised, it requests that the reference to these United States military manuals be omitted or that it be noted that the United States has raised concerns with the ICRC representation of United States sources in the ICRC customary international humanitarian law study and advising the reader to consult United States sources directly for official statements and interpretations.

14. Draft principle 14 – Application of the law of armed conflict to the natural environment

Canada

[Original: English]

Draft principle 14 would expand the customary international humanitarian law 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."

Colombia

[Original: Spanish]

On draft principles 14 […] and 15 […], Colombia suggests that the scope of application of the principles and rules contained therein concerning environmental protection be set out more clearly, with wording that would make it possible to determine whether the principles and rules also apply to non-State armed actors – who are most likely not governed by these types of considerations – especially in asymmetrical scenarios.

Czech Republic

[Original: English]

The formulation of the draft principle seems to be too general (and, in principle, only repeats what is already included in draft principle 13). Further, in its opinion, the principle of military necessity could be omitted from this list. This principle (together with the principle of humanity – which, however, is not mentioned here) normally belongs to a higher, more general level than the rest of the principles listed here. By contrast, the list does not include the principle of limited choice of methods and means of warfare.

[See also comment on draft principle 13.]

El Salvador

[Original: Spanish]

El Salvador proposes incorporating the prohibition on acts that modify ecosystems with the aim of gaining an advantage over an adversary, such as indiscriminate burning or the use of methods that reduce the cover of forests or natural spaces.

France

[Original: French]

France wishes to make three comments on these two draft principles [14 and 15], 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.

Germany

[Original: English]

On principle 14, Germany submits that the reference to “potential” effects of an attack in paragraph (7) of the commentary is to be understood as effects “which may be expected” and cannot be understood as a deviation from the established standards in assessing proportionality of collateral damages in international humanitarian law.

While not opposing its content, Germany sees no added value in principle 15 in relation to principle 14 and the application of the principle of proportionality there. Germany suggests combining principles 14 and 15, as they both elaborate the principles of proportionality and necessity in armed conflicts.

Ireland

[Original: English]

Ireland welcomes the way in which draft principle 14 affirms the application of international humanitarian law to the natural environment, but suggests that the Commission further explain what is meant by “with a view to its protection”, and particularly whether this phrase is intended to progressively develop the law.

Ireland suggests referring simply to “precautions”, rather than “precautions in attack”, in draft principle 14, so as to encompass both precautions in attack and precautions against the effects of attacks.

Proper application of draft principle 14 may in the view of Ireland obviate any need for draft principle 15 from a strictly legal perspective, but Ireland sees the potential operational value in expressly confirming the need to take environmental considerations into account and therefore supports the retention of this draft principle.

Israel

[Original: English]

Draft principle 14 and paragraphs (1) and (12) of the commentary

Current text: Draft principle 14 states: “The law of armed conflict, including the principles and rules on distinction, proportionality, military necessity and precautions in attack, shall be applied to the natural environment, with a view to its protection”. The words “with a view to its protection” also appear in paragraphs (1) and (12) of the commentary.

Comments: The words “with a view to its protection” alter the existing balance in the law of armed conflict between military necessity and humanitarian considerations by granting an elevated status to the latter. Israel submits that these words should be omitted from draft principle 14 and its commentary, especially as the word “shall” in the draft principle might be taken to suggest that they reflect the existing law – which they do not.

Suggested changes: *Delete* the words “with a view to its protection” from draft principle 14, and *amend* paragraphs (1) and (12) of the commentary accordingly. If the present text is retained, it should be clarified that it constitutes a proposal for the progressive development of the law.

Paragraph (4) of the commentary

Current text: “As explained in the commentary on draft principle 13, the natural environment is not intrinsically military in nature and should be treated as a civilian object.”

Comment: In line with the general comment made on this matter in Part I above regarding the anthropocentric approach, as well as the previous comments on draft principle 13, paragraph 3, the fact that the natural environment is not considered as intrinsically military in nature, does not necessarily mean that every element thereof should be treated as a civilian object under the law of armed conflict. Furthermore, as elaborated above, the natural environment should not be viewed in the abstract, but rather as a collection of elements, some of which are civilian in nature and protected as such.

Suggested change: *Delete* the passage cited above.

Paragraph (8) of the commentary

Current text: “If the rules relating to proportionality are applied in relation to the protection of the natural environment, it means that attacks against legitimate military objectives must be refrained from if such an attack would have incidental environmental effects that exceed the value of the military objective in question”.

Comments: This passage inaccurately rephrases the accepted language of the proportionality rule, rather than using the correct formulation as articulated in paragraph (5) of the commentary.

Additionally, it should be noted that for damage to be considered under the proportionality assessment, it needs to cross a minimal threshold (not, for example, result in mere inconvenience). This holds true also in the context of the natural environment, as virtually every attack causes some damage to elements of the environment (e.g. soil damage). Israel, like other States, does not consider every type of damage of this kind to constitute "collateral damage" for the purpose of the proportionality assessment. In addition, as elaborated above, Israel takes an anthropocentric approach in assessing which environmental elements constitute civilian objects relevant for the proportionality assessment. The weight given under the proportionality assessment to an element which is considered a civilian object will depend on the circumstances – for example, the weight given to a drinking water reservoir that a village depends upon, will be greater than the weight given to one fruit-bearing tree.

Suggested change: *Delete* the passage in paragraph (8) that is cited above.

Paragraph (9) of the commentary

[…]

Comments: There is a longstanding question regarding the modern role of the principle of military necessity under the law of armed conflict. While there is a consensus that the principle of military necessity is a foundational concept that underlies and informs particular rules of the law of armed conflict, there is a debate regarding if and to what extent the principle can also serve as an independent operative requirement that may operate in addition to particular law of armed conflict rules. This question touches upon the basic nature of the law of armed conflict, and the answer thereto may entail far-reaching implications.

Regrettably, draft principle 14 and its appended commentary fail to acknowledge the significant question mentioned above and assume – without any analysis or substantiation – an uncommon view according to which military necessity is a separate legal requirement that applies on top of particular law of armed conflict rules that already apply to a given situation. Notably, the main academic article that is repeatedly cited in the commentary to the draft principle actually takes the opposite view to the one implicitly adopted by the Commission. That is, it asserts that military necessity "infuses [international humanitarian law]; it is not a prohibition which applies over and above the extant rules". [103]

Israel considers that this fundamental question falls outside the scope of the current project. Without expressing a position on this matter, Israel suggests that the draft principles avoid this question altogether.

Suggested changes: *Delete* paragraph (9). Alternatively, *amend* the paragraph so that it addresses article 23 (g) of the Hague Regulations – a *specific* law of armed conflict rule that addresses military necessity and is relevant to the subject matter – as follows: "Under the law of armed conflict, destruction of the enemy property's is prohibited, unless such destruction is imperatively demanded by the necessities of war [footnote referring to article 23 (g) of the Hague Regulations]. Elements of the natural environment that qualify as enemy property are subject to this rule".

[103] See Michael N. Schmitt, "Military necessity and humanity in international humanitarian law: preserving the delicate balance", *Virginia Journal of International Law*, vol. 50 (2010), p. 795, at p. 835, also p. 799.

Japan

[Original: English]

In order to avoid repetition and redundancy, principle 14 and principle 15 could be rephrased and combined.

Spain

[Original: Spanish]

[See comment under general comments.]

Switzerland

[Original: French]

Draft principle 14, as currently formulated, sets out the basic idea that international humanitarian law applies. It would therefore be preferable (for systematic reasons) to place it as an introduction to Part Three, on principles applicable during armed conflict (draft principle 12), thus before the Martens Clause. Alternatively, it could be placed before the current draft principle 13, on general protection of the natural environment during armed conflict.

Switzerland also wishes to point out that the inclusion of the principle of military necessity in draft principles 14 and 15 raises certain questions. It is important to note that the principle of military necessity does not allow for derogation from existing rules of international humanitarian law. The rules of international humanitarian law balance military necessity against the principle of humanity. Thus, the principle of military necessity underlies and is embodied in many of the specific rules of international humanitarian law. On the other hand, this principle is explicitly included in specific rules in order to mitigate the obligations of the parties to an armed conflict in particular situations for which international humanitarian law sets out for exceptions on grounds of military necessity (e.g., incidental and unintentional destruction of civilian property). As a general principle of international humanitarian law, military necessity only permits the use of violence necessary to achieve a legitimate objective insofar as the relevant rules of international humanitarian law are otherwise respected. When the parties to an armed conflict encounter a formal prohibition contained in a rule of international humanitarian law, they can no longer invoke military necessity in order to derogate from the rule. Where such a possibility is expressly prescribed, they may invoke it only to the extent that it is prescribed".[104] It is also worth mentioning the principle of humanity, as international humanitarian law is based on a balance between military necessity and the requirements of humanity, which is specifically expressed in the fundamental rules and principles of international humanitarian law, such as the principle of proportionality.

United States of America

[Original: English]

Draft principle 14 warrants clarification. The text of the principle uses mandatory language "shall" and addresses the application of the law of armed conflict. The law of armed conflict already provides for when it applies, and specific law of armed conflict rules also have standards that address the scope or applicability of the rule in question.

[104] Observations of Switzerland 2016.

However, paragraph (1) of the commentary to draft principle 14 indicates that "the overall aim of the draft principle is to strengthen the protection of the environment in relation to armed conflict, and not to reaffirm the law of armed conflict." In particular, paragraph 12 of the commentary to draft principle 14 states:

> Lastly, the words "shall be applied to the natural environment, with a view to its protection" introduces an objective which those involved in armed conflict or military operations should strive towards, and thus it goes further than simply affirming the application of the rules of armed conflict to the environment.

The law of armed conflict is understood to impose obligations on parties to a conflict and to prescribe rights, duties, and liabilities for persons. The law of armed conflict does not "apply" to the natural environment in the same way that the law ordinarily is understood to "apply" to individuals or parties to a conflict.

The United States believes it would be useful to reaffirm that the application of the law of armed conflict, and in particular, adherence to its requirements, provides protection to the natural environment. However, the effort to combine this reaffirmation with progressive development is confusing and may impede the effective implementation of the draft principles.

Moreover, as noted in its general comments above, the United States would not want this draft principle to appear to modify the applicability of existing law in a way that diminishes existing legal protections in the law of armed conflict. At its core, the law of armed conflict prioritizes the protection of human life and the alleviation of human suffering during armed conflict. Thus, for example, when military commanders are faced with a choice between engaging enemy forces in a remote wildlife refuge or in an area populated with civilians, the law of armed conflict should not be understood to favour increased risks to the civilian population.

Therefore, it recommends revising this draft principle along the following lines:

> The **requirements of the** law of armed conflict **relevant to the protection of the natural environment**, including the principles and rules on distinction, proportionality, military necessity and precautions in attack, shall be **met. Additional appropriate measures to enhance the protection of the natural environment should also be considered** ~~applied to the natural environment with a view to its protection~~.

The revised first sentence would accurately reflect existing legal requirements. The second sentence would encourage further steps, as appropriate, to enhance the protection of the natural environment.

With regard to the first sentence of paragraph (9) of the commentary to draft principle 14, the United States recommends citing the military manuals interpreting the principle of military necessity in addition to ICRC.[105] For example, the *Department of Defense Law of War Manual* defines military necessity as follows:

> *Military necessity* may be defined as the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.[106]

[105] See, e.g., *Department of Defense Law of War Manual*, § 2.2 and footnote 13 collecting examples.
[106] *Ibid.*

The way the ICRC interprets the principle of military necessity has been contested by States.[107] Citing official State documents may better reflect State practice and the implementation of military necessity in practice.

The second sentence of paragraph (9) of the commentary to draft principle 14 should also be revised. States have generally understood the principle of military necessity to operate through specific rules, rather than independently to impose a constraint where there already is a rule specifically at issue. For example, the standard for determining whether an object constitutes a military objective "may be viewed as a way of evaluating whether military necessity exists to attack an object." *Department of Defense Law of War Manual*, § 5.6.3.

No source is cited for the proposition that "an attack against a legitimate military objective which may have negative environmental effects will only be allowed if such an attack is actually necessary to accomplish a specific military purpose" among other requirements. "[N]egative environmental effects" must constitute damage to civilian objects to be encompassed within the prohibition on attacks expected to cause excessive incidental harm.[108]

The reference to "the criteria contained in the principle of proportionality" is redundant with the principle of proportionality and suggests that the principle of military necessity includes within it the principle of proportionality. It may be clearer to describe military necessity as a distinct principle from proportionality and instead use the reference to proportionality to illustrate the point that military necessity does not justify actions prohibited by specific law of war rules.

Therefore, it recommends that paragraph (9) of the commentary to draft principle 14 be revised as follows:

> Under the law of armed conflict, military necessity ~~allows "measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited"~~ **justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of armed conflict**. It means that an attack ~~against a legitimate military objective~~ which may have negative environmental effects will only be allowed if such an attack is **directed against a legitimate military objective.** ~~actually necessary to accomplish a specific military purpose and~~ **In addition, military necessity does not justify action** ~~is not~~ covered by **prohibitions, such as** the prohibition against the employment of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment, **as applicable,** or ~~other relevant~~ **attacks prohibited by the principle of proportionality** ~~prohibitions, and meets the criteria contained in the principle of proportionality~~.

"[A]s applicable" should be added because the referenced rule is not customary international law. In addition, "relevant prohibitions" could be misunderstood as suggesting that military necessity requires that prohibitions be complied with even if the prohibition is not legally applicable.

[See also comment on draft principle 15.]

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[107] See, e.g., *ibid.*, § 2.2.3.1.

[108] See *Department of Defense Law of War Manual*, § 5.12 ("Combatants must refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive in relation to the concrete and direct military advantage expected to be gained.").

15. Draft principle 15 – Environmental considerations

Canada

[Original: English]

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."[109] 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.

Colombia

[Original: Spanish]

[See comment on draft principle 14.]

Czech Republic

[Original: English]

This rule should be incorporated into principle 14, as it only elaborates on what is said in principle 14 in relation to the two general principles of international humanitarian law mentioned in this draft principle.

France

[Original: French]

[See comments under general comments and on draft principle 14.]

Germany

[Original: English]

[See comment on draft principle 14.]

Ireland

[Original: English]

[See comment on draft principle 14.]

Israel

[Original: English]

[…]

Comments: As the commentary appended to draft principle 15 explains, the text of the draft principle is based on the passage in the *Nuclear Weapons* advisory opinion, where the International Court of Justice opined: "The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in

[109] See paras. (3) and (4) of the commentary to draft principle 15.

the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality".[110]

As is apparent from the reference to the relationship between the right of self-defence and environmental obligations, the International Court of Justice's passage is concerned with necessity and proportionality under the *jus ad bellum*. This has been acknowledged by the Commission itself, which, in its commentary to article 21 of its articles on responsibility of States for internationally wrongful acts, concerning self-defence as a circumstance precluding the wrongfulness of an act, quotes this same passage as authority on the subject of *jus ad bellum* self-defence.[111] Draft principle 15 is, however, based on the assumption that the quoted passage concerns environmental obligations and the law of armed conflict.

Moreover, the term "environmental considerations" in the context of proportionality under the law of armed conflict, would be too broad and imprecise.

Suggested changes:

a. *Delete* draft principle 15 and the appended commentary (as was suggested, according to the commentary, by several members of the Commission).

b. Alternatively, to the extent that the Commission wishes to put forward a proposed draft principle specifically concerning proportionality under the law of armed conflict, *amend* draft principle 15, so that it reads: "Upon launching an attack, damage to elements in the natural environment which are used or relied upon by civilians for their health or survival, shall be taken into account when assessing proportionality". The appended commentary would need to be *amended* accordingly.

[See also comment on draft principle 20.]

Japan

[Original: English]

[See comment on draft principle 14.]

Spain

[Original: Spanish]

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.

[See also comment under general comments].

Switzerland

[Original: French]

As noted in relation to the previous draft principle, international humanitarian law, including its rules and principles, must be applied to the natural environment. In the view of Switzerland, it follows that the environment and environmental considerations must be taken into account when applying the relevant rules and

[110] *Nuclear Weapons* advisory opinion (see footnote 20 above), para. 30.

[111] *Yearbook of the International Law Commission, 2001*, vol. II (Part Two) and corrigendum, pp. 74-75.

principles of international humanitarian law, in particular the principles of distinction, proportionality and precaution. Draft principle 15 could therefore be deleted or combined with the previous draft principle.

As stated above, the principle of proportionality already includes considerations of military necessity. On a more general level, the Commission could examine in more detail the correlation between protection of the environment and the rules of international humanitarian law which contain exceptions related to imperative military necessity, such as the prohibition of the destruction of any part of the natural environment, except in cases of imperative military necessity.

Environmental considerations are also an important issue to be taken into account when discharging the obligation to take all feasible precautions in the attack. This also applies to the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.[112] Such considerations must also be taken into account when selecting military objectives.[113]

[See also comment on draft principle 14.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

As set out above in relation to draft principle 13, the extract from the International Court of Justice's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* is again not taken in its full context. The International Court of Justice recognized that while environmental obligations cannot deprive States of their right to self-defence, States must take environmental considerations into account.

The United Kingdom requests that the commentary is clarified in line with the comment for draft principle 13.

United States of America

[Original: English]

This draft principle appears to recall the International Court of Justice's *Nuclear Weapons* advisory opinion. As an initial matter, it is unclear from that opinion whether the Court intended its statement as one of *jus in bello* or *jus ad bellum*.[114] This draft principle deviates from the Court's formulation and, assuming it is intended to refer to the *jus in bello* concepts of military necessity and

[112] Art. 57, para. 2 (a), chap. ii, of Additional Protocol I.

[113] Art. 57, para. 3, of Additional Protocol I: "When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects."

[114] *Cf.* Louise Doswald-Beck, "International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons", *International Review of the Red Cross*, No. 316 (1997), pp. 35 et seq., at 53 ("With regard to the relevance of this to international humanitarian law, the Court went on to say that environmental law treaties could not have intended to deprive States of the exercise of their right of self-defence, but 'States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.' It is not absolutely clear if this reference to 'necessity and proportionality' refers to the more general restraints inherent in the context of the law of self-defence, or to the principle of proportionality of collateral damage within humanitarian law.").

proportionality, the United States does not think the "shall" is accurate, insofar as, for example, not every proportionality calculus will require consideration of the environment. This is true even if one concedes that the environment is to be treated as civilian in nature, because in some cases the features of the environment to be destroyed will have become military objectives (e.g., by their use or strategic location in relation to the enemy's activities) and thus will not need to be considered for proportionality purposes at all.

More broadly, it is clear from the International Court of Justice's opinion that the Court was merely making an observation about the ways that existing international law protects the environment. For example, in paragraph 31 of its advisory opinion, the Court noted "Articles 35, paragraph 3, and 55 of Additional Protocol I provide additional protection for the environment" and "are powerful constraints for all the States having subscribed to these provisions." And, in paragraph 32 the Court cited the proposition that "destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law" in General Assembly resolution 47/37 of 25 November 1992 on the protection of the environment in times of armed conflict. The International Court of Justice's statement thus was not intended to express an independent rule of international law.

Paragraph (3) of the commentary to this draft principle notes that "[t]he added value of this draft principle in relation to draft principle 14 is that it provides specificity with regard to the application of the principle of proportionality and the rules of military necessity." However, it does not seem to be substantially more specific than draft principle 14, especially in light of the revisions of the United States to draft principle 14.

Paragraph (4) of the commentary states that "Draft principle 15 aims to address military conduct and does not deal with the process of determining what constitutes a military objective as such." However, as noted in its comments to draft principle 14, the standard for determining what constitutes a military objective can be viewed as one of the rules of military necessity. If the intent was not to "deal with the process of what constitutes a military objective", it would be clearer to use the formulation in the International Court of Justice's Advisory Opinion.

Paragraph (5) of the commentary asserts that: "Since knowledge of the environment and its eco-systems is constantly increasing, better understood and more widely accessible to humans, it means that environmental considerations cannot remain static over time, they should develop as human understanding of the environment develops." This statement does not codify *lex lata* or seem to relate to the progressive development of international law.

Because draft principle 15 is unclear and duplicative of draft principle 14, the United States recommends merging it with draft principle 14.

16. Draft principle 16 – Prohibition of reprisals

Canada

[Original: English]

Draft principle 16 restates the prohibition of reprisals contained in article 55, paragraph 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. [115] Canada

[115] See draft principle 16, commentary 4, 5 and 7.

recommends that the commentary to draft principle 16 clearly indicate that the prohibition against reprisals is a treaty-based obligation applicable only during international armed conflict.

France

[Original: French]

[…] 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."[116]

[See also comment under general comments.]

Germany

[Original: English]

Germany supports the inclusion of draft principle 16. As clarified in the commentary, there does not exist relevant treaty law in this regard concerning non-international armed conflicts and the rule enshrined in the draft principle is in this regard not yet part of customary international law. In its view, however, there is no reason not to apply the prohibition of reprisals to non-international armed conflicts. Germany suggests highlighting in the commentary to which extent this principle is a codification of existing customary law, or progressive development, respectively.

[See also comment to draft principle 13.]

Ireland

[Original: English]

Ireland welcomes the Commission's acknowledgment that it may be engaging in progressive development of the law in elaborating draft principle 16, and supports this development.

[116] Reservations and interpretative declarations concerning the ratification by France of Additional Protocol I, 11 April 2001, para. 11.

Israel

[Original: English]

[…]

Comment: Israel shares the observation made by the Commission, in paragraph (10) of the commentary, that the current text of this draft principle does not reflect customary international law. In the view of Israel, the same applies to article 55, paragraph 2, of Additional Protocol I, on which the draft principle is based (and to the other articles in the Protocol addressing reprisals).[117] As indicated in the comments above to draft principle 9, the same understanding may be found in the International Court of Justice's *Nuclear Weapons* advisory opinion, where the Court, while referring to article 55 (and also to article 35, paragraph 3, of Additional Protocol 1), noted that "[t]hese are powerful constraints for all the States having subscribed to these provisions".[118]

Suggested change: *Amend* draft principle 16 so that its text reads like a proposal for the progressive development of the law and not as laying down an obligation under existing international law.

Paragraph (9) of the commentary

Current text: "As the environment should be considered as a civilian object unless parts of it becomes a military objective …".

Comment: As mentioned […], Israel does not accept the argument that every element in the natural environment is *per se* a civilian object unless it is a military objective.

Suggested change: *Delete* the passage cited above and replace it with the word "[T]herefore".

Spain

[Original: Spanish]

[See comment under general comments.]

Switzerland

[Original: French]

Switzerland welcomes the fact that this principle explicitly recognizes the prohibition of attacks against the natural environment as a form of reprisal, in both international and non-international armed conflicts. This corresponds not only to the explicit prohibition in article 55, paragraph 2, of Additional Protocol I, but also to other provisions prohibiting reprisals against certain protected objects, including civilian objects in general,[119] objects indispensable to the survival of the civilian population[120] and cultural objects.[121]

[117] See, for example, statement of Israel to the Sixth Committee of the General Assembly, October 2020, regarding agenda item 83.

[118] *Nuclear Weapons advisory* opinion (see footnote 20 above), para. 31.

[119] Art. 52, para. 1, of Additional Protocol I.

[120] Art. 54 of Additional Protocol I.

[121] Art. 53 of Additional Protocol I and art. 4, para. 4, of the Convention for the Protection of Cultural Property in the Event of Armed Conflict.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom notes the divergent views within the Commission on the inclusion of this principle. As the commentary acknowledges, the United Kingdom does not accept the blanket prohibition against reprisals in draft principle 16. In the view of the United Kingdom, this does not reflect the current state of customary international law and reservations by States to article 55, paragraph 2, of Additional Protocol I to the Geneva Conventions.[122]

In accordance with its reservations, the United Kingdom'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 United Kingdom may undertake reprisals as necessary to, and for the sole purpose of, compelling the adverse party to cease committing violations.

The United Kingdom 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 United Kingdom statement to the International Court of Justice 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 United Kingdom maintains that this is contrary to State practice (as evidenced by the United Kingdom reservations to Additional Protocol I) and the United Kingdom 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 crystallized because of existing contrary State practice.

The United Kingdom therefore requests that draft principle 16 is deleted or amended to reflect the above.

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[122] The United Kingdom 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 violations giving rise thereto 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."
United Kingdom, Reservations and declarations made upon ratification of Additional Protocol I, 28 January 1998.

United States of America

[Original: English]

In its view, this draft principle does not reflect customary international law. The United States has previously expressed the view that Additional Protocol I's prohibition on reprisal attacks against the civilian population could be counter-productive by removing a significant deterrent that protects civilians. In 1987, then-United States Department of State Legal Adviser Abraham Sofaer noted that:

> To take another example, article 51 of Protocol I prohibits any reprisal attacks against the civilian population, that is, attacks that would otherwise be forbidden but that are in response to the enemy's own violations of the law and are intended to deter future violations. Historically, reciprocity has been the major sanction underlying the laws of war. If article 51 were to come into force for the United States, an enemy could deliberately carry out attacks against friendly civilian populations, and the United States would be legally forbidden to reply in kind. As a practical matter, the United States might, for political or humanitarian reasons, decide in a particular case not to carry out retaliatory or reprisal attacks involving unfriendly civilian populations. To formally renounce even the option of such attacks, however, removes a significant deterrent that presently protects civilians and other war victims on all sides of a conflict.[123]

At the same event, then-United States Department of State Deputy Legal Adviser Michael Matheson noted that this objection was also applicable to Additional Protocol I's provisions on reprisals against the natural environment.[124] States could regard the preservation of the possibility of reprisal attacks against the natural environment as a safeguard for the protection of the environment or civilians during armed conflict. In 1995, the United States also described the prohibition on reprisals against the natural environment as "among the new rules established by the Protocol."[125]

Paragraph (3) of the commentary asserts that:

> [Article 51 of Additional Protocol I] codifies the customary rule that civilians must be protected against danger arising from hostilities, and, in particular,

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[123] Judge Abraham D. Sofaer, Legal Adviser, United States Department of State, Remarks on the position of the United States on current law of war agreements (22 January 1987), *American University Journal of International Law and Policy*, vol. 2 (1987), p. 460, at p. 469.

[124] Michael J. Matheson, Deputy Legal Adviser, Department of State, Remarks on the United States position on the relation of customary international law to the 1977 Protocols Additional to the 1949 Geneva Conventions at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law, at p. 426 and footnote 33 ("On the other hand, we do not support the prohibition on reprisals in article 51 and subsequent articles, again for reasons that Judge Sofaer will explain later, and do not consider it a part of customary law. … See *id.* arts. 52-56 (listing civilian objects that according to the Protocol are not subject to attacks or reprisals, in particular the protections of works and installations containing dangerous forces).").

[125] Letter dated 20 June 1995 from the Acting Legal Adviser to the Department of State, together with Written Statement of the Government of the United States of America, International Court of Justice, Request by the General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, p. 31; see also *ibid.*, at p. 25 ("Additional Protocol I to the 1949 Geneva Conventions contains a number of new rules on means and methods of warfare, which of course apply only to States that ratify Protocol I. (For example, the provisions on reprisals and the protection of the environment are new rules that have not been incorporated into customary law.)").

> also provides that "attacks against the civilian population or civilians by way of reprisals are prohibited."

However, the Commission does not conduct a survey of State practice and *opinio juris*, instead citing the ICRC commentary on that provision of the treaty. Although that commentary describes the protection of civilians as customary, it also recognizes that the prohibition on reprisals is not a codification of customary international law, but a change in the law introduced by Additional Protocol I:

> This prohibition of attacks by way of reprisals and other prohibitions of the same type contained in the Protocol and in the Conventions have considerably reduced the scope for reprisals in time of war.[126]

Footnote 1228 in paragraph (7) of the commentary to draft principle 16 is inaccurate; none of the statements cited use the word "prohibited". The cited statements reflect an opposition to including the concept of reprisals in the 1977 Additional Protocol II, which is distinct from the question of whether reprisals would be prohibited under customary law.

In order to clarify the intention to support progressive development and in order to better reflect existing law, the United States recommends the draft principle be revised as follows:

> Attacks against the natural environment by way of reprisals are prohibited **in accordance with the State's legal obligations**.

Adding "in accordance with the State's legal obligations" is in line with the approach taken in draft principle 19.

The United States appreciates the references in the commentary to the statement of the United Kingdom, in connection with the deposit of its instrument of ratification of Additional Protocol I. However, it suggests citing a more official version of the United Kingdom statement, rather than the ICRC reproduction of the statement because it has found misquotations or other inaccuracies in the ICRC representations of State practice. The United Nations *Treaty Series* version of the United Kingdom statement (vol. 2020, No. 17512, p. 75, at pp. 77-78) differs slightly from the cited versions printed by ICRC and is available at: https://treaties.un.org/doc/Publication/UNTS/Volume%202020/v2020.pdf#page=109.

17. Draft principle 17 – Protected zones

Belgium

[Original: French]

Draft principle 17 […] contains only one of the conditions set out in article 60 of Additional Protocol I, for a demilitarized zone to retain its protected status (that is, the absence of a military objective in the zone). Paragraph (3) of the commentary to the draft principle contains a direct reference to article 60, using different wording: "if a party to an armed conflict uses a protected area for specified military purposes, the protected status shall be revoked". Belgium believes that all the conditions that are to be met in order for a zone to retain its protected status should be mentioned:

> - All combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;

[126] ICRC Commentary, p. 627.

- No hostile use shall be made of fixed military installations or establishments;

- No acts of hostility shall be committed by the authorities or by the population;

- Any activity linked to the military effort must have ceased.

Canada

[Original: English]

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.

Colombia

[Original: Spanish]

There is a need to further delimit the scope of draft principle 17 […], owing to the circumstances that can surround armed conflicts, which inevitably have a negative impact on the ecosystems of these protected zones. As already mentioned under draft principle 4, Colombia suggests that the wording be reviewed to clarify with what types of actors the State would have to "designate by agreement" areas of environmental or cultural importance. Is it a bilateral agreement between the State and the United Nations? Is it between the opposing parties? Is it a unilateral declaration by the State?

Cyprus

[Original: English]

[See comment on draft principle 4.]

Czech Republic

[Original: English]

The notion of protected zones does not appear in the corpus of international humanitarian law. There is a question of the status of such zones in international humanitarian law, and the relationship between them and the demilitarized zones: the international humanitarian law rules for demilitarized zones are much stricter than those proposed in this principle. According to the principle, the zone is to be protected against any attack only as long as it does not contain a military objective. On the other hand, a demilitarized zone must not be used for military purposes, which means that no part of its natural environment can become a military objective.

[See also comments under general comments and on draft principle 4.]

Germany

[Original: English]

[See comment on draft principle 4.]

Israel

[Original: English]

[…]

Comments: This wording could be improved by aligning it with the language commonly used in the law of armed conflict, which would better distinguish between intended and incidental harm to the environment. Inspiration may be drawn, in this context, from article 2, paragraph 4, in Protocol III 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, which refers to making elements of the natural environment by making it *the object of attack*.

The term "protected zone" may be used in various ways in international law. Accordingly, there is room to clarify that reference to this term is made in the specific context of the current draft principle.

Suggested changes: *Amend* draft principle 17, in line with the language of article 2, paragraph 4, in Protocol III and the comments above, so that it reads: "An area of major environmental and cultural importance designated by agreement as a protected zone within the meaning of this principle, shall not be the object of ~~be protected against any~~ attack, as long as it does not contain a military objective nor is itself a military objective".

Japan

[Original: English]

[See comment on draft principle 4.]

Netherlands

[Original: English]

[…] [T]he question arises as to how this draft principle relates to areas that are protected under multilateral environmental treaties. The interaction with relevant treaties merits further consideration and could possibly be clarified by the Commission.

Portugal

[Original: English]

[See comment under general comments.]

Spain

[Original: Spanish]

[See comment under general comments.]

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

[See comment on draft principle 4.]

Switzerland

[Original: French]

Switzerland notes with interest the concept of "protected zone" proposed in the draft principles.

The Geneva Conventions contain various concepts which have the effect of delimiting refuge areas, intended to protect the military or civilian wounded and sick,[127] as well as civilians not taking part in hostilities.[128] Additional Protocol I contains the complementary concepts of "non-defended localities" [129] and "demilitarized zones". [130] The relevant treaty provisions specify the unique characteristics of each of these zones, the conditions for their creation and the rights and obligations attached thereto. Although the above-mentioned provisions are primarily intended to protect war victims from the effects of hostilities, and experience shows that it is difficult to establish such zones once hostilities have started, these concepts could provide a valuable basis for the draft principles concerning "protected zones". Switzerland believes that it would be useful for the Commission to conduct a more in-depth analysis of how the rules concerning the various types of protected zones could be applied to enhance the protection of the natural environment. Guidance on how the establishment of such zones could be facilitated (in practice) would also be useful.

Switzerland reiterates the comments made above concerning draft principle 4 with regard to the complementarity of the two draft principles, the focus on areas of "major" environmental importance, and the possibility of agreements on such areas being concluded with or between non-State actors.

Switzerland also notes that the provision concerning demilitarized zones does not provide any particular reason for the conferring of the status of demilitarized zone, and that any area, regardless of its importance, could be the subject of a demilitarization agreement.

With regard to the termination of the protection granted to the zone, Switzerland notes that a substantial violation of the agreement by which the zone was designated as protected is the decisive criterion and not the presence or absence of a military objective in the zone. For example, article 60 of Additional Protocol I provides that "the subject of such an agreement shall normally be any zone which fulfils the following conditions". This means that possible deviations or agreements on other conditions or on more detailed conditions are possible. In this regard, ICRC states as follows in its study on customary international humanitarian law, in relation to rule 36: "Article 60 (3) of Additional Protocol I provides a blueprint for the terms of an agreement on a demilitarised zone, but any such agreement can be tailored to each specific situation ... The protection afforded to a demilitarised zone ceases if one of the parties commits a material breach of the agreement establishing

[127] Art. 23 of Geneva Convention I: "hospital zones and localities" to protect "the [military] wounded and sick [soldiers] as well as the personnel entrusted with the organization and administration of these zones and localities and with the care of the persons therein assembled; art. 14 of Geneva Convention IV: "hospital and safety zones and localities" to protect wounded, sick, disabled and aged persons, children under fifteen, expectant mothers and mothers of children under seven; ICRC study, rule 35.

[128] Art. 15 of Geneva Convention IV: "neutralized zones" established in regions where fighting is taking place to shelter wounded and sick combatants or non-combatants, and civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character; ICRC study, rule 35.

[129] Art. 59 of Additional Protocol I; ICRC study, rule 37.

[130] Art. 60 of Additional Protocol I; ICRC study, rule 36.

the zone." That said, in practice, the agreements are likely to contain provisions on the presence of (potential) military objectives in the area concerned.

[See also comment on draft principle 4.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

[See comment on draft principle 4.]

United States of America

[Original: English]

Agreements between parties to a conflict as discussed under draft principle 4 may allow zones to remain protected notwithstanding the presence of, for example, immovable military objectives within the zone. The United States therefore recommends revising this draft principle as follows:

> An area of major environmental and cultural importance designated by agreement **between parties to the conflict** as a protected zone shall be protected against ~~any~~ attack **in accordance with the agreement**, **and any location within the area shall not be made the object of attack** as long as it does not ~~contain~~ **constitute** a military objective.

It recommends revising "contain" to "constitute" and using the formulation "made the object of attack" rather than "attack" because even if a location does not contain a military objective, it might be affected by an attack against a military objective nearby.

18. Draft principle 18 – Prohibition of pillage

Cyprus

[Original: English]

The Republic of Cyprus attaches great importance to the prohibition of pillage of natural resources (draft principle 18), especially in situations of belligerent occupation (draft principle 21). It would like to point out the absolute prohibition of pillage in occupied areas and the serious nature of such acts under the law of armed conflict, international criminal law and other legal regimes. It does agree with the position that there should not be any distinction between public or private property. Moreover, it stresses the increased environmental risk engendered from operations carried out in occupied areas with a view to exploiting natural resources (i.e., hydrocarbon activities either inland or within the territorial sea).

Czech Republic

[Original: English]

In international humanitarian law, protection from pillage is, traditionally, limited to protection of property. This means that in this instance the draft seems to abandon general protection of the natural environment (primarily as a public good) to address protection of natural resources (primarily as private property). This draft principle illustrates the problems stemming from the absence of general definition of natural environment in the draft.

Germany

[Original: English]

On principle 18, Germany understands that it relies on the international law definition of pillage without the intent of altering said definition. It should therefore be clarified in paragraph (3) of the commentary that pillage required the deprivation of a third-party's property. Hence the commentary should read that "pillage only applies to natural resources that **are** subject to ownership and constitute property (emphasis added)". Should the intention behind principle 18 have been to progressively develop the law and equally prevent unlawful appropriation of natural resources during armed conflict without regard to ownership, Germany suggests that the principle should be rephrased to reflect such developmental nature.

Israel

[Original: English]

Paragraphs (3), (4), (5) and (6) of the commentary

[…]

Comments: Without purporting to offer a full and conclusive definition of the term "pillage" under international law, it can be said that in its classic and more common use, "pillage" involves the unlawful appropriation of property *by individuals* for *private use* during an armed conflict, and does not refer to any type of unlawful appropriation of property. While some international criminal tribunals have used the terms "plundering" or "looting" to describe more broadly any act of unlawful appropriation of property in an armed conflict, it was also explicitly acknowledged that these terms do not necessarily have the same meaning as the term "pillage".[131] Equating the different terms, as currently done in the appended commentary of draft principle 18, is imprecise, and certain corrections are therefore required, at least in paragraphs (3), (4), (5) and (7) of the appended commentary.

Moreover, the description of law of armed conflict rules addressing appropriation of enemy property in armed conflict in paragraph (4), footnote 1242, is partial and is likely to provide an inaccurate impression of these rules. Most fundamentally, the text lacks reference to the customary rule dealing with booty of war as well as to articles 52–53 to the Hague Regulations.

Suggested changes:

(a) *Amend* paragraph (4) of the appended commentary, so that it reads: "Pillage is a broad term that ~~applies to any~~ involves appropriation of property in armed conflict by individuals for private use, that violates the law of armed conflict". Alternatively*, delete* this sentence.

(b) *Amend* the text in footnote 1242 in paragraph (4) of the appended commentary, so that it ultimately reads: "Notably, the customary rule concerning booty of war; Geneva Convention I, art. 50; the Hague Regulations (1907), art. 23 (g) (See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* … (footnote 969 above), rule 50, pp. 175–177); as well as other rules concerning private property".

[131] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Delalić* e*t al.*, IT-96-21-T, Judgment of the Trial Chamber, 16 November 1998, pp. 208-209, at para. 590-591; ICTY, *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-T, Judgment of the Trial Chamber, 15 March 2006, p. 15, at para. 49.

(c) *Delete* the last sentence of paragraph (3) of the appended commentary given that the International Court of Justice's case did not refer to "pillage" as such; and also paragraph (5) in its entirety and the second sentence of paragraph (6).

Netherlands

[Original: English]

[See comment under general comments.]

Spain

[Original: Spanish]

[See comment under general comments.]

Switzerland

[Original: French]

Switzerland welcomes the inclusion of this prohibition in the draft principles. It is one of the fundamental prohibitions applicable during hostilities and in situations of occupation.

As for the definition of pillage, it seems to imply that the appropriation must be for private or personal use.

United States of America

[Original: English]

Paragraph (3) of the commentary to draft principle 18 is helpful in clarifying that pillage must involve the taking of property and that only natural resources constituting property would be the subject of this prohibition. Paragraph (4) of the commentary asserts that "[p]illage is a broad term that applies to any appropriation of property in armed conflict that violates the law of armed conflict." The *Department of Defense Law of War Manual* defines pillage as follows:

> *Pillage* is the taking of private or public movable property (including enemy military equipment) for private or personal use. It does not include an appropriation of property justified by military necessity.[132]

The United States recommends revising the definition of pillage to include the element of "movable property" as well as the notion that pillage involves the taking of property for private or personal use rather than defining pillage as having an element of violating other law of war rules. Pillage is a violation of the law of war; pillage does not require that another law of war violation be established. The sentence could read:

> Pillage is a ~~broad~~ term that applies to any appropriation of **movable** property in armed conflict **for private or personal use,** and ~~that~~ **pillage** violates the law of armed conflict.

[132] *Department of Defense Law of War Manual*, § 5.17.4.1.

19. Draft principle 19 – Environmental modification techniques

Colombia

[Original: Spanish]

On draft principle 19, although the Commission stated in the commentaries that the principle was modelled on the 1976 Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques, to which Colombia is not a party, it may be useful for the Commission to provide additional comments about the environmental modification techniques to which the document refers, in order to assess their relevance and implications for the defence and security sector.

France

[Original: French]

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 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.

[See also comment under general comments.]

Israel

[Original: English]

Paragraph (2) of the commentary

[…]

Comments: Like other States, Israel has serious reservations regarding the methodology applied in the ICRC study on customary humanitarian law, and consequently, regarding many of its conclusions. This methodology is inconsistent in many respects with the Commission's own conclusions on the identification of customary international law.[133] More specifically, the ICRC proposition in rule 45 of its study lacks adequate substantiation. Additionally, Israel does not consider that the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Technique reflects customary international law. Israel stresses that manipulation of natural processes or using the destruction of the

[133] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), p. 135.

environment as a weapon, should be distinguished from the effects of the use of a weapon on the environment.

It also bears noting that while the draft mentions that according to ICRC, there is a prohibition on the *use* of the environment as a weapon, ICRC argues that there is a prohibition on using the *destruction* of the natural environment as a weapon.

Suggested changes: *Delete* the text which begins with the words "and, to the extent", until the end of the paragraph. If the Commission nevertheless chooses to keep the ICRC proposition in the text, it is suggested to *replace* the words "the use" with the words "using the destruction", in order to quote ICRC more accurately.

Japan

[Original: English]

Japan considers that it should be clarified that the term "environmental modification techniques" has the same meaning as what is stipulated in article 2 of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. Therefore, the phrase "as defined in article 2 of the Convention on the Prohibition of Military or Any Other Hostile use of environmental modification techniques" should be added after the term "environmental modification techniques".

Portugal

[Original: English]

[See comment under general comments.]

Spain

[Original: Spanish]

[See comment under general comments.]

Switzerland

[Original: French]

The 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques prohibits any environmental modification that causes damage to another State party to the Convention.[134] While the application of the Convention to non-international armed conflicts may be less clear, Switzerland believes that the Convention covers at least the use of environmental modification techniques for hostile purposes, which would meet the required threshold of damage in the territory of another State party. Indeed, the damage referred to in the Convention rarely seems to be limited just to the territory of the State party in whose territory a non-international armed conflict takes place.

The use of the environment as a weapon is prohibited in international and non-international armed conflicts.

Switzerland has recognized that a person commits a war crime, in the context of an international or non-international armed conflict, if he launches an attack although he knows or must assume that such an attack will cause loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe

[134] Art. 1 of the Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques.

damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.[135]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

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 United Kingdom 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.

The United Kingdom therefore requests that draft principle 19 is amended accordingly.

United States of America

[Original: English]

The United States recommends that this draft principle be revised to refer to a singular State as opposed to multiple "States" because States can have different international obligations in regard to environmental modification techniques.

It also recommends that the interpretations of "widespread", "long-lasting", and "severe", which are given in footnote 1194 in paragraph (8) of the commentary to draft principle 13, be added to the commentary's discussion of this draft principle as they are directly relevant and have been relied upon by States Parties to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.[136]

Part Four
Principles applicable in situations of occupation
Introduction

Israel

[Original: English]

Current text: Paragraph (4) [of the commentary to the introduction to Part Four]

Comments: Israel disagrees with this text. While a theory of "indirect occupation" was suggested in certain sources, it should still be considered *lex ferenda.* This theory is in tension with the language of article 42 of the Hague Regulations,[137] the common interpretation of which requires actual presence of a State's military forces in a territory for it to be considered occupied. Likewise, Israel observes there is clearly no "sufficiently widespread and representative, as well as consistent" State practice that is accepted as law (or in fact any such practice, to the best of its knowledge), which is required for a customary rule to emerge.[138] In this

[135] Article 264g of the Swiss Criminal Code of 21 December 1937 (status as at 1 July 2020), *Recueil systématique du droit fédéral* RS 311.0.

[136] See *Department of Defense Law of War Manual*, § 6.10.2.

[137] Hague Regulations, art. 42.

[138] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), p. 135.

regard, paragraph (4) refers only to one official State source, but even that source does not unequivocally acknowledge the "indirect occupation" theory as part of existing law.[139] As mentioned by ICRC itself in its publication referred to in paragraph (4), "[t]he notion of indirect effective control has scarcely been addressed in the legal literature or in military manuals".[140]

Other sources cited in paragraph (4) likewise fail to lend reliable support to the theory. For example, the International Court of Justice's judgment in the *Armed Activities* case cannot be considered as supporting the "indirect occupation" theory. In that case, the International Court of Justice rejected the position that Uganda occupied certain areas in the Democratic Republic of the Congo through rebel movements controlling those areas, and noted in a separate sentence that "the evidence does not support the view that these groups were 'under the control' of Uganda".[141] It does not necessarily follow that if there were any such control, the International Court of Justice would have found that occupation existed. The passage may be read as if the International Court of Justice simply did not see a need to discuss the Democratic Republic of the Congo's argument of "indirect occupation", since there was no sufficient connection between Uganda and the rebels to begin with. Indeed, the International Court of Justice did not substantively address, let alone adopt, the "indirect occupation" theory.

Although some International Criminal Tribunal for the Former Yugoslavia judgments may be read as acknowledging the possibility of exercising occupation through proxies, attention should be paid to inconsistencies between different ICTY judgments. These inconsistencies illustrate that it is difficult to discern any coherent or solidly rooted theory of "indirect occupation" even within the ICTY case-law. In any event, observations by the ICTY do not replace the requirements for the formation of customary international law.

Moreover, the *Loizidou v. Turkey* judgment of the European Court of Human Rights cited in paragraph (4) was concerned with the applicability of "[t]he obligation to secure […] the rights and freedoms set out in the [European Convention on Human Rights]",[142] *not* with the applicability of the law of belligerent occupation.

Suggested changes: *Delete* paragraph (4). Alternatively, replace the words "It is widely acknowledged" with the words "It has been suggested" and delete the references to the International Court of Justice and European Court of Human Rights cases.

United States of America

[Original: English]

The United States is concerned that the draft principles addressing situations of occupation go beyond what is required by the law of occupation, yet are framed as obligations on States rather than recommendations or for progressive development. As indicated above, it is inappropriate to use the language of legal

[139] United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, Oxford University Press, 2004), ¶ 11.3.1.

[140] ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2016), art. 2, para. 331.

[141] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168, at para. 177.

[142] *Loizidou v. Turkey*, Judgment (Merits), 18 December 1996, *Reports of Judgments and Decisions 1996-VI*, para. 52.

obligation, such as “shall”, to describe conduct that is not required by existing international law.

Paragraphs (4) and (5) of the commentary introducing Part Four seem to mix the concept of “effective control” from the jurisprudence of the European Court of Human Rights addressing the European Convention on Human Rights with the international humanitarian law standard for determining when occupation law applies. For example, footnote 1282 discusses a European Court of Human Rights case interpreting the European Convention on Human Rights and not international humanitarian law. Similarly, neither the 1949 Geneva Conventions nor the Regulations annexed to the 1907 Hague IV Convention use the term “effective control” in defining occupation.

Therefore, the United States recommends omitting footnote 1282 and the accompanying text and revising the second and third sentences of paragraph (4) of the commentary to the introduction to Part Four as follows:

> It is widely acknowledged that the law of occupation ~~applies to such cases provided that the~~ **cannot be evaded through the use of a** local surrogate acting on behalf of ~~a State exercises effective control over the occupied territory~~ **the Occupying Power**. The possibility of such an “indirect occupation” has been acknowledged by the International Criminal Tribunal for the Former Yugoslavia**, and** the International Court of Justice~~, and the European Court of Human Rights~~.

The first sentence of paragraph (5) of the commentary to the introduction to Part Four should be revised as follows:

> The law of occupation is applicable to situations that fulfil the factual requirements of ~~effective control of a foreign territory~~ **occupation** irrespective of whether the Occupying Power invokes the legal regime of occupation.

20. Draft principle 20 – General obligations of an Occupying Power

Canada

[Original: English]

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.

Cyprus

[Original: English]

The Republic of Cyprus also expresses its serious apprehension in respect of the adverse effects that environmental harm may have on population in occupied areas (draft principle 20). Therefore, special attention should be given to the protection of the environment in occupied areas in order to, among others, safeguard the health and well-being of individuals residing therein.

Czech Republic

[Original: English]

The law of occupation contains no explicit reference to environment; international humanitarian law contains only general obligations on the basis of which the Commission builds more specific rules concerning the environment. As a result, the legal status of these new rules is unclear. This again shows that the draft

promotes progressive development of international law, and this fact should be reflected in the draft as well as in the commentary.

El Salvador

[Original: Spanish]

The draft principles should include a definition of the term "occupation" and its respective relationship with the term "belligerent occupation", in order to provide greater legal certainty in the interpretation of the text. Regardless of the form of the occupation or the circumstances in which it originated, the obligation related to the protection of the environment is an imperative that must be maintained and in the various temporal phases of conflict, since it is part of the substantive content of human rights.

In that regard, the definitions and characteristics established in the existing legal framework on the topic could be used, including article 43 of the Regulations on the Laws and Customs of War on Land, and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949).

France

[Original: French]

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.

Germany

[Original: English]

Germany welcomes the inclusion of principles 20 to 22 as there currently is no explicit reference to the environment in the law of occupation.

With regard to principle 20, paragraph 2, Germany submits that further clarification would be needed in terms of scope and standard applied. It is not evident, in its view that the situations of article 3 of the draft articles on prevention of transboundary harm are fully equivalent with the relation of an Occupying Power towards occupied territory. Paragraph 2 should address more clearly whether environmental harm must be prevented only from the Occupying Power's own activities or beyond that, from all activities in the occupied territory. Should the

latter be the case, further clarification would be needed as to the envisaged role of the institutions of the occupied territory in such prevention (cf. art. 56 of Geneva Convention IV: "with the cooperation of national and local authorities"). As currently phrased, Germany is doubtful as to the customary international law character attributed to this paragraph and suggests changing "shall" to "should".

Furthermore, Germany would like to note that the second phrase "that is likely to prejudice the health and well-being of the population of the occupied territory" could be omitted. The commentary itself clarifies that this passage is not intended to create a second, cumulative threshold, thus, the current wording of the draft principle seems to be redundant and might be misleading. Furthermore, it would like to note that mentioning "health and the well-being of the population" while omitting other human rights raises selection issues.

The wording of principle 20, paragraph 3, should be changed from "respect the law and institutions" to "respect the laws in force in the country, unless absolutely prevented, and should let the institutions continue to function" to fully reflect the wording of article 43 of the Hague Regulations, which the commentary identifies as basis of this principle. While the reference to laws, as rephrased, arguably forms part of customary international law, the reference to institutions charged with environmental protection might not qualify as such. An analogue application of the rule, that tribunals of the occupied territory shall continue to function, to institutions charged with environmental protection would, in the view of Germany, require further elaboration.

[See also comment under general comments.]

Ireland

[Original: English]

Ireland suggests that the Commission further consider and explain the legal basis of draft principle 20, paragraph 2, including by explaining in further detail how international human rights law (and any other applicable law) combines with article 55, paragraph 1, of Additional Protocol I to the Geneva Conventions to provide the basis for draft principle 20, paragraph 2.

Israel

[Original: English]

Draft principle 20, paragraph 1

[…]

Comments: Israel refers to the comments it made above regarding draft principle 13, paragraph 1, and reiterates that in the present context it is preferable that the words "respect and protect" be replaced with a more general wording concerning compliance with the law. Additionally, the subjection of the draft principle's requirements to the applicable international law should apply to draft principle 20, paragraph 1, in its entirety.

Suggested changes: *Amend* the text as follows: "An Occupying Power shall ~~respect and protect~~ comply with its obligations concerning the protection of the environment of the occupied territory ~~in accordance with applicable international law~~ and take environmental considerations into account in the administration of such territory, in accordance with applicable international law". In addition, *amend* the appended commentary accordingly.

Paragraph (1) of the commentary

[…]

Comment: Israel agrees that article 43 of the Hague Regulations sets out the basic obligation of an Occupying Power under the law of belligerent occupation. It should be noted that the phrase "public order and security" derives from an inaccurate translation of the authentic French version of the Hague Regulations, which reads "*l'ordre et la vie publics*".[143] These words are also the words used in the French text of the draft principles. They describe more accurately the obligations of an Occupying Power under international law to ensure public order and life. Public life covers public security, but is not limited to it.

Suggested change: *Amend* paragraph (1) as follows: "The provision is based on the Occupying Power's obligation to take care of the welfare of the occupied population, derived from article 43 of the Hague Regulations which requires that the Occupying Power restores and maintains public order and life (including public security) in the occupied territory".

Paragraph (4) of the commentary

[…]

Comments: Israel agrees in principle that environmental considerations may be relevant to an Occupying Power's obligation to "ensure, as far as possible, public order and life", pursuant to customary international law reflected in article 43 of the Hague Regulations.

Israel reiterates its concern, as stated in its comments to draft principle 15, that the Court's statement in paragraph 30 of the *Nuclear Weapons* advisory opinion, clearly refers to the concepts of necessity and proportionality under the *jus ad bellum*, and not in the context of the law of armed conflict, or the law of belligerent occupation in particular.

As for the reference to the International Court of Justice's observation on the consideration of environmental factors in implementing the law of armed conflict, the Court's language and the context in which it appears demonstrate that it is merely an affirmation of the undisputed fact that there are rules in the law of armed conflict that require consideration of environmental factors (rules that at least some of which, as the Court itself appears to imply, do not necessarily reflect customary international law). The passage does not refer to a general obligation in the law of armed conflict to consider environmental factors beyond the requirements of specific rules.

Suggested change: *Amend* paragraph (4) by incorporating an explanation that environmental considerations may be relevant to the Occupying Power's general obligation to "ensure, as far as possible, public order and life", and omit the reference to the *Nuclear Weapons* advisory opinion.

Paragraphs (5)-(8) of the commentary

[…]

Comments: Israel views draft principle 20, paragraph 2, as a potential specific application of draft principle 20, paragraph 1, and, accordingly, of the general obligation under article 43 of the Hague Regulations to "ensure, as far as possible, public order and life". However, instead of relying on the law of belligerent

[143] See *Christian Society for the Holy Sites v. Minister of Defence*, High Court of Justice (HCJ) Case No. 337/71, PD XXVI(1), p. 574, at p. 581 (1972).

occupation, paragraphs (5)-(8) of the appended commentary primarily refer to elements from article 55 of Additional Protocol I, which is applicable in the specific context of hostilities,[144] and, moreover, does not oblige States not parties to the Protocol. The existing commentary also heavily leans on international human rights law and employs standards and terms which do not seem to originate from any binding source of international law. In line with the general comment on methodology in chapter II, section A, of the present document, Israel is concerned that such a justification for draft principle 20, paragraph 2, erroneously conflates different and distinct legal rules, and relies on non-legal notions, instead of focusing on the law of belligerent occupation.

Suggested change: *End* paragraph (5) of the appended commentary after the words "adverse consequences for the population of the occupied territory", and *delete* the rest of paragraph (5) as well as paragraphs (6)-(8).

Draft principle 20, paragraph 3

[…]

Comments: Israel believes that the text of draft principle 20, paragraph 3, should more accurately reflect article 43 of the Hague Regulations, which refers to "the laws in force", and makes no mention of "institutions". The "laws in force" in an occupied territory may enable the Occupying Power to make changes to existing institutions for the benefit of the local population and for other lawful purposes. As Israel has already noted in the Sixth Committee, the present formulation of draft principle 20, paragraph 3, does not reflect customary international law.[145]

Suggested changes:

(a). *Amend* draft principle 20, paragraph 3, as follows: "An Occupying Power shall respect the laws in force in ~~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".

(b) *Delete* reference to changes in institutions in paragraphs (9) and (10) of the appended commentary.

Paragraph (12) of the commentary

[…]

Comments: While it is true that changes to the law that cause "permanent changes in fundamental institutions" might in certain cases be contrary to the customary international law governing belligerent occupation, international law does not contain an absolute prohibition on such changes to the laws in force. In fact, the application of the obligation to "ensure public order and life" may sometimes *require* the Occupying Power to carry out such changes.[146]

It is further observed that the commentary's list of considerations that may justify changes in the laws of the occupied territory fails to mention security

[144] Article 55 is found in Section I of Part IV of Additional Protocol I. This section is titled "General protection against effects of hostilities". That is, the applicability of the rules encompassed in article 55 is clearly confined to hostilities, whereas the existence of a belligerent occupation is not dependent on the existence of hostilities (notwithstanding that, in some situations, hostilities may take place in an occupied territory).

[145] Statement of Israel to the Sixth Committee of the General Assembly, 26 October 2018, available at http://statements.unmeetings.org/media2/20305255/israel-82-cluster-3.pdf.

[146] See e.g. the Israeli High Court of Justice judgment in *Jam'ait Iscan v. IDF Commander in the Judea and Samaria Area*, HCJ Case No. 393/82, PD XXXVII(4), p. 785, at p. 801 (1983).

considerations, which are an integral part of "public order and life" (and are explicitly mentioned in the English version of article 43 of the Hague Regulations, cited in paragraph (1) of the commentary to draft principle 20).

Suggested change: *Amend* the sentence as follows: "While active interference in the law ~~and institutions~~ concerning the environment of the occupied territory may ~~thus~~ sometimes be required, ~~the Occupying Power may not introduce permanent changes in fundamental institutions of the country and~~ the Occupying Power shall in this regard be guided by a limited set of considerations: the concern for public order, civil life, security, and welfare in the occupied territory".

[See also comments on draft principles 13 and 15.]

Lebanon

[Original: Arabic]

Draft principle 20 on the obligations of an occupying Power contains principles applicable in situations of occupation. This draft principle is of particular value because although the effects of the military presence and military activities of occupying forces on the environment are for the most part tangible and obvious, some of those effects can be long-term or become evident only after an occupation is over. It would therefore be beneficial to include in that draft principle provisions relating to post-occupation responsibilities of occupying forces.

Spain

[Original: Spanish]

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.

[See also comment under general comments.]

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries agree that specific provisions regarding situations of occupation (draft principles 20-22) have their place among the draft principles. The detail and depth of the analysis in the commentaries will be useful for those called upon to apply the principles.

Switzerland

[Original: French]

As already mentioned in relation to other definitions, such as that of armed conflict, Switzerland is of the opinion that a detailed definition of the concept of occupation should be avoided in the introduction to Part Four. At the very least, care should be taken to ensure that the commentary faithfully captures the wording of the relevant treaties, customary law and case law, in particular the Hague Regulations.[147]

[147] See inter alia arts. 42 and 43 of the advisory opinion of the International Court of Justice on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004.

With regard to the general obligations of an Occupying Power, the Commission could, in its commentary to draft principle 20, in paragraph (1) in particular, elaborate further on the role of the Occupying Power as administrator and usufructuary,[148] or on the protections against the destruction or seizure of an adversary's property.[149] As for paragraph 2 of the draft principle itself, the Commission might consider clarifying the limitation to "significant harm", for example, in the light of the general obligation to " restore, and ensure, as far as possible, public order and safety",[150] or on other obligations concerning public health or food supply.

The Commission could also clarify the reference to the protection of "the population of the occupied territory" in draft principles 20 and 21, particularly with regard to the concept of "protected persons". Currently, it appears that different definitions are used in the commentaries. The Commission could also specify how the interests of the local population are to be taken into account, for example when introducing changes in the laws and institutions of the occupied territory or when using natural resources. In this respect, the rule of usufruct and the presumption in favour of maintaining the existing legal order are of vital importance.

United States of America

[Original: English]

In line with its above comments, the United States suggests changing "shall" to "should" in each of the paragraphs of this draft principle. Although there are legal rules relevant to each of these paragraphs, the language in each of these paragraphs does not reflect existing international law. Alternatively, the United States suggests revisions to this draft principle to bring it in line with existing international law:

> 1. ~~An Occupying Power shall respect and protect t~~**T**he environment of the occupied territory shall **receive respect and protection** in accordance with applicable international law and ~~take~~ environmental considerations **shall be taken** into account in the administration of such territory **as necessary to comply with applicable international law**.
>
> 2. An Occupying Power shall take ~~appropriate~~ **such** measures to prevent significant harm to the environment of the occupied territory that is likely to prejudice the health and well-being of the population of the occupied territory**, that are required by its duties as an Occupying Power, including the obligation to take all the measures in its power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country**.
>
> 3. An Occupying Power shall respect the law ~~and institutions of~~ **in force in** the occupied territory concerning the protection of the environment**, unless absolutely prevented,** and may only introduce changes within the limits provided by the law of armed conflict.

Corresponding changes should be made to the commentary to draft principle 20.

[148] In particular, as set out in art. 55 of the Hague Regulations.

[149] In particular as contained in arts. 23 (g), 46, 52, 53 and 55 of the Hague Regulations and art. 53 Geneva Convention IV.

[150] Art. 43 of the Hague Regulations.

21. Draft principle 21 – Sustainable use of natural resources

Canada

[Original: English]

[See comment on draft principle 20.]

Cyprus

[Original: English]

[…] [A] statement should be made that to the extent that an occupier State administers and uses the natural resources in an occupied territory, this is with no prejudice to the permanent sovereignty of a State over its natural resources, according to customary international law and as repeatedly affirmed by the United Nations.

[See also comment on draft principle 18.]

Czech Republic

[Original: English]

[See comment on draft principle 20.]

France

[Original: French]

[See comment on draft principle 20.]

Germany

[Original: English]

[…] Germany would like to suggest further clarification as to the application of the concept of sustainability with regard to movable public property, which can be used for military operations and may thus under international humanitarian law be confiscated, as opposed to being administered according to the rule of usufruct. This is deemed especially relevant as principle 18 characterizes natural resources at least partly as movable property that can be (forcibly) taken. The commentary could highlight that principle 21 was applicable to immovable (public) property, to which the rule of usufruct applies.

[See also comment on draft principle 20.]

Israel

[Original: English]

Draft principle 21 and paragraph (9) of the commentary

[…]

Comments: The term of art in the law of belligerent occupation referring to the use of natural resources in occupied territory is “usufructuary”, a term that originates in article 55 of the Hague Regulations. By contrast, the term “sustainable use” that is currently used in draft principle 21 is not a recognized legal term in this context, and its precise content lacks certainty. Even if the Commission is of the view that the modern concept of sustainability should influence in one way or another the application of the legal obligation of a usufructuary, changing the basic legal terminology in this field creates an undesirable inaccuracy. To be clear, Israel

reads the requirement reflected in the words "minimizes environmental harm" in draft principle 21 as subject to and demarcated by the existing law, namely, the obligation reflected in article 55 of the Hague Regulations.

Suggested change:

(a) *Amend* the text of draft principle 21 as follows: "To the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory, for the benefit of the population of the occupied territory and for other lawful purposes under the law of armed conflict, it shall do so in accordance with the rules of usufruct ~~a way that ensures their sustainable use and minimizes environmental harm~~".

(b) *Amend* the text of paragraph (9) of the appended commentary accordingly.

Paragraph (2) of the commentary

Current text: "This description has traditionally been interpreted to forbid 'wasteful or negligent destruction of the capital value, whether by excessive cutting or mining or other abusive exploitation'. A similar limitation deriving from the nature of occupation as temporary administration of the territory prevents the Occupying Power from using the resources of the occupied country or territory for its own domestic purposes. Furthermore, any exploitation of property is permitted only to the extent required to cover the expenses of the occupation, and 'these should not be greater than the economy of the country can reasonably be expected to bear'."

Comments: Israel fully agrees that article 55 of the Hague Regulations dictates a reasonable use of natural resources that is not wasteful or negligent, as stated in the first sentence in the passage cited above. The second sentence of the passage, however, is not adequately nuanced and is not supported by the sources it refers to. These sources state that "the economy of an occupied country can only be required to bear the expense of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear". [151] It does not necessarily follow from that text, or from any source of existing law, that it is completely forbidden to use natural resources in the Occupying Power's territory. In particular, such inference overlooks the option of standard commercial export from the occupied territory to other States (including the State of the Occupying Power) – which contributes to the occupied territory's economy. It seems that this suggested prohibition assumes resource exploitation which amounts to acts of pillage (or plunder), or at least unreasonable use which harms the natural resources, rather than any type of *use as such*. Moreover, the connection drawn between the temporary nature of the administration of the occupied territory and the claim in this sentence, is unclear. Under article 43 of the Hague Regulations, the Occupying Power is responsible for the administration of the territory, including its economy, and allowing export of natural resources in accordance with international law is consistent with the fulfillment of this responsibility.

The third sentence of the passage cited above is not fully clear, as it conflates two distinct issues – profits from the resource production, and the extent of the production. As the latter issue was already discussed in previous sentences of the passage, it is suggested to focus the third sentence on the issue of profits and thereby clarify it.

[151] *In re Krupp and Others*, Judgment of 30 June 1948, *Trials of War Criminals before the Nürnberg Military Tribunals*, vol. IX, p. 1339. This determination is essentially reiterated in the second cited source in footnote 1330.

Suggested changes: *Amend* the text as follows: "This description has traditionally been interpreted to forbid 'wasteful or negligent destruction of the capital value, whether by excessive cutting or mining or other abusive exploitation'. A similar limitation deriv~~ing~~es from the nature of occupation as temporary administration of the territory. ~~prevents the Occupying Power from~~ This limitation also applies to using the resources of the occupied country or territory for its own domestic purposes. Furthermore, any use of profit that the Occupying Power makes from exploitation of property is permitted only to the extent required to cover the expenses of the occupation, and 'these should not be greater than the economy of the country can reasonably be expected to bear'.

Paragraph (4) of the commentary

[…]

Comments: The current description of the law of armed conflict rules concerning property which may be relevant in the context of natural resources is partial and imprecise, as it fails to mention the rule concerning booty of war, article 52 of the Hague Regulations, and other rules which may be potentially relevant. Moreover, the attempt to describe articles 23 (g) and 53 of the Hague Regulations and article 53 of Geneva Convention IV by using a uniform standard of "necessary for military operations" is inaccurate in view of the differences between the said articles. Most notably, this formulation is not the test contained in article 53 of the Hague Regulations.

The footnote reference to the Rome Statute does not refer to the articles concerning pillage, as stated in the last sentence of paragraph (4), but rather, to articles dealing with illegal destruction and seizure of property. The Rome Statute addresses pillage separately in articles 8, paragraph 2 (b) (xvi), and 8, paragraph 2 (e)(v).

Suggested changes:

(a) *Amend* the paragraph as follows: "A further limitation that provides protection to the natural resources and certain other components of the environment of the occupied territory is contained in various rules of the law of armed conflict, including the rules limiting ~~general prohibition~~ of destruction or seizure of property, whether public or private, movable or immovable, in the occupied territory ~~unless such destruction or seizure is rendered absolutely necessary by military operations, (or, with respect to seizure of movable public property;, is necessary for military operations)~~, as well as the rule concerning booty of war".

(b) *Add* a reference to article 52 of the Hague Regulations in footnote 1334.

(c) *Delete* the words "of 'pillage'" in the last sentence of paragraph (4). A separate reference to the articles that concern pillage in the Rome Statute may be added.

Paragraph (5) of the commentary

Current text: "The principle of permanent sovereignty over natural resources also has a bearing on the interpretation of article 55 of the Hague Regulations ... In no case may a people be deprived of its own means of subsistence. The International Court of Justice has confirmed the customary nature of the principle. Similarly, the principle of self-determination may be invoked in relation to the exploitation of natural resources in territories under occupation, particularly in the case of territories that are not part of any established State."

Comments: This passage, too, conflates different legal frameworks – in this case, the law of belligerent occupation and international human rights law. It also relies on non-binding sources such as United Nations General Assembly resolutions.

Israel maintains that such sources do not affect the interpretation of article 55 of the Hague Regulations.

Even within the framework of international human rights law, the basis for some determinations in the paragraph concerned is flawed, since it appears to misrepresent the International Court of Justice's case law. First, the relevant paragraph in the *Armed Activities* case addresses the principle of sovereignty over natural resources, not a principle regarding means of subsistence.[152] Second, the International Court of Justice explicitly opines that the principle concerning sovereignty over natural resources is inapplicable to a situation involving an army militarily intervening in another State and using its natural resources, which undermines the other statements made in paragraph (5) regarding the relevance of this principle to a state of belligerent occupation.[153]

The comment concerning the principle of self-determination made in the last sentence of paragraph (5), which is supposedly based upon the International Court of Justice's advisory opinion in the *Wall* case, is an inference that does not exist in the opinion itself.[154] Furthermore, the concrete contribution of that statement to the draft principle is unclear – indeed, it is presented as a possible argument rather than as a legal or practical statement.

Suggested change: *Delete* the passage cited above.

Paragraph (7) of the commentary

Current text: "In the light of the development of the international legal framework for the exploitation and conservation of natural resources, environmental considerations and sustainability are to be seen as integral elements of the duty to safeguard the capital. Reference can in this respect be made to the *Gabčíkovo-Nagymaros* judgment,[155] in which the International Court of Justice, in interpreting a treaty that predated certain recent norms of environmental law, accepted that 'the Treaty is not static, and is open to adapt to emerging norms of international law'. An arbitral tribunal has furthermore stated that principles of international environmental law must be taken into account even when interpreting treaties concluded before the development of that body of law."

Comments: Under the customary rules of treaty interpretation, considering new legal norms in the interpretation of pre-existing treaties is not an automatic or trivial move, but is subject to various limitations. The passage cited above makes sweeping statements that disregard the relevant constraints and thus distorts the customary rules of treaty interpretation.

Furthermore, the text is based on references that do not actually support it. In particular, the *Gabčíkovo-Nagymaros* decision dealt with a specific bilateral treaty that *explicitly required* the parties thereto "to take new environmental considerations into consideration" when performing certain actions in compliance with that treaty, and the Court's pronouncement quoted in paragraph (7) was connected with that treaty obligation. The Hague Regulations, by contrast, do not include a similar provision. Moreover, none of the references offered in paragraph (7) deal with the interpretation of the law of armed conflict treaties in light of new environmental norms from other branches of international law.

Suggested change: *Delete* the passage cited above.

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[152] *Armed Activities* case (see footnote 141 above), para. 244.

[153] *Ibid*.

[154] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinion, I.C.J. Reports 2004*, p. 136.

[155] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, 1.C.J. Reports 1997*, p. 7.

Paragraph (8) of the commentary

[…]

Comments: Production of natural resources that exceeds pre-occupation levels has long been the subject of debate in the scholarly discourse on the law of belligerent occupation. The prevailing interpretation in the view of Israel is that under the law of belligerent occupation, production exceeding pre-occupation levels is not prohibited *per se*, as long as it is reasonable and does not unlawfully harm the capital. One may recall in this context the obligations of the Occupying Power under article 43 of the Hague Regulations, which may require it to maintain or develop the economy of the occupied territory. The Israeli Supreme Court accepted this interpretation.[156] The current text of paragraph (8) is indeed much too sweeping and lacks sufficient legal basis.

Suggested change: *Delete* the words "not exceeding pre-occupation levels of production".

Lebanon

[Original: Arabic]

Draft principle 21 on sustainable use of natural resources should contain a reference to integrating the law of occupation with other branches of international law, and in particular with the right to self-determination, in relation to the exploitation and use of natural resources for the benefit of the population of the occupied area and in accordance with their wishes.

Netherlands

[Original: English]

[See comment under general comments.]

Spain

[Original: Spanish]

[See comment under general comments.]

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

[See comment on draft principle 20.]

Switzerland

[Original: French]

[See comment on draft principle 20.]

United States of America

[Original: English]

The United States recommends using "should" instead of "shall" because this principle does not reflect an existing obligation under international law.

[156] HCJ 2164/09 *Yesh Din v. Commander of the IDF Forces in the West Bank* (26 December 2011).

Paragraph (3) of the commentary to draft principle 21 explains that "The reference to 'the population of the occupied territory' is to be understood in this context in the sense of article 4 of Geneva Convention IV, which defines protected persons as 'those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or Occupying Power of which they are not nationals'." Because article 4 does not define "population" in Geneva Convention IV, the United States recommends revising the commentary to more accurately reflect the language of this article and the intent of the draft principle.

> The reference to "the population of the occupied territory" is to be understood in this context in ~~the sense of article 4 of Geneva Convention IV, which defines protected persons~~ as 'those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or Occupying Power of which they are not nationals'. **This understanding derives from part of the definition of "protected persons" in article 4 of the Fourth Geneva Convention.**

22. Draft principle 22 – Due diligence

Canada

[Original: English]

[See comment on draft principle 20.]

Czech Republic

[Original: English]

[See comment on draft principle 10.]

France

[Original: French]

[See comment on draft principle 20.]

Germany

[Original: English]

[See comment on draft principle 20.]

Spain

[Original: Spanish]

[See comment under general comments.]

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

[See comment on draft principle 20.]

Switzerland

[Original: French]

The Commission could clarify the application of the draft principle on the obligation of due diligence in situations other than that of occupation. It might be

worthwhile for the Commission to extend that duty to situations other than those of occupation, modelled on its work on the draft articles on prevention of transboundary harm from hazardous activities, where that obligation is said to apply to activities carried out within the territory or otherwise under the jurisdiction or control of a State.

United States of America

[Original: English]

It is not clear that this draft principle accurately reflects the obligations of an Occupying Power. The United States recommends revising this draft principle as follows:

> An Occupying Power shall **respect, unless absolutely prevented, the occupied State's obligation to** exercise due diligence **not to allow** ~~to ensure that~~ activities in the occupied territory ~~do not~~ to cause significant harm to the environment of **another State**~~areas beyond the occupied territory~~.

The "no-harm principle"/*sic utere tuo* generally means that a State must exercise due diligence not to cause significant harm to the environment of another State due to activities within its jurisdiction or control. As the Tribunal in the *Trail Smelter* arbitration found, "under the principles of international law" "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."[157] Similarly, the International Court of Justice has ruled that a State is "obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation 'is now part of the corpus of international law relating to the environment.'"[158] It is associated with the principles of State responsibility and reflected in several environmental instruments, including article IV of the Boundary Waters Treaty of 1909.[159] As one commentator noted, the principle generally imposes a due diligence standard rather than an absolute prohibition, as States generally would not be willing to accept such an absolute prohibition against causing harm, "nor would such a prohibition be fundamentally fair when applied to countries lacking the capability to monitor closely all potentially harm-causing activities."[160]

In the context of an occupation, the Occupying Power has the duty to respect, unless absolutely prevented, the laws in force in the country, which would include an obligation to respect the occupied State's obligation in this regard.[161] However, the extent to which the Occupying Power would assume an affirmative obligation of the occupied State could depend on the nature and circumstances of the occupation

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[157] *American Journal of International Law*, vol. 35 (1941), p. 684, at p. 716.

[158] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 56 (internal citations omitted).

[159] Boundary Waters Treaty [between the United States and Canada] (Washington, D.C., 11 January 1909), in Charles I. Bevans, ed., *Treaties and Other International Agreements of the United States of America, 1776–1949*, vol. 12 (Department of State publication 8761. Released 1974), p. 319.

[160] Stephen C. McCaffrey, *The Law of International Watercourses* (3d ed., Oxford, Oxford University Press, 2019), at p. 489 (internal citations omitted).

[161] See art. 43 of the Regulations concerning the Laws and Customs of War on Land annexed to the Convention (IV) respecting the Laws and Customs of War on Land.

in question, and in some cases, the Occupying Power might be in the position of supporting the competent national authorities of the occupied country in exercising due diligence for the protection of the natural environment rather than directly performing this obligation.[162] Moreover, the United States does not regard the obligation on the Occupying Power as being heightened from that which is imposed on the territorial State under normal circumstances: as a result, it does not regard the obligation of due diligence to require the Occupying Power to "ensure" a particular result, nor to apply internally within the occupied State (especially when there may be combat operations that are consistent with international humanitarian law affecting the environment of occupied and non-occupied territories).

23. Draft principle 23 – Peace processes

Colombia

[Original: Spanish]

[…] Colombia wishes to share its experience with its own armed conflict, which has damaged the environment in various ways, ranging from illegal mining and logging, the presence of illicit crops, the planting of anti-personnel mines and the presence of explosive remnants of war, which have affected thousands of hectares of parts of the territory, to the destruction of wells and oil spills, which affect the health of the civilian population.

This is why the current Government encourages reintegrated fighters who appear in court to admit their acts in full and in detail, and to propose an individual or collective plan for reparation and restoration activities. The proposals expressly include the implementation of environmental protection programmes in reserve areas; the implementation of environmental recovery programmes in areas affected by the use of illicit crops and anti-personnel mines; and the implementation of programmes for access to drinking water and the construction of sanitation networks and systems.

The Government's intent with such proposals is to recognize that natural resources and the environment are essential to peace restoration and peacebuilding.[163]

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[162] *Cf.* Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 5, para. 1 ("Any High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.").

[163] The importance of the environmental dimension in peacebuilding processes was clearly established in the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace in Colombia, with the following phrase: "Having regard to the fact that the new vision of a Colombia at peace enables us to achieve a sustainable society that is united in diversity and that is based not only on consideration for human rights but on mutual tolerance, protection of the environment, respect for nature and its renewable and non-renewable resources and biodiversity".
Although the Final Agreement does not contain a specific chapter on the environment, it contains different elements and useful tools for environmental protection and sustainability reflected in issues such as the definition and closing of the agricultural frontier, protection of areas of special environmental interest, appropriate use of land, participatory environmental zoning, productive reconversion to improve land use, and supply and implementation of sustainable production systems. Territorial Renewal Agency. Available at: https://www.renovacionterritorio.gov.co/Publicaciones/el_acuerdo_final_y_la_dimensin_ambiental.

Czech Republic

[Original: English]

[See comment on draft principle 24.]

Ireland

[Original: English]

[See comment under general comments.]

24. Draft principle 24 – Sharing and granting access to information

Belgium

[Original: French]

Draft principle 24, paragraph 2, provides that "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 ...". Belgium considers it incorrect to mention reasons of national defence or security in relation to an international organization. Although this discrepancy is noted in the commentary, Belgium suggests that the wording of the draft principle be modified accordingly.

Czech Republic

[Original: English]

In the opinion of the Czech Republic, the existence of a generally binding (on States) rule on the sharing of and access to information cannot be unambiguously inferred from international law. This principle should rather be rewritten into a recommendation.

As in the case of principle 23 and as an effort to promote progressive development of international law, the target group could include also non-State actors (armed groups), which may also have information relevant for the reparation of environmental damage.

France

[Original: French]

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.

[See also comment under general comments.]

Germany

[Original: English]

[…] Germany, like others, remains doubtful as to the existence of such customary international law rule to share and grant access to information, yet, based on the reference to "their obligations under international law", understands the principle as restatement of (potentially) existing obligations rather than codification of a new obligation.

[See also comment under general comments.]

Ireland

[Original: English]

[See comment under general comments.]

Lebanon

[Original: Arabic]

Draft principle 24 on sharing and granting access to information would be improved by specifying the types of information to which this principle is applicable.

Netherlands

[Original: English]

On draft principle 24 concerning information sharing and draft principle 27 on poisonous and explosive remnants of war, the Kingdom of the Netherlands has previously shared its concerns on the Commission's conclusion that they have the status of customary international law. With regard to draft principle 27, however, the Kingdom of the Netherlands sees merit in noting that certain developments in international environmental law, including in respect of the "polluter pays" principle and the principle of due diligence, may point to certain obligations for States that could possibly be considered to be of a customary international law nature.

Portugal

[Original: English]

Portugal kindly invites the Commission to consider the following additions (in **bold** and underlined) […]:

"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."

Spain

[Original: Spanish]

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.

[See also comment under general comments.]

Switzerland

[Original: French]

The draft principle contains important provisions concerning remedial measures. The Commission could consider describing in more detail the role of non-State actors expected to provide relevant information. For example, in accordance with Amended Protocol II annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, the parties to a conflict must record and retain all information concerning minefields, mined areas, mines, booby-traps and other devices. Amended Protocol II also provides for the granting of access to such information.[164] The Commission may also wish to examine the extent to which such information could already be provided before the end of an armed conflict, notably upon the cessation of active hostilities.

Environmental challenges are transboundary challenges that can only be addressed through cooperation and therefore the granting of access to and sharing of information on the issue. The right of access to information in general derives from article 19 of the International Covenant on Civil and Political Rights[165] and is embodied in the Aarhus Convention.[166] The duty of States parties to grant access to environmental information should also play a role in armed conflicts.[167]

United States of America

[Original: English]

The United States is concerned that paragraph 2, which states that "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", suggests that the draft principles otherwise impose binding obligations on States. Moreover, the word "vital" appears to set a high bar that would require States to share very sensitive or even damaging information that fell short of being "vital" to national defence or security. Paragraph 2 further purports to impose an obligation on States and international organizations to "cooperate in good faith with a view to providing as much information as possible under the circumstances". The draft principles clearly could not impose any obligations on States. As with other draft principles that do not reflect existing international humanitarian law obligations, paragraphs 1 and 2 of draft principle 24 should be stated in terms of "should" rather than "shall."

25. Draft principle 25 - Post-armed conflict environmental assessments and remedial measures

France

[Original: French]

[See comment under general comments.]

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[164] Art. 9 of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II, as amended on 3 May 1996), annexed 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, United Nations, *Treaty Series*, vol. 2048, No. 22495, p. 93.

[165] International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI); entered into force on 23 March 1976, in accordance with the provisions of its article 49.

[166] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) (Aarhus, Denmark, 25 June 1998), United Nations, *Treaty Series*, vol. 2161, No. 37770, p. 447.

[167] Art. 4 of Aarhus Convention.

Ireland

[Original: English]

[See comment under general comments.]

Spain

[Original: Spanish]

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)).

[See also comment under general comments.]

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

[See comment under general comments.]

26. Draft principle 26 – Relief and assistance

Czech Republic

[Original: English]

The shortcoming of this principle is that although it explicitly targets States, it is obviously closely related to the principles 24 and 25 that address a broader target group (i.e., also international organizations, parties to the conflict). In addition, the use of the term "encourage" (in comparison to the use of the term "should" in other recommendatory provisions) could be explained.

France

[Original: French]

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,[168] the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction of 1997[169] and the Convention on Cluster Munitions of 2008[170]).

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

[See also comment under general comments.]

Ireland

[Original: English]

[See comment under general comments.]

Spain

[Original: Spanish]

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.

[See also comment under general comments.]

Switzerland

[Original: French]

Switzerland invites the Commission to reflect further on this draft principle. It could, for example, examine in more detail the different obligations and modalities of relief or assistance towards individuals and victims or affected parts of the

[168] Protocol on Explosive Remnants of War, annexed 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 (Protocol V) (hereinafter, "Protocol V to the Convention on Certain Conventional Weapons") (Geneva, 3 May 1996), United Nations, *Treaty Series*, vol. 2399, No. 22495, p. 100.

[169] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997), *ibid.*, vol. 2056, No. 35597, p. 211.

[170] Convention on Cluster Munitions (Dublin, 30 May 2008), *ibid.*, vol. 2688, No. 47713, p. 39.

environment under the jurisdiction or control of a State. It would also be interesting to reflect on the obligations and modalities of relief or assistance that could be envisaged when the source of environmental damage is identified, as well as the obligations of the State concerned in cases where responsibility is attributed to a third State.

The Commission could also examine in more detail possible obligations regarding international cooperation and assistance.

27. Draft principle 27 – Remnants of war

Cyprus

[Original: English]

[…] [T]he Republic of Cyprus agrees with the reference to the terms " jurisdiction or control" in order to ensure the application of such principles in areas outside of a State's territory over which a State exercises control, irrespective of its legality (draft principle 27). The recognition of extraterritorial jurisdiction or control leading to the broadening of the geographical scope of these draft principles is crucial so as to ensure the protection of the environment where a State exercises jurisdiction or control in areas beyond its territory (either in another State's territory or at sea) whether done lawfully or unlawfully.

Czech Republic

[Original: English]

The provision is based on the 2003 Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention on Certain Conventional Weapons). However, it is questionable whether Protocol's rules are of a customary nature: rules concerning remnants of war were not included in the ICRC study on customary international humanitarian law (2005). As a result, it is not clear on what basis the Commission has concluded that they are generally binding.

France

[Original: French]

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.

[See also comment under general comments.]

Germany

[Original: English]

[…] Germany supports and welcomes the intention conveyed in draft principles 27 and 28 to eliminate remnants of war that could have harmful effects on the environment. However, paragraph 1 of draft principle 27 could be read as entailing an obligation to act in any case where remnants of war are identified, including in the territorial sea and, with respect to warships and other State-owned

vessels, even outside territorial waters, which would place an inappropriate burden on many States. It would therefore seem advisable to reword draft principle 27 in order to make it clear that an obligation to act only arises after an environmental impact assessment has concluded that action is viable, necessary and appropriate in order to minimize environmental harm.

[See also comment under general comments.]

Ireland

[Original: English]

[See comment under general comments.]

Israel

[Original: English]

Draft principle 27, paragraph 1

[…]

Comments: Israel agrees with the Commission's statement that "different States thus have varying obligations relating to remnants of war", [171] as these obligations appear in treaties that are not universally ratified. This should be made clearer in the language of draft principle 27, paragraph 1, notably by replacing the second sentence of the draft principle with a more comprehensive qualifier. Furthermore, Israel does not recognize the formulation that appears in draft principle 27, paragraph 1, as emanating from any binding source of international law, and notes its conflation between the law of armed conflict and international environmental law.

Suggested change: *Amend* the text as follows: "Subject to their applicable international obligations, 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.~~" Alternatively, *replace* the word "shall" with the word "should".

Netherlands

[Original: English]

[See comment on draft principle 24.]

Spain

[Original: Spanish]

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

[171] Draft principle 27, para. (7) of the commentary.

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.

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

Draft principles 27 […] and 28 […] belong to the provisions applicable after the armed conflict. Draft principle 28, which is addressed to States, generally complements the broader draft principle 27, addressed to the parties to conflict. This is a particularly challenging area to regulate and the Nordic countries feel that the Commission has found the right balance that does not undermine existing international legal obligations, but leaves room for the development of law. Regarding paragraphs 1 and 2 in draft principle 27, the Nordic countries wonder whether the conjunctive "and" in "toxic and hazardous" could be replaced by the disjunctive "or".

Switzerland

[Original: French]

Switzerland welcomes the inclusion of a draft principle on remnants of war, which can have a significant ecological footprint, hinder the return of displaced persons, undermine sustainable development and affect human security.

This is why Switzerland also welcomes the fact that the draft principle is not limited to explosive remnants of war. The draft principle should, however, better reflect the obligations attaching to explosive remnants of war under international law.

The Commission could consider placing greater emphasis on the following issues:

- Although the draft principle applies mainly to post-conflict situations, some activities may already take place upstream, for example, immediately upon the cessation of active hostilities.

- The Commission could consider aiming the draft principle at "States and parties to a conflict", in order to cover different situations during and after an armed conflict.

- The Commission could clarify the meaning of the obligation of parties to a conflict to "seek to remove or render harmless" toxic and hazardous remnants of war.

- Depleted uranium also falls within the realm of arms control and could be included in the category of "hazardous remnants of war". The Commission could provide a more detailed description of the international commitments on the subject

and of how depleted uranium should be handled, particularly in a post-conflict situation.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

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'" (para. (3)). The commentary does not elaborate on the active steps which "seek to" requires.

Therefore, the United Kingdom would welcome further clarification on the standard being applied in the requirement to "seek to".

United States of America

[Original: English]

Paragraphs 1 and 2 under this principle should be stated in terms of "should" rather than "shall" because they do not reflect existing obligations under international law. Rather, as reflected in paragraph 3 of this draft principle, as well as paragraph (7) of the commentary to draft principle 27, States may have different obligations with respect to remnants of war depending on the type of remnant, when they came into existence, where they are located, and what treaties States have ratified.

28. Draft principle 28 – Remnants of war at sea

Germany

[Original: English]

[See comment on draft principle 27.]

Ireland

[Original: English]

[See comment under general comments.]

Spain

[Original: Spanish]

[See comment on draft principle 27.]

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

[See comment on draft principle 27.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

[See comment on draft principle 27.]

III. Comments and observations received from international organizations and others

A. General comments and observations

Environmental Law Institute

[Original: English]

1. The draft principles are notable for taking an integrated approach to international law protecting the environment in relation to armed conflict.

Historically, the focus of environmental protection in relation to armed conflict has been on international humanitarian law during armed conflict. Moreover, some have asserted that during an armed conflict international humanitarian law applies exclusively as *lex specialis*, implying the suspension of other potentially applicable bodies of law. It is generally accepted that in a case of conflicting norms, *lex specialis* takes precedence, or at least serves as the lens through which other norms are applied.[172]

In recent years, though, the Commission has observed that treaties continue to apply during armed conflict to the extent that they do not directly conflict with international humanitarian law.[173] Recognizing the evolution of diverse bodies of international law, the Commission has emphasized that international law is to be conceptualized as a system and implemented in a coherent manner.[174] The draft principles on protection of the environment in relation to armed conflicts utilize an integrated view of international law, drawing upon relevant provisions of international humanitarian law, international human rights law, international criminal law, international environmental law, and international trade law, among other bodies of law.

Such concurrent applicability has been recognized by multiple authorities. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons,* the International Court of Justice noted that international human rights law continues to apply during armed conflict alongside international humanitarian law,[175] and that "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives", since there is a "general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States … is … part of the corpus of international law relating to the environment."[176] The Commission cited this Advisory Opinion in its 2011 report on the fragmentation of international law, further finding that "no regime [of international law] is self-contained" from general international law.[177]

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[172] *Yearbook of the International Law Commission, 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission, paras. 56 *et seq*.

[173] *Yearbook of the International Law Commission, 2011*, vol. II (Part Two), chap. VI, sect. E (text of the draft articles on the effects of armed conflicts on treaties).

[174] "Fragmentation" (see footnote 172 above).

[175] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 226, at para. 25.

[176] *Ibid.*, para. 29.

[177] "Fragmentation" (see footnote 172 above), para. 192 *et seq*.

Similarly, draft article 3 of the Commission's draft articles on the effects of armed conflicts on treaties states that "[t]he existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties",[178] while the "indicative list of treaties the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict"[179] includes treaties on human rights, protection of the environment, international watercourses, and international criminal law.[180]

By incorporating the various relevant bodies of international law, the draft principles recognize these concurrent regimes and their complementary contributions to the protection of the environment. The integration of these diverse bodies of international law protecting the environment in relation to armed conflict provide additional foundations that extend the protections temporally and in other ways.

2. The draft principles are notable for their temporal scope codifying protections before, during, and after armed conflict.

It is well established that international humanitarian law provides both direct and indirect protections of the environment, especially since the adoption of the 1977 Additional Protocols and the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.[181] Due to the nature of international humanitarian law, however, these protections apply only during conflict.

In adopting a broader framing of protecting the environment *in relation to* armed conflict (and not only during conflict), the draft principles have looked beyond the traditional focus of international humanitarian law. This broader framing reflects the realities of modern warfare, as well as substantial experience and legal developments over the past four decades.

The draft principles are innovative for the integration of international legal protections applying across the conflict, with principles applicable pre-conflict (and generally), during armed conflict, and post-conflict. They are also on solid ground from an international legal perspective (as discussed in the first general comment, above).

The Environmental Law Institute notes that the principles of general applicability and those applicable in a pre-conflict context have been combined into a single section, which may generate some confusion. At the same time, it also recognizes that the preventive measures in the principles of general applicability may also be taken during or after a conflict, in addition to in the pre-conflict stage. For example, while States may take measures to minimize the threat of environmental damage prior to the onset of an armed conflict through planning and legislation — e.g., by incorporating environmental standards into their manuals on military activities and agreements to address and mitigate the risk of environmental degradation due to the presence of armed forces — these steps can also be taken during a conflict or afterward.

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[178] Draft articles on the effects of armed conflicts on treaties, with commentaries, *Yearbook of the International Law Commission, 2011*, vol. II (Part Two), chap. VI, sect. E, draft art. 3.

[179] *Ibid*., draft art. 7.

[180] *Ibid*., annex: Indicative list of treaties referred to in article 7.

[181] See, e.g., Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd ed., Cambridge University Press, 2016), chap. 7; United Nations Environment Programme, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (2009), pp. 10–28.

3. The draft principles are notable for their application to a wide range of armed conflicts, including international and non-international, as well as emerging hybrid forms of conflict that do not clearly fit within the scope of Additional Protocols I or II.

Traditionally, international humanitarian law has largely separated the applicable law for international armed conflict v. non-international armed conflict . In the increasingly common contexts of conflicts that begin as non-international but which grow to involve other States, [182] however, this dichotomy has made it challenging to know what law applies. [183]

Even where there is clarity on the nature of the conflict, armed conflicts are overwhelmingly non-international[184] and the relevant international humanitarian law provisions under Additional Protocol II (applicable in non-international armed conflict) recognize far fewer restrictions on belligerent conduct, including with respect to the environment. As such, in non-international armed conflicts, there are fewer international humanitarian law protections of the environment.

This is not to say that other bodies of law do not protect the environment in non-international armed conflicts.

Indeed, the draft principles are significant for their broad applicability to international armed conflict, non-international armed conflict, and a range of hybrid armed conflicts (including internationalized non-international armed conflict).

The draft principles' broader framing of the relevant conflict contexts follows from the draft principles' consideration of the concurrent application of relevant international law beyond international humanitarian law, as many of these other regimes — e.g., international human rights law, international environmental law, international criminal law, and international trade law — contain environmental provisions or principles that continue to apply during conflict (and indeed throughout the conflict life cycle) and they apply regardless of whether conflict is international, non-international, or hybrid. The draft principles thus unite in a single, comprehensive legal framework the obligations and recommendations that parties to an armed conflict must observe across the range of conflict contexts.

It is worth noting that in this context, the draft principles do not seek to apply the provisions of Additional Protocol I to non-international armed conflicts, nor do they seek to bind States that have not ratified Additional Protocol II. Rather, they acknowledge that by looking at the corpus of international law coherently and comprehensively, these obligations are found in various other international legal regimes that do not distinguish between non-international armed conflict and international armed conflict. And barring a direct conflict with relevant international humanitarian law, these other legal norms apply.

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[182] E.g., Hans-Peter Gasser, "Internationalized non-international armed conflicts: case studies from Afghanistan, Kampuchea, and Lebanon", *American University Law Review*, vol. 33 (1983), p. 145; Kubo Macak, *Internationalized Armed Conflicts in International Law* (Oxford University Press 2018).

[183] E.g., *Prosecutor v. Tadić a/k/a "DULE"*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 97; draft articles on the effects of armed conflicts on treaties, with commentaries, *Yearbook of the International Law Commission, 2011*, vol. II (Part Two), chap. VI, sect. E, draft art. 18 and commentary thereto.

[184] Therése Pettersson and Magnus Öberg, "Organized violence, 1989-2019", *Journal of Peace Research*, vol. 57 (2020): 597.

4. The draft principles are notable for their inclusion of natural resource exploitation in relation to armed conflict.

Historically, legal analysis of the protection of the environment in armed conflict has focused almost exclusively on pollution and damage to the environment from military activities (whether direct or indirect), largely omitting the role of natural resources as drivers of conflict and the increased opportunity for illegal exploitation in conflict-related contexts.

Inclusion of natural resources in the draft principles is important from a practical standpoint. Since 1989, at least 35 major armed conflicts (conflicts with more than 1,000 battle deaths) have been financed by revenues from natural resources, ranging from diamonds and timber to narcotics, fisheries, and bananas.[185] In the last 20 years, natural resources have become a standard element of peace agreements, providing incentives to resolve the conflict while also providing a foundation for post-conflict recovery.[186]

In addition to the practical considerations, inclusion of natural resources in the draft principles is justified by international law. International law has long recognized an absolute prohibition on pillage,[187] and this prohibition has more recently been applied to illegal natural resource exploitation.[188] In this context, the International Court of Justice has also emphasized the international legal principle of permanent sovereignty over natural resources.[189] The law of occupation also addresses natural resources. The many property rights protections found in international humanitarian law and international criminal law,[190] reinforce the importance of the draft principles in addressing natural resources.

The Institute also welcomes the inclusion of corporate due diligence and liability in the draft principles. While the principles related to due diligence and liability are recommendatory in nature, they provide important normative guidance as international law and State practice continue to evolve in this space. As the commentaries note, the role of natural resources in driving or financing armed conflict and human rights violations have been acknowledged at both the domestic

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[185] Carl Bruch, David Jensen, Mikiyasu Nakayama, and Jon Unruh, "The changing nature of conflict, peacebuilding, and environmental cooperation", *Environmental Law Reporter*, vol. 49 (2019), 10134-10154.

[186] United Nations Department of Political Affairs and United Nations Environment Programme, *Natural Resources and Conflict: A Guide for Mediation Practitioners* (2015).

[187] Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, arts. 28 and 47; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 33; Additional Protocol II, art. 4, para. 2 (g); Rome Statute of the International Criminal Court, arts. 8, para. 2 (b) (xvi) and 8, para. 2 (e) (v).

[188] E.g., *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), I.C.J. Reports 2005*, p. 168 (*Armed Activities*), paras. 245-246, 248.

[189] Permanent sovereignty over natural resources in the occupied Palestinian and other Arab territories: Report of the Secretary General (A/38/282); for application, see the declaration of Judge Koroma in *Armed Activities,* in which he asserts that the principle of permanent sovereignty remains in effect "*during armed conflict and during occupation*" (emphasis in original): *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda*), *I.C.J. Reports 2005*, p. 168, Declaration of Judge Koroma, at pp. 289-290.

[190] E.g., ICRC customary international humanitarian law database, available at https://ihl-databases.icrc.org/customaryihl/eng/docs/v1, rules 50 ("Destruction and seizure of property of an adversary") and 51 ("Public and private property in occupied territory"); Rome Statute of the International Criminal Court, art. 8, para. 2 (a) (iv), para. 2 (b) (xiii), and para. 2 (e) (xii).

and international levels.[191] Inclusion of these provisions is thus notable in supporting progressive development of international law and State practice in this area.

Opportunities for improvement

[…] The Environmental Law Institute also notes four ways that the draft principles should be strengthened to reflect current international law.

1. The draft principles should include a provision protecting water infrastructure before, during, and after armed conflict.

Recent conflicts have seen a rapid rise in the targeting of water infrastructure upon which civilian populations depend.[192]

There is a substantial body of existing international law protecting water infrastructure during armed conflict, as well as before and after. Under Additional Protocol I, States are prohibited from attacking, destroying, or rendering useless objects which are indispensable to the survival of the civilian population, including drinking water installations.[193] The only exception to this prohibition is infrastructure that is "solely for the members of [the State's] armed forces" or "in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement."[194] Additional Protocol II reiterates this prohibition in practically identical terms.[195] As such, international humanitarian law protects water infrastructure during both international armed conflicts and non-international armed conflicts.

In addition to international humanitarian law, international human rights law offers protections before, during, and after conflict (extending beyond the temporal application of international humanitarian law during armed conflict). For example, general comment No. 15 by the Committee on Economic, Social and Cultural Rights clarifies that article 11 of the International Covenant on Economic, Social and Cultural Rights, which provides protection for a basic standard of living, includes a human right to water.[196]

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[191] E.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L No 111-203 (2010), which includes regulations on conflict minerals from the Democratic Republic of the Congo and neighbouring countries; European Union Regulation 2017/821 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, *Official Journal*, L 130 (2017), on supply chain due diligence for certain conflict minerals; OHCHR, "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework " UN Doc. HR/PUB/11/04 (2011).

[192] E.g., Jeannie L. Sowers, Erika Weinthal, and Neda Zawahri, "Targeting environmental infrastructures, international law, and civilians in the new middle eastern wars", *Security Dialogue*, vol. 48 (2017), pp. 410-430; Erika Weinthal and Jeannie L. Sowers, "The Water-Energy Nexus in the Middle East: Infrastructure, Development, and Conflict," *WIREs Water*, vol. 7 (2020): e1437; Juliane Schillinger, Gül Özerol, Şermin Güven-Griemert, and Michael Heldeweg, "Water in war: understanding the impacts of armed conflict on water resources and on their management", *WIREs Water*, vol. 7 (2020): e1480.

[193] Additional Protocol I, art. 54, para. 2.

[194] *Ibid*., art. 54, para. 3.

[195] Additional Protocol II, art. 14.

[196] Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002) on the right to water (E/C.12/2002/11).

Following are a few potential options for a new draft principle that reflects existing international law protecting water infrastructure:

> "To the extent that it supplies water to civilian populations, water infrastructure shall not be targeted during armed conflict."
>
> "Water infrastructure shall be protected from the effects of armed conflict, with the exception of water infrastructure that exclusively provides water to military forces."
>
> "Attacks on or pollution of water infrastructure by combatants are prohibited if such attacks or pollution would render civilian drinking water installations unsafe for use."

This language is only a starting point. The Geneva List of Principles on the Protection of Water Infrastructure highlights the key principles of international law protecting water infrastructure during conflict, as well as before and after.[197] As such, the Geneva List provides additional options and dimensions that may be considered.

2. The draft principles could better articulate how they apply to non-State actors.

Non-State armed groups are widespread in contemporary armed conflicts, and often exploit, target, and otherwise harm the environment. While the draft principles do a good job of addressing conduct by States and agents of States, they are less clear when it comes to non-State armed groups.

International law protecting the environment in relation to armed conflict already governs behaviour by non-State armed groups.

It is well-established that non-State actors engaged in armed conflict are bound by international humanitarian law. For example, they bear responsibility under international humanitarian law in common article 3 to the four 1949 Geneva Conventions, under various rules of the Hague laws, and under customary rules of international humanitarian law.[198] International criminal law also applies to non-State armed groups, but it is less clear to what extent international human rights law binds non-State armed groups.[199]

Many of the draft principles do apply to non-State armed groups, although this application could be more explicit.

While many of the initial draft principles explicitly apply to States, and only to States, a number of the later draft principles are drafted more broadly so that they could apply to non-State armed groups, as well as other non-State actors including individuals. Indeed, the International Law Commission commentary on the draft principles confirms that specific draft principles apply to non-State actors. For example, draft principle 18 on pillage states that "Pillage of natural resources is prohibited." This broad language is not limited to States, and thus arguably applies to non-State armed groups and other non-state actors (and indeed paragraph (7) of the International Law Commission commentary on draft principle 18 confirms this).

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[197] The Geneva Water Hub, *The Geneva List of Principles on the Protection of Water Infrastructure* (Geneva, GLP, 2019).

[198] E.g. ICRC guidelines ; see also CEOBS, "Non-state armed groups continue to cause environmental damage in conflicts, yet States are reluctant to meaningfully address their conduct for fear of granting them legitimacy", 4 December 2015.

[199] ICRC Guidelines, p. 28, footnote 90.

That said, the lack of mention of non-State armed groups risks obscuring the fact that it applies to them.

Indeed, draft principle 13 (providing general protections of the natural environment, including prohibiting attacks that cause widespread, long-term, and severe damage to the environment) does not clarify to whom it applies. Does the fact that the commentary for draft principle 18 confirms that it applies to non-State actors and the absence of similar commentary for draft principle 13 mean that there is no international law preventing non-State armed groups from causing long-term, widespread, and severe damage to the environment? Can non-State armed groups attack the natural environment even where it is not a military objective?

The current draft principles vary widely in terms of whom they apply to due to variations in wording and there are some key gaps that could be addressed. draft principles 3, 4, 5, 6, 7, 8, and 9 refer only to "States" or "States and international organizations". For example, in draft principle 5, it would be helpful to use a broader term when discussing the protection of the environment of indigenous peoples as they may often live in areas under occupation or de facto governments (provided by non-State actors). For example, in draft principle 5 [6] the clause "States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit" could be rephrased to read "Appropriate measures should be taken, in the event of armed conflict to protect the environment of the territories that indigenous peoples inhabit".

In contrast to the many places where non-State actors are not mentioned, draft principle 8 refers to "States, international organizations and other relevant actors" (in the context of who should prevent damage to the environment in areas where displaced persons are situated).

One option, then, would be to amend the relevant language of the various draft principles to expressly incorporate non-State armed groups and other non-State actors. This might be politically difficult, as the language has been so extensively discussed and debated. Moreover, the brevity and clarity of draft principle 18 (and similar draft principles) give it strength.

As such, it may be preferable to adopt a new, stand-alone draft principle that explicitly addresses non-State armed groups and other non-State actors, indicating which draft principles apply to them.

[See also comments under draft principles 5 and 10.]

Food and Agriculture Organization of the United Nations

[Original: English]

A glossary of essential terms would be useful to ensure a common understanding and interpretation of the terminology used in the document.

It is recommended to map and integrate better in the text key provisions of the Core Humanitarian Standard on Quality and Accountability, the Professional Standards for Protection Work and the Sphere Handbook. The current formulation of the principles treats environment in isolation of the affected communities who live there. Rights of the latter should be respected and integrated with environmental considerations.

Under Part Five on measures addressing aftermath of the armed conflict, State action should be guided by the leadership and experience of local actors and communities to prepare for changing climate and environmental risks, reduce risks

and vulnerability to shocks, stresses and longer-term changes through an increased focus on climate change adaptation, disaster risk reduction and anticipatory action.

Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean

[Original: Spanish]

[The submission was provided in a form that did not allow for its reproduction in the present report. The submission is available on the website of the Commission.[200]]

International Atomic Energy Agency

[Original: English]

[…] The International Atomic Energy Agency (IAEA) shares some general comments and individual specific observations, based on the mandate and experience of IAEA, which are attached to this note. These comments and observations predominantly relate to the functions of IAEA envisaged under Article III(A), paragraph 6, of its Statute, which authorizes the Agency to "establish or adopt … standards of safety for protection of health and minimization of danger to life and property … and to provide for the application of these standards to its own operations as well as to the operations making use of materials, services, equipment, facilities, and information made available by the Agency or at its request or under its control or supervision; and to provide for the application of these standards, at the request of the parties, to operations under any bilateral or multilateral arrangement, or, at the request of a State, to any of that State's activities in the field of atomic energy".

IAEA has, to date, published a series of 131 such Safety Standards, which provide fundamental principles, requirements and recommendations to ensure nuclear safety, serve as a global reference for protecting people and the environment, and contribute to a harmonized high level of safety worldwide. It notes that the IAEA has, "at the request of a State" applied these standards in a variety of settings, including post-conflict situations involving radioactive materials. In this respect, IAEA has assisted States with addressing environmental consequences linked to depleted uranium ammunitions, nuclear and radioactive installations, and nuclear weapons testing.

[…]

1. Depleted uranium ammunitions

With a view to radioactive residues from the use of depleted uranium in conventional munitions in armed conflicts, IAEA notes that particles dispersed in the environment and ammunition remnants may constitute potentially serious hazards for the environment and populations in affected areas alike. Yet, IAEA has found that both safe management of these hazards and environmental remediation actions are frequently attainable, if desired. In these contexts, IAEA has, in consultation and collaboration with United Nations system organizations, including the United Nations Environment Programme (UNEP) and the World Health Organization (WHO), performed radiological assessments and produced recommendations to governments on managerial actions to address the presence of depleted uranium in the environment, resulting in the protection and reassurance of people and States involved.

[200] https://legal.un.org/ilc/guide/8_7.shtml#govcoms.

Specifically, upon request, IAEA will evaluate existing information relevant to a radiological assessment and may participate in the collecting of environmental samples where local authorities are not trained to conduct such sampling. These samples are then measured in IAEA and international independent laboratories. IAEA subsequently convenes teams of independent recognized experts that produce radiological assessments, as well as recommendations for the management of radioactive waste and remediation activities based upon the results of corresponding analyses. The relevant results and recommendations are then provided to the affected State, which remains responsible for implementation. IAEA disseminates these results through publications (see, e.g., documents STI/PUB/1164 of August 2003 (Kuwait) and STI/PUB/1434 of June 2010 (Iraq), published in the IAEA Radiological Assessment Report Series).

2. Nuclear and radioactive installations

A second potential source of risk to people and the environment linked to nuclear safety that may arise in the context of armed conflicts, relates to effects on nuclear and radioactive installations. Here too, upon request, IAEA has provided assistance to States involved in armed conflicts and States participating in subsequent remediation efforts. In this context, reference may be made, for example, to a request received from the government of Iraq in 2004, which entailed, inter alia, preparation, by IAEA of studies to determine the efforts needed to address risks emanating from nuclear and radioactive installations and to construct plans and programmes to support and implement this endeavour. The principal outcome of these studies was the Iraq Decommissioning Project, which focused on addressing the decommissioning of former nuclear facilities of Iraq and capacity building for Iraqi scientists from 2006 to 2013. During this period, significant decommissioning capacity was established within Iraq, and ongoing decommissioning of nuclear facilities throughout the State continues with support from Iraqi ministries and various international agencies, including IAEA and the European Commission.

3. Nuclear weapons testing

While IAEA has not been requested to provide assistance relating to the effects of the use of nuclear weapons during armed conflicts on the public and the environment, its experience both with a view to environmental remediation after accidents at nuclear powerplants and nuclear weapons tests, may be especially relevant in post-conflict radiological situations involving the use of nuclear weapons. In the past, where radioactive residues from nuclear weapons testing were located in States lacking infrastructure and expertise necessary to evaluate associated radiation risks and remediation, or in cases where States have felt that an additional assessment was necessary, States occasionally requested IAEA assistance. In this regard, IAEA has received requests from affected or testing States with respect to tests carried out in locations such as Algeria, the Marshall Islands and Mururoa and Fangataufa (see, e.g., documents STI/PUB/1215 of 2005 (Algeria), STI/PUB/1054 of 1998 (Marshall Islands), published in the IAEA Radiological Assessment Report Series and Mururoa and Fangataufa at the following reference https://www.iaea.org/publications/4728/the-radiological-situation-at-the-atolls-of-mururoa-and-fangataufa

International Committee of the Red Cross

[Original: English]

[…] Armed conflicts continue to cause environmental degradation and destruction, affecting the well-being, health and survival of people across the globe, and underscores the need to consolidate the legal framework governing the protection of the environment in relation to armed conflicts. In this regard, ICRC

has no doubt that the draft principles will constitute an important contribution to contemporary international law in line with the leading role played by the International Law Commission in its codification and progressive development.

The International Law Commission's draft principles complement the ICRC efforts to enhance respect for international humanitarian law rules protecting the natural environment in armed conflict. They are complementary to the ICRC updated 2020 Guidelines on the Protection of the Natural Environment in Armed Conflict (ICRC Guidelines). First, the Commission's scope is broader, both in terms of temporal scope and in regard to the branches of public international law on which they draw. Secondly, the draft principles reflect and affirm that the international humanitarian law principles and rules on distinction, proportionality and precautions shall be applied to the natural environment, and finally, there are other draft principles that are based on international humanitarian law.

[…] The ICRC comments set out below are not meant to be exhaustive but focus on the main issues raised by the draft principles of particular interest to ICRC.

[…]

Relationship between the draft principles and international humanitarian law

As they explain, the draft principles are general in nature and must be read together with draft principle 14, which specifically references the application of the law of armed conflict rules to the natural environment. In turn, draft principle 14 lists some specific principles and rules of the law of armed conflict but, as mentioned in the commentary, does not elaborate on these or on how they should be interpreted. Furthermore, the commentary notes that the list provided should not be seen as a closed one, as all other rules of the law of armed conflict which relate to the protection of the environment in relation to armed conflict remain applicable and cannot be disregarded. This is an important assertion and one that ICRC welcomes. Indeed, there are many other existing rules and recommendations relating to the protection of the natural environment under international humanitarian law. These are set out in the ICRC Guidelines, which also contain commentaries to aid understanding and to clarify the source and applicability of the rules therein.

Based on the above, and to ensure that the draft principles and their commentaries are not interpreted as restricting or impairing international humanitarian law rules, ICRC recommends that a "without prejudice" clause be included in a second paragraph in draft principle 1 (or in a separate draft principle), as follows: "The present draft principles shall not be interpreted as restricting or impairing applicable rules of international law, in particular the law of armed conflict."

International Union for the Conservation of Nature

[Original: English]

The temporal approach adopted in the draft principles has allowed the Special Rapporteurs to give equal weighting and consideration to all three phases of conflict, providing a much richer analysis and extrapolation of the obligations upon States across a broader range of international legal regimes, and enabling the teasing out of the issues of environmental remediation, liability and cooperation. However, much has occurred in the global environment since the adoption of the draft principles in December 2019. The world has witnessed a global pandemic, highlighting the boundaries of human interactions with nature. Over 1 billion people

are now covered by jurisdictions declaring a climate emergency.[201] The United Nations has commenced its Decade on Ecosystem Restoration, designed to restore and revive damaged ecosystems to create a healthier planet[202] and the Decade of Ocean Science for Sustainable Development[203] in recognition of the ocean's role in climate regulation and the increasing pressures on marine life and the marine environment due to a changing ocean. Furthermore, in February 2021 IUCN adopted its programme for the next decade, entitled "Nature 2030: One Nature, One Future",[204] where it warned that "Our world is in a crisis. Rapid loss of biodiversity and dangerously changing climate are some indicators of this crisis".[205] Based on the IUCN Red List of Threatened Species,[206] the IUCN warns that "never have human impacts on nature been greater",[207] with the rate of extinction risk at approximately 28 per cent of all species, and worsening. And in human rights jurisprudence, a growing body of States are moving beyond a purely anthropocentric environmental human rights discourse to one that recognizes rights of nature.[208] IUCN urges the Commission to consider these developments as the background to the adoption of the draft principles with a view to enhancing the protections for the environment in relation to armed conflicts well into the future.

[…]

IUCN wishes to comment on the lack of wording referring specifically to "nature", "species", "wildlife", "habitats" or "biodiversity". While it recognizes that many provisions are drawn from the laws of armed conflict where the term "natural environment" is preferred to refer more broadly to the composite whole of the "natural world", it suggests the addition of a preamble emphasizing the importance of all living and non-living components of the terrestrial, atmospheric, aquatic and marine environment and their interaction, as well as healthy ecosystem functioning and biodiversity. The commentary could also refer specifically to obligations adopted by States within key treaties, such as the Convention on Biological Diversity, United Nations Framework Convention on Climate Change, Convention on Wetlands of International Importance Especially as Waterfowl Habitat, the African Convention on the Conservation of Nature and Natural Resources, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, and the United Nations Convention on the Law of the Sea.

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[201] See https://climateemergencydeclaration.org/climate-emergency-declarations-cover-15-million-citizens/.

[202] Adopted in General Assembly resolution 73/284 of 6 March 2019.

[203] Adopted in General Assembly resolution 72/73 of 4 January 2018. See www.oceandecade.org/about.

[204] "Nature 2030: One Nature, One Future" available at https://portals.iucn.org/library/sites/library/files/documents/WCC-7th-001-En.pdf.

[205] *Ibid.*, p. 3.

[206] Available at www.iucnredlist.org/.

[207] "Nature 2030: One Nature, One Future", p. 3.

[208] See for example, the *Case of the Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v. Argentina (Merits, reparations and costs)*, Inter-American Court of Human Rights, 6 February 2020, para. 289, available at www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf. The case builds on the Advisory Opinion *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of articles 4(1) and 5(1) of the American Convention on Human Rights*, Advisory Opinion OC-23/17 of 15 November 2017, Inter-American Court of Human Rights, Series A, No. 23, available at www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf; Ecuador, Constitutional Court, "Mangroves Case", Judgment No. 166-15-SEP-CC, 20 May 2015, and the Colombia, Constitutional Court, "Atrato River Case", *Center for Social Justice Studies et al. v. Presidency of the Republic et al.*, Judgment No. T-622/16, 10 November 2016.

IUCN suggests that the concept of "natural environment" be replaced throughout with that of "environment". The concept of natural environment is outdated. If it is ultimately determined that the term "natural environment" is to be retained for the purposes of Part Three, it would be a valuable addition to the commentary if it could provide an explanation of the shift in terminology. Further work on this aspect of the laws of armed conflict would be valuable in delineating where the pertinent issues of controversy remain, with a view to limiting inroads into the protection of all forms of nature, wherever it is found.

Office of the United Nations High Commissioner for Human Rights

[Original: English]

This note contains observations of the Office of the United Nations High Commissioner for Human Rights (OHCHR) in light of international human rights norms and standards, in particular those contained in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and other relevant instruments, as well as human rights jurisprudence and applicable international environmental law. The note focuses on some of the most relevant issues addressed by the draft principles and the accompanying commentaries from a human rights perspective.

OHCHR welcomes and supports the integrated approach in the draft principles and related commentaries of civil, cultural, economic, political and social rights in the context of protection of the environment in relation to armed conflicts. It is also welcomes that the draft principles and the related commentaries consistently refer to linkages between the environment and the enjoyment of a range of human rights, including through references to the human right to a healthy environment, which has been recognized by more than 150 States, demonstrating a growing legal and normative consensus.[209]

General observations on the relationship between human rights and the environment

As reflected in the draft principles and the related commentaries, United Nations human rights treaty bodies have recognized and referenced linkages between human rights and the environment, including in their general comments (CCPR/C/GC/36; CEDAW/C/GC/37; CRC/C/GC/15; E/C.12/2002/11). In particular, the Committee on Economic, Social and Cultural Rights has stated in its general comment No. 14 (2000) on the right to the highest attainable standard of health that the right to health includes a healthy environment as an "underlying determinant[] of health" (E/C.12/2000/4, para. 4). The Human Rights Committee also noted in its general comment No. 36 (2018) on the right to life that "environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life" (CCPR/C/GC/36, para. 62). An increasing number of cases and decisions before the Committees are also addressing linkages between human rights and environment.[210]

[209] See e.g. A/HRC/RES/46/7; and "Human Rights for the Planet - high-level international conference on human rights and environmental protection", Statement by United Nations High Commissioner for Human Rights, Michelle Bachelet, 5 October 2020.

[210] CCPR/C/126/D/2751/2016; CCPR/C/127/D/2728/2016, noting in para. 9.11 that "without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights […], thereby triggering the *non-refoulement* obligations of sending states." See also A/HRC/10/61, para. 18.

The Human Rights Council has noted that "more than 155 States have recognized some form of a right to a healthy environment in, inter alia, international agreements or their national constitutions, legislation or policies" (A/HRC/RES/46/7). The Human Rights Council has also "[r]ecogniz[ed] the benefits of seeking to mitigate and minimize the negative effects of pollution and other forms of environmental degradation in situations of armed conflict and post-conflict contexts, and express[ed] its deep concern at the threats posed to the effective enjoyment of human rights by persons in vulnerable situations, including children, women and girls, youth, persons with disabilities, older persons, indigenous peoples, local communities, refugees, internally displaced persons and migrants" (*ibid.*). Other recent Human Rights Council resolutions have addressed specific issues related to human rights and the environment including a safe and stable climate (A/HRC/RES/44/7), recognition and protection of environmental human rights defenders (A/HRC/RES/40/11), and toxic wastes (A/HRC/RES/45/17). Resolution 45/30 acknowledges "ongoing discussions in the International Law Commission on the toxic remnants of war, and [expresses concern] at the possible threat that they pose to the full enjoyment of the rights of the child" (A/HRC/RES/45/30).

OHCHR welcomes references to positions of the Human Rights Council special procedures mandates in the commentaries to the draft principles.[211] The Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment has noted that "more work is necessary to clarify how human rights norms relating to the environment apply to specific areas, including … the effects of armed conflict on human rights and the environment" (A/HRC/37/59, para. 18). A number of special procedure mandate holders have further engaged with climate change and environmental degradation, and on the contours of the right to non-discrimination in this context.[212]

The Secretary-General's Call to Action for Human Rights, issued in February 2020, also contains a dedicated section on rights of future generations, especially climate justice, highlighting as a key action going forward to "increase United Nations support to Member States at field level for laws and policies that regulate and promote the right to a safe, clean, healthy and sustainable environment, and for effective individual access to justice and effective remedies for environment-related concerns".[213]

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[211] In 2012, the Human Rights Council established the mandate for the Independent Expert on human rights and the environment in resolution 19/10, which was extended as a Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment in 2015 (resolution 28/11). A number of additional relevant thematic reports have been issued by the mandate, e.g. focusing on a healthy biosphere and the right to a healthy environment (A/75/161); good practices on the right to a safe, clean, healthy and sustainable environment (A/HRC/43/53); safe climate (A/74/161); clean air and the right to a healthy and sustainable environment (A/HRC/40/55); children's rights and the environment (A/HRC/37/58); framework principles on human rights and the environment (A/HRC/37/59); biodiversity (A/HRC/34/49); climate change (A/HRC/31/52); implementation of human rights obligations relating to the enjoyment of a healthy environment (A/HRC/31/53); good practices (A/HRC/28/61); mapping (A/HRC/25/53); and preliminary report outlining the linkages between environment and human rights as well as States' obligations to protect these rights (A/HRC/22/43).

[212] This includes A/71/229; A/75/207; A/HRC/16/49; A/HRC/19/54; A/HRC/19/54/Add.1; A/HRC/36/46; A/HRC/41/39; A/64/255; A/71/281; A/75/298. See additional references in OHCHR, "Frequently asked questions on human rights and climate change" (2021), available at www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf.

[213] United Nations, "The highest aspiration: a call to action for human rights", available at www.un.org/sg/sites/www.un.org.sg/files/atoms/files/The_Highest_Asperation_A_Call_To_Action_For_Human_Right_English.pdf.

This enhanced focus on the human right to a healthy environment aligns with developments in the work of the United Nations human rights treaty bodies as outlined above, in decisions by regional human rights mechanisms and courts[214] and national courts,[215] and in environmental law and policy. The latter include the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement);[216] the Aarhus Convention; the Paris Agreement;[217] and the negotiations for the post-2020 global biodiversity framework; as well as resolutions of the United Nations Environment Assembly.[218]

For instance, United Nations Environment Assembly Resolution 4/17 on promoting gender equality and the human rights and empowerment of women and girls in environmental governance is the first United Nations Environment Assembly resolution with a specific focus on human rights and a healthy environment (UNEP/EA.4/Res.17). Two other recent United Nations Environment Assembly resolutions referenced in the commentaries to the draft principles highlight the linkages between environmental degradation and armed conflict while also referencing human rights (UNEP/EA.2/Res.15, fourteenth preambular paragraph; UNEP/EA.3/Res.1, ninth preambular paragraph and para. 1).

Observations relating to the structure of the draft principles

The draft principles include principles of general nature, principles applying *before* the outbreak of an armed conflict, as well as principles applicable *during* armed conflict, in situations of *occupation*, and *after* armed conflict, with the related commentaries affirming that the structure in three temporal phases (before, during and after armed conflict) was chosen for practical reasons (draft principle 1, para. (2) of the commentary). The Commission also emphasizes that there might be a certain degree of overlap between the three phases (draft principle 1, para. (1) of the commentary) and that such phases are closely connected (draft principle 2, para. (2) of the commentary).

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[214] E.g. cases by the European Court of Human Rights, Community Court of Justice of the Economic Community of West African States, and the Inter-American Court of Human Rights as highlighted in footnote 1182 of the commentary. See also the Inter-American Court's decision in *Case of the Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v. Argentina (Merits, reparations and costs)*, Inter-American Court of Human Rights, 6 February 2020.

[215] E.g. decision of the Supreme Court of the Netherlands, *Urgenda Foundation v. State of the Netherlands,* 20 December 2019. See also judgment of the German Federal Constitutional Court, *Neubauer, et al. v. Germany*, 29 April 2021; Supreme Court of Norway, *People vs. Arctic Oil,* 22 December 2020; Supreme Court of the United Stations of America, *Juliana v. United States*, 30 July 2018.

[216] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú, 4 March 2018) (Escazú Agreement), text available from https://treaties.un.org (Status of Multilateral Treaties Deposited with the Secretary General, chap. XXVII.18).

[217] Paris Agreement (Paris, 12 December 2015), United Nations, *Treaty Series*, No. 54113 (volume number yet to be determined).

[218] See African Charter on Human and Peoples' Rights ((Nairobi, 27 June 1981), United Nations, Treaty Series, vol. 1520, No. 26363, p. 217), art. 24; Aarhus Convention, art. 1; Escazú Agreement, art. 1; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador, 17 November 1988, OAS, *Treaty Series*, No. 69), art. 11; and ASEAN Human Rights Declaration, art. 28. See also Declaration of the United Nations Conference on the Human Environment, 1972, preambular para. 1 and principle 1; Rio Declaration on Environment and Development (Rio Declaration), 1992, principle 1; Paris Agreement, 2015, preamble.

OHCHR acknowledges the effort by the Commission to delimit the draft principles in a coherent manner, not limited exclusively to situations of armed conflict. Most obligations applicable to States under international law will apply across all such temporal periods. This is true also for international human rights law, which to a varying degree are relevant in the interpretation of all the draft principles.[219] The structure of the draft principles in different temporal phases may lead to a potential lack of clarity as to when and how international rules concerning natural resources, the protection of the environment and the responsibility and liability of States and non-State actors apply. While not intended to be read as precluding the application of principles outside their temporal placement in the draft (e.g. draft principle 2, para. (2) of the commentary), there may be potential risk that the structure might nonetheless be read in this manner.

In light of the foregoing, it is recommended that the draft principles state that the temporal phases are interconnected, may not definitively be sequenced and that the application of principles to more than one phase is not precluded. Situations may not be easily qualified as falling in one or the other phase as defined in the draft principles, also taking into account geographic scope. Alternatively, the subheadings in question could be deleted or amended in this sense.

Observations on the interplay between international human rights law and international humanitarian law relevant for the protection of the environment in relation to armed conflicts

OHCHR welcomes the reference in the draft principles and its commentaries to the application of international humanitarian law and other applicable international law, including international human rights law, as well as to the interplay between the law of armed conflict and post-conflict situations on the one hand and the protection of the environment on the other hand.[220]

Regarding the relationship between international humanitarian law and international human rights law, the commentaries assert that during armed conflict, the "law of armed conflict" is *lex specialis*.[221] A possible interpretation of this position may be that the application of international humanitarian law is taken to preclude the application of other branches of international law during armed conflict. In this context, the consistent practice of United Nations human rights mechanisms taking a wider, integrating approach is recalled. Taking into account the judgment of the International Court of Justice,[222] the Human Rights Committee concluded that "the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may

[219] The general obligation to protect against violations of human rights law is one example. The argument is equally applicable to specific norms addressed, such as the duty to cooperate and the right of access to information (International Covenant on Economic, Social and Cultural Rights , art. 2, para. 1).

[220] Consistent with A/HRC/RES/46/7, preamble; A/HRC/RES/45/30, preamble. Two other recent United Nations Environment Assembly resolutions referenced in the commentary highlight the linkages between environmental degradation and armed conflict while also referencing human rights, see UNEP/EA.2/Res.15; UNEP/EA.3/Res.1 (also referenced above).

[221] With respect to the term "applicable international law", draft principle 13, para. (5) of the commentary, states that "it must be noted that the law of armed conflict is *lex specialis* during times of armed conflict, but that other rules of international law providing environmental protection, such as international environmental law and international human rights law, remain relevant". Similarly, draft principle 14, para. (2) of the commentary; Part Four, para. (6) of the commentary; and principle 9, para. (4) of the commentary.

[222] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *I.C.J. Reports 2005*, p. 168, at paras. 216-217.

be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive" (CCPR/C/21/Rev.1/Add.13, para. 11). Further, the Committee recalled that like the rest of the International Covenant on Civil and Political Rights , article 6 of the Covenant continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable, including to the conduct of hostilities, and that while rules of international humanitarian law may be relevant for the interpretation and application of article 6 when the situation calls for their application, both spheres of law are complementary, not mutually exclusive (CCPR/C/GC/36, para. 64). This position has been consistently maintained by the Committee and other United Nations human rights treaty bodies.[223]

Regional human rights courts have adopted the same approach.[224] Notably, in *Georgia v. Russia (II)*, the European Court of Human Rights held the legally appropriate approach to be to examine "the interrelation between the two legal regimes with regard to each aspect of the case and each Convention Article alleged to have been breached [ascertaining] each time whether there is a conflict between the provisions of the Convention and the rules of international humanitarian law."[225]

In light of the above, it is recommended that the draft principles and their commentaries further emphasize the interplay between international humanitarian law and other branches of international law, taking into account the existing practice by human rights mechanisms referred to above.

Observations on the integration of the preventive approach

OHCHR welcomes the integration of the preventive approach throughout the draft principles, establishing a range of preventive measures aiming at avoiding or mitigating environmental damage.[226] As highlighted in draft principle 2, the purpose of the draft principles is to enhance the protection of the environment in relation to armed conflict, including through preventive measures and remedial measures.

In this regard, under human rights treaties such as in the International Covenant on Civil and Political Rights, the general legal obligations of States include the obligation *to respect* and *to ensure* the rights in the respective treaty.[227] States must thus adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations (CCPR/C/21/Rev.1/Add.13, para. 7). The duty to respect entails a State's duty to refrain from committing human rights violations (*ibid.*, para. 6). The duty to ensure encapsulates the general obligation to take positive measures to protect individuals (CCPR/C/21/Rev.1/Add.13, para. 8; CCPR/C/GC/36, para. 21). In relation to the right to life, the Human Rights Committee has noted that States are "under a due diligence obligation to undertake reasonable positive measures, which do not impose on them disproportionate burdens, in response to reasonably foreseeable threats to life originating from [actors and entities] whose conduct is not attributable

[223] See CCPR/C/GC/35, para. 64; CCPR/C/GC/37, para. 97; CEDAW/C/GC/30, paras. 20-21; E/C.12/CAF/CO/1, para. 9; and E/C.12/ISR/CO/4, paras. 8-9.

[224] European Court of Human Rights, *Hassan v. The United Kingdom* [GC], application No. 29750/09, Judgment of 16 September 2014, para. 104; Inter-American Court of Human Rights, *Cruz Sánchez et al. v. Peru*, Judgment of 17 April 2015, para. 272. See also Inter-American Court of Human Rights and the International Committee of the Red Cross, "Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 17. Interacción entre el Derecho Internacional de los Derechos Humanos y el Derecho Internacional Humanitario" (2021).

[225] European Court of Human Rights, *Georgia v. Russia (II)* [GC], application No. 38263/08, Judgment of 21 January 2021, para. 95.

[226] Draft principles 2, 6, 7, 8, and 20, para. 2.

[227] See e.g. International Covenant on Civil and Political Rights, art. 2, para. 1.

to the State" (*ibid.*, para. 21). As further highlighted by the Committee, the "duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity [including] degradation of the environment" (CCPR/C/GC/36, para. 26). The Human Rights Committee has also affirmed that this obligation applies also with respect to environmental pollution (CCPR/C/126/D/2751/2016, para. 7.3). Lastly, the "[i]mplementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm" (CCPR/C/GC/36, para. 62).

Likewise, the Committee on Economic, Social and Cultural Rights has made clear that the International Covenant on Economic, Social and Cultural Rights establishes obligations of States parties to *respect, to protect and to fulfil*.[228] The obligation to protect requires that States adopt legislative, administrative, educational and other appropriate measures, to ensure effective protection against Covenant rights violations linked to business activities, and that they provide victims of such corporate abuses with access to effective remedies (E/C.12/GC/24, para. 14).

These obligations apply both with respect to situations on a State party's territory, and in all contexts where the State party exercises jurisdiction,[229] and are applicable in peacetime as well as during armed conflict.[230] In light of the foregoing, it is recommended that the draft principles express the obligation to protect in general terms, taking into account these understandings of obligations under international human rights law. It is also recommended that these obligations are

[228] E/C.12/GC/24, para. 10. See also in relation to the nature of the obligations under International Covenant on Economic, Social and Cultural Rights and the minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enshrined in the Covenant in Committee on Economic, Social and Cultural Rights, general comment No. 3 (contained in document E/1991/23), paras. 9–10.

[229] CCPR/C/21/Rev.1/Add.13, para. 10; CCPR/C/GC/36, para. 63; CCPR/C/120/D/2285/2013, para. 6.5; E/C.12/GC/24, para. 10. On the extraterritorial obligation to protect, the Committee on Economic, Social and Cultural Rights noted that it includes the obligation by States parties to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, see E/C.12/GC/24, para. 30.

[230] CCPR/C/21/Rev.1/Add.13, para. 11; CCPR/C/GC/36, para. 64. The Committee on Economic, Social and Cultural Rights stated "States should also refrain from unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health, and from limiting access to health services as a punitive measure, e.g. during armed conflicts in violation of international humanitarian law." (E/C.12/2000/4, para. 34). See also OHCHR, "Protection of economic, social and cultural rights in conflict", available at https://www.ohchr.org/Documents/Issues/ESCR/E-2015-59.pdf.

reflected in the commentaries, where relevant.[231] It is also suggested that the draft principles' preventive approach be strengthened throughout, applying a more comprehensive treatment of the duty to respect and to protect against environmental harm.

Observations on non-discrimination

References to the Convention on the Rights of Persons with Disabilities could be included in the commentaries, including to draft principles 23, 24, 25 and 26. In particular, the Commission may wish to refer to article 11 of the Convention referencing the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters. Security Council resolution 2475 (2009) on the rights of persons with disabilities in armed conflicts and humanitarian crisis recalls article 11 of the Convention, underlines the benefit of providing sustainable, timely, appropriate, inclusive and accessible assistance to civilians with disabilities affected by armed conflict, and urges State parties to comply with the obligations applicable to them under the Convention (S/RES/2475, preamble, para. 4 and para. 11). The Committee on the Rights of Persons with Disabilities has issued several concluding observations of relevance to this topic (see e.g. CRPD/C/GBR/CO/1, para. 29 (b); CRPD/C/RWA/CO/1, para. 22 (a)-(c); CRPD/C/NPL/CO/1, para. 20; CRPD/C/OMN/CO/1, para. 23; CRPD/C/PHL/CO/1, para. 23; and CRPD/C/POL/CO/1, para. 18).

Moreover, it is worth noting that human rights mechanisms have repeatedly held that people of African descent suffer disproportionately from environmental pollution and lack of access to clean water (A/HRC/27/68/Add.1; A/HRC/42/59/Add.2; A/HRC/45/44/Add.1; A/HRC/45/44/Add.2; AL USA 33/2020). Corresponding reference could be included in the commentaries to the draft principles.

Office of the United Nations High Commissioner for Refugees

[Original: English]

The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the consolidation of the principles on the protection of the environment during and after armed conflict and during occupation, particularly the recognition and safekeeping of indigenous communities and their environment; and the need to

[231] An example where such revision could be necessary may be draft principle 26, which encourages States to provide relief and assistance to those affected by environmental damage "where the source of environmental damage is unidentified or reparation is unavailable". The commentaries make clear that the notion of unidentified source of environmental damage is intended to denote situations where establishing responsibility is complex, while "unavailable reparation" is intended to denote circumstances where no internationally wrongful act has occurred. However, as noted, the general duty to protect human rights may entail an obligation to take positive measures to protect human rights, irrespective of whether there is an identifiable subject of international law which could be held responsible to provide reparations for the damage to the environment. Moreover, the principle and its commentaries suggest that relief and assistance measures referred to in principle 26 are not intended to refer to measures of reparation following an internationally wrongful act. However, such measures could instead follow as a legal obligation from the general duty to protect human rights. Such an obligation to protect would not be altered where there is available reparation, either from the State exercising jurisdiction or where a third-State is responsible for the environmental damage. Therefore, instead of constituting a surrogate for reparations, they may be more appropriately viewed as complementary to them, and in some circumstances, following from the legal obligations of States.

prevent 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, including by international organizations.

In the view of UNHCR, these principles shed light on the necessary framework required to prevent and reduce the negative impacts on the environment caused by armed conflict, highlighting the vulnerability of peoples, their ancestral territories and the risk of human displacement. These principles bring much-needed clarifications to the application of precautionary measures that should be upheld by all actors involved in circumstances of armed conflict, including international organizations such as UNHCR, that possess a clear mandate to provide relief and assistance to displaced populations and host communities.

UNHCR welcomes the specific attention given to the relationship between human displacement, the environment and armed conflict. This is particularly relevant for UNHCR since the adverse effects of environmental degradation and the interaction with armed conflict may, in some circumstances, constitute elements which may form the basis of claims for refugee status. People displaced across borders may be refugees when environmental degradation limits access to and control over land, natural resources and livelihoods, in conditions which lead to persecution and violation of individual rights and freedoms. Entire populations may be gradually or immediately affected or suffer longer-term diminutions in their enjoyment of human rights, risks against which the State is unable or unwilling to protect, particularly in times of conflict.

In addition, UNHCR welcomes the call made to States and international organizations to protect the environment in areas where displaced people are located or residing. Recognizing a right to a healthy environment in times of conflict can advance the protection of refugees, other displaced people and their host communities.

UNHCR would like to take this opportunity to suggest some adjustments and clarifications to the International Law Commission, potentially through its commentary to the principles, on the following:

- The principles recall that States should take appropriate measures in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit. It would be appreciated if the Commission could clarify the extent to which these principles also apply to the protection of the environment of territories where other peoples reside, such as ethnic minorities who depend on certain natural resources. Further, it would also be beneficial to acknowledge the protection of territories that are part of the livelihood of nomadic peoples. For this reason, UNHCR suggests a more inclusive term that includes not only indigenous peoples but other communities as well.

- While the principles and the commentaries clarify that States must consult and cooperate with indigenous communities to determine the entry and operation of military forces and military activities in their territories, it would be appreciated if the International Law Commission can elaborate on two specific issues. First it would be helpful to shed light on how States would operate whenever military activities taking place in ancestral territories concern more than one State, meaning that the process of consultation with indigenous peoples is not exclusive of one State's jurisdiction. Second, it would be appreciated if the Commission could expand on the responsibility of States in preventing non-State actors and corporations from breaching and negatively affecting ancestral territories in the event of armed conflict. While the principles are clear on the norms that States must fulfil in the exercise of their military activities, there should be greater clarity on

what are the positive and negative obligations that States must enforce to prevent non-state actors from affecting ancestral territory.

- The commentary to principle 8, on human displacement, refers in paragraph (6) to the Global Compact for Safe, Orderly and Regular Migration, as a recent General Assembly-affirmed instrument which refers to the relationship between migration and environmental degradation. UNHCR notes that this section of the commentary might also usefully include a reference to the global compact on refugees, also affirmed by the General Assembly in December 2018 (A/RES/73/151, A/73/12 (Part II)). The global compact on refugees also refers relevantly to the role of environmental degradation in contributing to forced displacement, and the need for guidance and support to address protection and other humanitarian challenges in this context (see UNHCR, *Climate change and the Global Compact on Refugees*, 2018, available at www.unhcr.org/5c9e13297.pdf; see also V. Türk, and M. Garlick, "Addressing displacement in the context of disasters and the adverse effects of climate change: elements and opportunities in the global compact on refugees", *International Journal of Refugee Law*, vol. 31, No. 2-3 (June/October 2019), pp. 389–399, https://doi.org/10.1093/ijrl/eez029).

- Finally, the principles acknowledge the application of remedial measures to mitigate environmental damage after armed conflict. It would be appreciated if the Commission could elaborate further on how these remedial measures – including relief and assistance – would operate when populations have been displaced.

Organisation for the Prohibition of Chemical Weapons

[Original: English]

The commentaries make explicit reference to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction ("Chemical Weapons Convention" or "Convention").[232] The draft principles and commentaries also refer to matters relevant to the Chemical Weapons Convention, including remnants of war and remnants of war at sea.[233]

The following response describes the various ways in which the provisions of the Chemical Weapons Convention incorporate and amplify environmental concerns. In doing so, it provides examples of chemical weapons removal operations, conducted pursuant to or in connection with the Chemical Weapons Convention, which were carefully designed and implemented in order to comply with domestic and international environmental standards. The response then examines the provisions of the Chemical Weapons Convention dealing with abandoned chemical weapons ("ACWs"), old chemical weapons ("OCWs"), and sea-dumped chemical weapons ("SDCWs"), which are of particular relevance to […] draft principles 27 and 28 on remnants of war and remnants of war at sea, respectively. The discussion provides examples of the practice of States parties in pursuit of these obligations under the Chemical Weapons Convention and highlights the emphasis that has been placed upon environmental protection and preservation.

[232] Commentaries, fn. 1431.

[233] Commentaries, p. 220 (referring to "special treaty-based prohibitions of certain weapons (such as biological and chemical weapons) that may cause serious environmental harm"); pp. 292-293 (referring to the relative risks of moving chemical weapons that have been dumped at sea as opposed to leaving them *in situ*); p. 295 (fn. 1434) (referring to General Assembly resolution 71/220 on environmental effects related to waste originating from chemical weapons dumped at sea and the need for cooperative measures to address this matter); p. 295 (fn. 1436) (referring to legal challenges arising from remnants of war at sea).

International environmental norms mainstreamed into the Chemical Weapons Convention

The negotiation of the Chemical Weapons Convention in the United Nations Conference on Disarmament demonstrated the concern of the drafters for safeguarding the environment.[234] As a result, the Convention possesses a number of provisions regulating the storage, transport, and destruction of chemical weapons in an environmentally safe manner.[235] Moreover, the Convention prohibits certain destruction methodologies, such as dumping in any body of water, land burial, or open-pit burning. The mainstreaming of international environmental norms into the Chemical Weapons Convention is consistent with the United Nations General Assembly's emphasis upon the importance of the observance of environmental norms in the preparation and implementation of disarmament agreements.[236]

Article IV, paragraph 10, of the Chemical Weapons Convention provides: "[e]ach State Party, during transportation, sampling, storage and destruction of chemical weapons, shall assign the highest priority to ensuring the safety of people *and to protecting the environment*. Each State Party shall transport, sample, store and destroy chemical weapons in accordance with its national standards for safety and emissions" (emphasis added).[237] It may also be mentioned that a possessor State Party has an obligation to obtain, for each of its chemical weapons destruction facilities, the domestic environmental permits required for the destruction operations to be conducted there, pursuant to paragraph 32 of Part IV(A) of the Annex on Implementation and Verification of the Convention ("Verification Annex").

Following World War II, three disposal methodologies were used for chemical weapons: land burial, open pit burning, and dumping in large bodies of water. With the growing environmental awareness in the twentieth century, States parties, when drafting the Convention, prohibited such destruction methodologies. Part IV(A) of the Verification Annex, at paragraph 13, stipulates that: "[e]ach State Party shall determine how it shall destroy chemical weapons, except that the following processes may not be used: *dumping in any body of water*, *land burial* or *open-pit burning*. It shall destroy chemical weapons only at specifically designated and appropriately designed and equipped facilities" (emphasis added).

From 2013 to 2014, the Organisation for the Prohibition of Chemical Weapons (OPCW) (through the OPCW–United Nations Joint Mission on the Elimination of

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[234] "Final record of the Five Hundred and Eighty-Sixth Plenary Meeting" (7 March 1991) CV/PV.586 (Book 41). The numerous and complex records from 1969–1992 of the United Nations Conference on Disarmament (and its predecessors) relating to the drafting and negotiation of the Chemical Weapons Convention have been compiled into a multi-volume set by the Canadian Arms Control and Disarmament Division of External Affairs and International Trade (located in Ottawa, Canada). Hereinafter, these documents will be referred to as "Chemical Weapons Convention *Travaux Préparatoires*", with the document reference of the Conference on Disarmament.

[235] See generally Grant Dawson, "The operation of the Chemical Weapons Convention as a multilateral environmental instrument in the mission to remove and destroy the remainder of Libya's chemical weapons stockpile", *Int'l Union for the Conservation of Nature, Int'l Academy of Environmental Law Journal*, No. 9 (2018).

[236] General Assembly resolution, "Observance of environmental norms in the drafting and implementation of agreements on disarmament and arms control" (A/RES/63/51, adopted 2 December 2008 and issued 12 January 2009).

[237] See also Chemical Weapons Convention, art. VII, para. 3: "[e]ach State Party, during the implementation of its obligations under this Convention, shall assign the highest priority to ensuring the safety of people *and to protecting the environment*, and shall cooperate as appropriate with other States Parties in this regard" (emphasis added).

the Chemical Weapons Programme in the Syrian Arab Republic) coordinated international efforts to remove and destroy the Syrian chemical weapons arsenal during an active armed conflict in order to prevent the further use of chemical weapons.[238] In 2016, OPCW coordinated a multinational operation to remove the remainder of the chemical weapons stockpile of Libya and oversaw an environmental clean-up of the storage facility that housed the chemicals.[239] These operations were conducted in strict compliance with international, regional, and national environmental protection norms and were examples of OPCW assigning the highest priority to applicable environmental standards during its destruction operations, as specified in article IV of the Convention.[240]

[…] [T]he Chemical Weapons Convention sets out detailed regimes that are of direct relevance to the substance and aims of the […] draft principles, particularly in relation to abandoned, old, and sea-dumped chemical weapons. As was stated during the negotiation of the Convention in the United Nations Conference on Disarmament, "[t]he destruction of chemical weapons is not just a political and security objective; it is also an environmental objective."[241] That environmental imperative has also been observed by OPCW and its States parties in seeking to rid the world of chemical weapons.

United Nations Economic and Social Commission for Asia and the Pacific

[Original: English]

[…] Building on the Geneva Conventions and subsequent protocols, the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) suggests adding a preamble stating the spirit of these principles, considering that albeit undesirable and harmful, armed conflicts may also be able to minimize environmental damage. In line with the Universal Declaration of Human Rights, one of the goals of the United Nations is to work towards building an arms-free and peaceful world; in the meantime, it is important to take immediate action to minimize the damages, including environmental impacts that may hinder post-conflict recovery work.

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[238] OPCW Executive Council Decision, "Destruction of Syrian chemical weapons" (EC-M-33/DEC.1, dated 27 September 2013); Background of the Organisation for the Prohibition of Chemical Weapons – United Nations Joint Mission.

[239] OPCW Executive Council Decision, "Destruction of Libya's remaining chemical weapons stockpile" (ECM-51/DEC.1, dated 24 February 2016); OPCW Executive Council Decision, "Destruction of Libya's Remaining Chemical Weapons" (EC-M-52/DEC.1, dated 20 July 2016); OPCW news on the destruction of Libya's chemicals; Grant Dawson and Evangelia Linaki, "The legal challenges in the mission to remove the remaining chemical weapon stockpiles from Libya", *Journal of Conflict and Security Law*, vol. 24, No. 1 (2019), pp. 53–70 [Dawson and Linaki (2019)], at pp. 58-61.

[240] OPCW Executive Council Decision, "Detailed Requirements for the Destruction of Syrian Chemical Weapons and Syrian Chemical Weapons Production Facilities" (EC-M-34/DEC.1, dated 15 November 2013); OPCW Executive Council Decision, "Destruction of Syrian Chemical Weapons at Commercial Facilities and Arrangement Governing On-site Inspections" (EC-M-38/DEC.1, dated 30 January 2014), annex; OPCW Executive Council Decision, "Detailed Requirements for the Destruction of Libya's Remaining Category 2 Chemical Weapons" (EC-M-52/DEC.2, dated 27 July 2016), paras 4, 11; OPCW, Executive Council, "Note by the Director-General: Plan for the Destruction of Libya's Remaining Category 2 Chemical Weapons Outside the Territory of Libya" (EC-M-53/DG.1, dated 19 August 2016), para. 12; Dawson and Linaki (2019), at pp. 61-62, 69–70.

[241] Chemical Weapons Convention *Travaux Préparatoires*, "Final record of the Five-Hundred and Eighty-Sixth Plenary Meeting" (7 March 1991) CV/PV.586 (Book 41).

A preamble may also include references to the importance of the environment for livelihoods, food and nutrition security and maintaining the traditions and cultures, which is many times intangible and irreplaceable, and enables various aspects of human rights.

[…]

For the eventual effective application of these principles, ESCAP observes a lack of definition of the concept "environment", as shall be safeguarded in armed conflicts. Ideally, a definition should include the biosphere, geosphere, atmosphere, cryosphere and hydrosphere, and potentially the troposphere envisaging potential participation of aircraft. Likewise, it should be clear that the term environment, as construed by these principles, is an overarching construct that includes the marine environment.

[…]

While these comprehensive principles address the protection of the environment in relation to human life, it strongly believes there should be a principle or an additional provision within one of the principles (i.e. principle 1, scope/definitions, principle 13) regarding the respect for wildlife. Animal life is important *per se*, and also considering the role it plays within an ecosystem as an integral part of the environment. These principles should explicitly embrace the protection of wildlife and minimize any animal casualties during armed conflict. This is of particular importance for endangered species near extinction, including forms of life below water.

United Nations Economic Commission for Latin America and the Caribbean

[Original: English]

The United Nations Economic Commission for Latin America and the Caribbean (ECLAC) observes that the protection of the environment and the sustainable management of natural resources are fundamental for peace, stability and security. A clean, healthy and safe environment is the foundation on which sustainable development and the full respect, promotion and protection of human rights are premised. Moreover, sound, informed and participatory environmental management contributes to conflict prevention and resolution. Such postulates have inspired the 1992 Rio Declaration on Environment and Development[242] including principles 4, 10, 11, 13, 24 and 25.

At the national level, the right to a healthy environment has been widely enshrined in constitutions and legal frameworks by countries of the region[243]. At the regional level, the Escazú Agreement,[244] adopted on 4 March 2018, also safeguards the right of every person to live in a healthy environment and articulates a regional benchmark on access to information, public participation and justice in

[242] See General Assembly, *Report of the United Nations Conference on Environment and Development*, vol. I (A/CONF.151/26 (Vol. I); United Nations publication, Sales No. E.93.I.8), annex I.

[243] See ECLAC, *Access to information, participation and justice in environmental matters in Latin America and the Caribbean: towards achievement of the 2030 Agenda for Sustainable Development* (LC/TS.2017/83), Santiago, 2018, available at https://repositorio.cepal.org/bitstream/handle/11362/43302/1/S1701020_en.pdf.

[244] See ECLAC, Regional Agreement on Access to information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (LC/PUB.2018/8/-*), Santiago, 2018, [online]: https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf and the Observatory on Principle 10 in Latin America and the Caribbean at http://observatoriop10.cepal.org/en.

environmental matters.[245] The Escazú Agreement is the first regional environmental treaty of Latin America and the Caribbean and the first in the world to contain specific provisions on environmental human rights defenders.

The Escazú Agreement builds on principle 10 of the Rio Declaration and provides clear standards with respect to access to information, public participation and access to justice in environmental matters by Latin American and Caribbean countries. It is likewise synergistic with the Aarhus Convention, referenced in the draft principles.

Considering the complementary nature of the Escazú Agreement, the International Law Commission may wish to additionally mention the Escazú Agreement where the Aarhus Convention is referenced. The International Law Commission may also refer to the ECLAC Observatory on Principle 10 in Latin America and the Caribbean [246] for additional supporting information. The Observatory contains information and references to the constitutions, laws, policies and case law of the 33 countries of Latin America and the Caribbean and applicable treaties related to environmental access rights.

B. Specific comments on the draft principles[247]

1. Draft principle 1 – Scope

International Committee of the Red Cross

[Original: English]

As noted in this principle, the draft principles apply to the protection of the environment before, during or after an armed conflict. ICRC welcomes this temporal approach. However, a division is then made in the draft principles between those applicable during armed conflict and those applicable in situations of occupation. As occupation is regarded as a type or part of international armed conflict and treated as such by relevant instruments in international humanitarian law, particularly the Hague Regulations of 1907 and the Geneva Conventions of 1949, this approach can lead to some confusion. As a result, ICRC recommends that occupation be explicitly mentioned as a type of armed conflict in this draft principle, and that this be further clarified in the commentary.

Furthermore, although the focus of the draft principles is on States, non-State armed groups that are parties to a non-international armed conflict are also bound by international humanitarian law. It would be important to further clarify the scope *ratione personae* of the draft principles in the commentary on draft principle 1.

[See also comment under general comments.]

Office of the United Nations High Commissioner for Human Rights

[Original: English]

[See comment under general comments.]

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[245] The current status of signatories and parties is available at the Observatory on Principle 10 in Latin America and the Caribbean: https://observatoriop10.cepal.org/en/treaties/regional-agreement-access-information-public-participation-and-justice-environmental

[246] See http://observatoriop10.cepal.org/en.

[247] Quotations of the draft principles and commentaries thereto in the comments and observations as submitted have been omitted where appropriate. The full text of the draft principles and commentaries is contained in document A/74/10.

United Nations Economic and Social Commission for Asia and the Pacific

[Original: English]

While the scope successfully encompasses the temporal dimension *ratione temporis*, ESCAP considers it would the helpful to include the *ratione materiae* element as elaborated in the commentaries, with explicit mention to both international and non-international armed conflict, by recognized States or others. Consequently, these principles should be applicable and enforceable within the territories of all signatories, even if the armed conflict has been engaged by third parties.

United Nations Environment Programme

[Original: English]

It should be noted that within the Commission process, the former Special Rapporteur has suggested working definitions of both "armed conflict" and "environment", and the inclusion of definitions for these terms would be useful in promoting coherence among legal frameworks on this topic.

The draft principles should consider the distinction between internal and international armed conflicts more specifically, although the principles are generally understood to address both. It should be noted that when considering "armed conflict", over 40 per cent of *internal* armed conflicts over the last 60 years are linked to natural resource issues, and "maintaining a peaceful society depends on vindication of environment-related rights". Given that most armed conflicts today are non-international or civil wars, much of the existing legal framework does not necessarily apply and thus requires special consideration in extending the application of existing obligations and norms.[248]

2. Draft principle 2 – Purpose

International Committee of the Red Cross

[Original: English]

ICRC welcomes draft principle 2 and the references to preventive and remedial measures to enhance the protection of the environment in relation to armed conflict. As international humanitarian law contains relevant obligations to avoid damage from occurring in the first place, see for instance Rule 8 of the ICRC Guidelines, ICRC recommends that a reference be added to "avoiding" in addition to "minimizing" damage to the environment.

Office of the United Nations High Commissioner for Human Rights

[Original: English]

[See comment under general comments.]

[248] A/70/10, para 153. While some members of the Drafting Committee were reluctant to include the definitions, others considered that "such a provision would assist in properly determining the scope of the text and clarify the subject matter at hand". United Nations Environment Programme, *Environmental Rule of Law: First Global Report*, p. 19. United Nations Environment Programme , *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, p. 6. "Clarification is urgently needed, for example, for extending applicable rules to non-international armed conflicts."

United Nations Environment Programme

[Original: English]

It should be added that "preventative measures" include [*avoiding*] and minimizing damage to the environment.[249]

Introduction to Part Two of the draft principles

United Nations Environment Programme

[Original: English]

Principles of general application should include the gender dimension with respect to armed conflicts, the environment, and peacebuilding.[250]

3. Draft principle 3 – Measures to enhance the protection of the environment

Environmental Law Institute

[Original: English]

[See comment under general comments.]

International Committee of the Red Cross

[Original: English]

ICRC strongly welcomes draft principle 3 and its formulation. As mentioned in the commentary, the law of armed conflict imposes several obligations on States. This includes an obligation to act in accordance with their obligations to adopt domestic legislation and other measures at the national level to ensure that international humanitarian law rules, including those protecting the natural environment, are put into practice (see ICRC Guidelines, rule 27). As some of these obligations are mentioned in the commentary while others are not, ICRC recommends that a caveat be included to emphasize the non-exhaustive nature of the list provided in the commentary. Furthermore, ICRC has provided more specific comments on some of the obligations, including those related to the dissemination of international humanitarian law to the armed forces and among the civilian population (see ICRC Guidelines, rules 29 and 30) and on legal review of new weapons, means or methods of warfare (see ICRC Guidelines rule 32). For instance, on obligations related to the repression of war crimes, ICRC recommends that the commentary to the draft principle be complemented to include other serious violations of international humanitarian law relevant to the protection of the natural environment beyond the grave breaches rules (see ICRC Guidelines, rule 28).

[249] United Nations Environment Programme, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, p. 20. ICRC, *Customary International Humanitarian Law,* Vol. 1: *Rules*, p. 147. "Rule 44. Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken *to avoid*, and in any event to minimise, incidental damage to the environment …" (emphasis added).

[250] UNEP/EA.2/Res.15 (27 May 2016), "*Recognizing* further the specific negative effects of environmental degradation on women and the need to apply a gender perspective with respect to the environment and armed conflicts."

International Union for the Conservation of Nature

[Original: English]

IUCN welcomes the draft principle which reminds States in paragraph 1 of their existing international law obligations, including that of the dissemination of the laws of armed conflict as contained in articles 83 and 19 of Additional Protocols I and II, respectively. Furthermore, IUCN suggests that the commentary recognizes that in order to effectively protect the environment during the whole cycle of armed conflict, environmental norms should be integrated into all aspects of policies and standing operating procedures of the armed forces and the defence sector, particularly for the prevention of environmental damage.

United Nations Environment Programme

[Original: English]

The principle should include reference to "strengthening environmental rule of law."

The principles should clarify to what extent and by what means of determining the international obligations of States includes the ongoing obligations of multilateral environmental agreements.[251]

4. Draft principle 4 – Designation of protected zones

Environmental Law Institute

[Original: English]

[See comment under general comments.]

International Atomic Energy Agency

[Original: English]

Paragraph (6) of the commentary to principle 4 […] addresses the significance of the term "cultural" with a view to protected zones. In this context, it is noted that within IAEA Safety Standards, definition of the term "environment", in the context of environmental protection, has been established, *inter alia*, by an information note referencing the "protection and conservation of … amenities used in … cultural … activities" ("Radiation Protection and Safety of Radiation Sources: International Basic Safety Standards" (IAEA General Safety Requirements Part 3, No. GSR Part 3), p. 391).

Paragraph (9) of the commentary to the same principle refers to designation of protected areas by reference to "rights of indigenous peoples" and principle 5 […]

[251] UNEP/GC.27/9 (2013). United Nations Environment Programme, *Environmental Rule of Law: First Global Report*, pp. 231-232: "Before, during, and after conflict, conditions of weak environmental rule of law enable illicit, and often harmful, exploitation of natural resources…Strengthening environmental rule of law – including a sound legal framework, institutional capacity, and functional mechanisms for peacefully resolving disputes – is an important means to prevent or mitigate the effects of the resource curse and address grievances that could escalate to violence, and thus a priority for conflict prevention." United Nations Environment Programme, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, pp. 5, 43-58, noting that "the provisions of multilateral environment agreements (MEAs) should be regarded as continuing to apply during both international and non-international armed conflict, unless they specifically stipulate otherwise …. [MEAs] deal[] with various areas and subjects of protection."

refers, *inter alia*, to the "special relationship between indigenous peoples and their environment" (para. (1) of the commentary). With respect to radioactive discharges, it is noted that IAEA Safety Standards have denominated, among others, "indigenous peoples living in the vicinity of [a] facility or activity under consideration" as "interested parties" ("Regulatory Control of Radioactive Discharges to the Environment" (IAEA General Safety Guide, No. GSG-9), p. 42).

International Committee of the Red Cross

[Original: English]

ICRC recommends that this principle be reformulated such that it does not exclude the overlap in meaning between "environmental" and "cultural" importance that is set out in the commentary, without *requiring* the overlap. While ICRC shares the view that areas of major environmental importance will most often have cultural significance (particularly in the meaning of, for example, the preamble of the Convention on Biological Diversity), this should not be a requisite definitional element. ICRC notes that regardless of this change, the commentary that follows could largely stay the same, because its remarks regarding the relationship between environmental importance and cultural importance remain relevant and accurate, in its view.

This reformulation could be as follows: "States should designate, by agreement or otherwise, areas of major environmental importance as protected zones, including where those areas are of major cultural importance."

ICRC recommends this for two reasons. First, because under international humanitarian law the establishment of demilitarized zones or non-defended localities is not limited to areas of cultural importance; a wide variety of agreements are permitted under international humanitarian law (see ICRC Guidelines, para. 202). Recommendation 17 of the ICRC Guidelines is thus worded with a broad focus on environmental protection: "Parties to a conflict should endeavour to conclude agreements providing additional protection to the natural environment in situations of armed conflict". See further paragraphs 202-213 thereof.

Second, several of the conventions, non-binding instruments, and legislation examples described in the commentary refer to culture as a disjunctive element of the environment or environmental importance (i.e. using "or"), rather than as a definitional requirement.

[See also comment on draft principle 17.]

International Union for the Conservation of Nature

[Original: English]

Recognizing the many obligations on States to designate spaces within their territories as protected areas,[252] including in the marine environment, draft principle 4 could be rephrased as a mandatory obligation (i.e. "shall") "in accordance with a State's international legal obligations" (such as wetlands of international importance, Sites of Special Scientific Interest, world cultural and natural heritage). IUCN suggests that the draft principle could also go further and stipulate that States "*should* also designate other environmentally important areas".

[252] For example, 1992 Convention on Biological Diversity, art. 8; 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, , art. 2; 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, art. 3.

IUCN suggests that the commentary could also stipulate that when designating such spaces in peacetime, States are strongly encouraged to take practical measures to plan for protection during armed conflict or other emergencies, including to avoid locating facilities or infrastructure in such locations that could be designated as military objectives according to the laws of armed conflict.

IUCN welcomes reference in the commentary to the IUCN definition of "protected areas" as follows: "natural or cultural area[s] of outstanding international significance from the points of view of ecology, history, art, science, ethnology, anthropology, or natural beauty, which may include, *inter alia*, areas designated under any international agreement or intergovernmental programme which meet these criteria".[253] It also recognizes the authority of Indigenous Peoples' and Community Conserved Territories and Areas[254] as governance actors for conservation outcomes, and urge the Commission to include reference to the areas in its commentary to draft principles 4, 5 and 17.

IUCN welcomes the approach of the Commission in trying to keep the provision as broad as possible by referring to both major "environmental" *and* "cultural" importance. It is, however, concerned that this phrasing narrows the scope of the draft principle unnecessarily and it suggests instead that the draft principle is rephrased to "and/or" so as to remove the cumulative requirement. Thus, IUCN suggests rephrasing as follows: "Pursuant to their international obligations States shall designate and protect areas of environmental and/or cultural significance, and are encouraged to designate other important environmental and/or cultural areas for protection."

United Nations Economic and Social Commission for Asia and the Pacific

[Original: English]

As suggested by this principle, States should designate areas of major environmental and cultural zones. ESCAP believes it is important that States recognize the United Nations Educational, Scientific and Cultural Organization's World Heritage sites, as well as Marine Protected Areas, whose biodiversity and ecosystems may be invaluable, under the premise they should simultaneously be "demilitarizes zones" within the law of armed conflict.

United Nations Environment Programme

[Original: English]

It may be noted that damage to certain components of a natural environment, including endangered species or particularly delicate or sensitive ecosystems, will *later result in a greater level of damage*, including direct and indirect effects on the natural environment and the population.

While some multilateral environmental agreements are referenced in the commentary as guidelines to determine areas of "major environmental and cultural

[253] IUCN Commission on Environmental Law and the International Council of Environmental Law, 1996 Draft Convention on the Prohibition of Hostile Military Activities in Internationally Protected Areas, art. 1.

[254] See www.iucn.org/theme/protected-areas/our-work/governance-equity-and-rights/global-support-initiative-iccas.

importance," clarification of the ongoing obligations of multilateral environmental agreements during armed conflict could also be useful here.[255]

5. Draft principle 5 – Protection of the environment of indigenous peoples

Environmental Law Institute

[Original: English]

While the inclusion of draft principle 5 represents an important step forward in the recognition of the environmental rights of indigenous peoples, the International Law Commission should consider the growing weight of evidence that draft principle 5, paragraph 2, represents an existing legal obligation.

Draft principle 5 […] reflects the growing international consensus that indigenous peoples have a special connection to the lands they have traditionally occupied. This growing consensus is reflected in a variety of global and regional conventions, declarations of international organizations, and the decisions of international courts. Particular attention focuses on both the substantive right of indigenous peoples to the land, resources, and environment on which they have traditionally relied, as well as the procedural rights of free, prior and informed consent (and more broadly consultation).

The 1989 Indigenous and Tribal Peoples Convention (ILO 169), a treaty organized by the International Labour Organization, recognized the "special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories . . . which they occupy or otherwise use".[256] In 2007, an overwhelming majority of the United Nations General Assembly approved the United Nations Declaration on the Rights of Indigenous Peoples, which affirmed a right of indigenous peoples to "redress … for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been … damaged without their free, prior and informed consent," as well as forbid the military use of indigenous lands without the same free, prior, and informed consent.[257] Nine years later, the Organization of American States released a declaration recognizing the same rights that the United Nations Declaration on the Rights of Indigenous Peoples had, in addition to an explicit obligation on the part of States to protect indigenous peoples "in situations or periods of internal or international armed conflict", as well as an obligation for States to "adopt effective reparation measures and provide adequate resources for said reparation, in conjunction with the indigenous peoples concerned, for the damages or harm caused by an armed conflict."[258]

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[255] United Nations Environment Programme, *Integrating Environment in Post Conflict Needs Assessments: UNEP Guidance Note* (March 2009). "Warfare in Biodiversity Hotspots," *Conservation Biology*, Vol. 23, No. 3, 578-587, finding that over 90 percent of major armed conflicts between 1950 – 2000 occurred in countries containing biodiversity hotspots, "with more than 80% of these conflicts taking place directly in the biodiversity hotspot areas." IISD, *MEAs, conservation and conflict – A case study of Virunga National Park, DRC* (2008).

[256] Convention (No. 169) Concerning Indigenous and Tribal People in Independent Countries (ILO 169) (opened for signature 27 June 1989, entered into force 5 September 1991), United Nations, *Treaty Series*, vol. 1650, No. 28383, p. 383, art. 13, para. 1.

[257] United Nations Declaration on the Rights of Indigenous Peoples, General Assembly resolution 61/295 of 13 September 2007, annex, (arts. 28, para. 1 and 30, para. 1. The General Assembly approved the United Nations Declaration on the Rights of Indigenous Peoples 144 in favour and 4 opposed, with Australia, Canada, New Zealand, and the United States voting in opposition.

[258] Organization of American States, General Assembly, American Declaration on the Rights of Indigenous Peoples, resolution 2888 (XLVI-O/16) (Washington, D.C., 15 June 2016), art. XXX, paras. 3 and 4 (b).

Regional courts and tribunals have likewise affirmed both the special relationship of indigenous people to their lands and State obligations with respect to that special relationship. In 2007, the same year that the General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples, the Inter-American Court of Human Rights recognized the State obligation to seek and receive the "free, prior, and informed consent" of indigenous peoples with regard to use or damage of their lands.[259] In 2012, the Court again found that indigenous peoples inherently have a "close relationship with their traditional lands and natural resources, not only because these are their main means of subsistence, but also because they constitute an integral component of their cosmovision, religious beliefs and, consequently, their cultural identity."[260] And in 2017, the African Court on Human and Peoples' Rights applied the principles of the United Nations Declaration on the Rights of Indigenous Peoples in its decision recognizing the land rights of the Ogiek indigenous community.[261]

Given the surge in treaties, declarations, and judgments of multiple regional courts, it is worth questioning whether the principles laid out in draft principle 5, particularly paragraph 2, ought to be regarded as binding.

[See also comment under general comments.]

International Atomic Energy Agency

[Original: English]

[See comment on draft principle 4.]

International Committee of the Red Cross

[Original: English]

In general, while it goes beyond its area of expertise, ICRC welcomes this draft principle and its commentary. It wonders, however, if the reference to "in the event of an armed conflict" does not unduly restrict the draft principle to the "during" phase and whether "in relation to" would not more adequately cover the intended scope of this draft principle as per paragraph (1) of the commentary. On a related note, ICRC would also question the limitation in paragraph 2 of the draft principle to "after an armed conflict"; although remediation may be difficult during an armed conflict, it would be welcome for these measures to be taken already during armed conflict, to the extent possible and as required by international law, especially in light of the long duration of contemporary armed conflicts. For instance, it notes that international law contains certain rules that require action before the end of an armed conflict, such as the clearance of landmines. Finally, as the draft principle is focused on States, ICRC would welcome a reference in the commentary to clarify that non-State armed groups also have obligations under international humanitarian law.

[259] *Case of the Saramaka People v. Suriname*(Preliminary Objections, Merits, Reparations, and Costs) , Judgment, 28 November 2007, Inter-American Court of Human Rights, Series C, No. 172, para. 134.

[260] *Río Negro Massacres v. Guatemala* (Preliminary objection, merits, reparations and costs), Judgment, 4 September 2012, Inter-American Court of Human Rights, Series C, No. 250, para. 177, footnote 266.

[261] *African Commission on Human and Peoples' Rights v Republic of Kenya*, Case No. 006/2012, Judgment, 25 May 2017, African Court on Human and Peoples' Rights, , paras.122-131.

International Union for the Conservation of Nature

[Original: English]

Both the 2007 United Nations Declaration on the Rights of Indigenous Peoples (at art. 26, para. 1) and a growing body of human rights jurisprudence[262] recognize that indigenous peoples have land or property rights over an area that is broader than simply the area that they inhabit, such as their "lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired". IUCN suggests, therefore, that the wording of the draft principle is rephrased to better reflect this broader concept of indigenous property and land, water and sea rights, and the duty to cooperate therein.

[See also comment on draft principle 4.]

Office of the United Nations High Commissioner for Human Rights

[Original: English]

OHCHR welcomes the reference in draft principle 5 to "protect the environment of the territories that indigenous peoples inhabit" and to the participation of indigenous communities in the question of remedial measures. United Nations human rights mechanisms have repeatedly raised concerns and recommendations in relation to the impact of environmental damage on indigenous peoples and their enjoyment of human rights.[263] Indeed, damage to their territory and lands may affect their survival and well-being, as well as specific ways of life, livelihood and ancestral traditions.

For the purpose of taking remedial measures, the draft principle provides for such consultations and for cooperation with indigenous peoples concerned "[a]fter an armed conflict" (draft principle 5, para. 2). In light of the application of human rights during armed conflict and the duty to protect the rights of individuals under the jurisdiction of the State highlighted above, the duty to take measures to take taking remedial measures is not temporally restricted to after the end of armed conflict. Thus, consultations and cooperation should not be limited as a matter of law to post-conflict situations.

Further, the draft principle highlights that States "should undertake effective consultations and cooperation with the indigenous peoples concerned … for the purpose of taking remedial measures." Under human rights law, such remedial measures may follow as matter of legal obligation. In particular, article 28 of the United Nations Declaration on the Rights of Indigenous Peoples states that indigenous peoples "have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been … damaged without their free, prior and informed consent" (see also United Nations Declaration on the Rights of Indigenous Peoples, art. 20, para. 2).

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[262] *African Commission on Human and Peoples' Rights v Republic of Kenya*, Case No. 006/2012, Judgment, 25 May 2017, African Court on Human and Peoples' Rights, . See also the *Lhaka Honhat* case: *Case of the Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v. Argentina (Merits, reparations and costs)*, Inter-American Court of Human Rights, 6 February 2020.

[263] CERD/C/CAN/CO/21-23, para. 19 (a); CERD/C/USA/CO/7-9, para. 10; CERD/C/MEX/CO/18-21, para. 23; CERD/C/ECU/CO/23-24, paras. 16-17; E/C.12/CMR/CO/4, paras. 16-17; E/C.12/COD/CO/4, para. 14, and E/C.12/COL/CO/6, para. 15. See also A/HRC/36/46; A/71/229; and A/HRC/27/66.

The draft principle also recommends that States undertake consultations and cooperation with indigenous peoples "through appropriate procedures and in particular through their own representative institutions". As stated in article 19 of the United Nations Declaration on the Rights of Indigenous Peoples , "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and *informed consent* before adopting and implementing legislative or administrative measures that may affect them" (emphasis added). Further, in its general recommendation No. 23 (1997) on the rights of indigenous peoples, the Committee on the Elimination of Racial Discrimination called upon States to ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent. In its Views concerning the *Poma Poma v. Peru* case, the Human Rights Committee stated that when an indigenous community constitutes a minority, measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community require the participation in the decision-making process by the community in question. Such process requires not simply consultation but the free, prior and informed consent of the members of the community. (CCPR/C/95/D/1457/2006, para. 7.6). United Nations human rights treaty bodies have also addressed this issue in their concluding observations in relation to States' periodic reports (A/52/18, annex V, para. 4.d; see also CCPR/C/COL/CO/7, paras. 42-43; CCPR/C/GTM/CO/4, para. 39 (a); E/C.12/COL/CO/6, para. 18 (b); CERD/C/MEX/CO/18-21, para. 21(a)(c); CERD/C/COL/CO/17-19, para. 13 (a)).[264]

In light of the foregoing, OHCHR recommends taking into account the above standards set forth in international human rights instruments in the further framing of draft principle 5.

Office of the United Nations High Commissioner for Refugees

[Original: English]

[See comment under general comments.]

United Nations Environment Programme

[Original: English]

Principle 5, paragraph 1, in accordance with 5, paragraph 2, should include the importance of the protection of the environment of indigenous peoples through effective consultation with indigenous peoples.[265]

[264] See also A/HRC/36/46, paras. 44-50; and A/HRC/27/66, paras. 56-58.

[265] A/CN.4/720, where the Special Rapporteur noted some arguments for the inclusion of addressing "the obligations of belligerents to take into consideration the traditional knowledge and practices of indigenous peoples in relation to their natural environment", seeking consultation of affected indigenous peoples not only following an armed conflict, but before, during, and after conflict. United Nations Environment Programme, *Environmental Rule of Law: First Global Report*, p. 162, recognizing that indigenous communities are often accorded additional protections given their close economic and cultural association with the environment and their traditional disempowerment from legal and governmental systems.

6. Draft principle 6 – Agreements concerning the presence of military forces in relation to armed conflict

Environmental Law Institute

[Original: English]

[See comment under general comments.]

International Union for the Conservation of Nature

[Original: English]

IUCN commends the recognition of the importance of including obligations of environmental protection in military forces agreements. In relation to "preventive measures" IUCN suggests that the commentary reference the need that such measures should be accompanied by the "means to ensure implementation of such measures".

7. Draft principle 7 – Peace operations

Environmental Law Institute

[Original: English]

[See comment under general comments.]

International Committee of the Red Cross

[Original: English]

As the draft principle on peace operations covers all temporal phases and is thus also applicable during armed conflict, ICRC recommends that the commentary distinguish clearly between peace operations deployed in armed conflict from those that are deployed in armed conflict *and* are party to the armed conflict, as the latter have obligations under international humanitarian law. In this regard, there are elements in the commentary that could be read as falling below existing obligations under international humanitarian law and that should be amended: see in particular the references to "should" in paragraph (4) and in paragraph (7).

Furthermore, the commentary could also clarify that States and international organizations that form part of peace operations also have an obligation to ensure respect for international humanitarian law rules protecting the natural environment in relation to the (other) belligerents over which they may have some degree of influence (see ICRC Guidelines, rule 16, see also para. 167 of the ICRC updated commentary on common article 1 to the Geneva Conventions[266]).

United Nations Economic and Social Commission for Asia and the Pacific

[Original: English]

Immediately after the conflict has ended, during a ceasefire and at the beginning of peace operations, the integrity of environmental experts should be guaranteed to allow environmental fact-finding missions (in line with paragraph (8) in the commentary) to determine whether any environmental damage has occurred and assess the course of action.

[266] Available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD.

8. Draft principle 8 – Human displacement

Environmental Law Institute

[Original: English]

[See comment under general comments.]

International Committee of the Red Cross

[Original: English]

ICRC welcomes this draft principle. Indeed, the ICRC Guidelines (see paras. 3 and 151-152) and the ICRC report, *When Rain Turns to Dust*,[267] both recognize the environmental effects of conflict-related displacement. While ICRC agrees with its formulation, ICRC wishes to emphasize that there are relevant obligations of States and non-State armed groups parties to armed conflict under international humanitarian law related to displacement and to the provision of relief and assistance for such persons and local communities. As a result, it is important to ensure that the draft principle (formulated as "should") not be understood as falling below these existing obligations in situations of armed conflict. Based on this, ICRC recommends that the commentary clarify that the draft principle goes beyond existing obligations, which are not restricted or impaired.

International Union for the Conservation of Nature

[Original: English]

IUCN commends the Commission on the inclusion of the draft principle which recognizes the need to provide for displaced persons in tandem with the need to protect the environment from over-exploitation and other damaging impacts. IUCN suggests that this draft principle may be further reinforced by highlighting the link between the provision of adequate relief and assistance for displaced persons, the protection of the environment and the prevention of environmental health risks as well as upholding fundamental human rights.

Office of the United Nations High Commissioner for Human Rights

[Original: English]

As noted in paragraph (1) of the commentary to draft principle 8, the "draft principle covers both international and internal displacement". Accordingly, it would be appropriate for the Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2) to be referenced in the commentary. The Commission may also wish to include additional references to human rights materials in this context (e.g. A/75/207; A/HRC/RES/35/20).

Office of the United Nations High Commissioner for Refugees

[Original: English]

[See comment under general comments.]

[267] ICRC, *When Rain Turns to Dust: Understanding and Responding to the Combined Impact of Armed Conflicts and the Climate and Environment Crisis on People's Lives* (Geneva, 2020). Available at https://shop.icrc.org/when-rain-turns-to-dust-pdf-en.

United Nations Environment Programme

[Original: English]

Noting that the commentary of the principle includes consideration of both international and internal displacement, and that oftentimes the movement of displaced persons contributes heavily both directly and indirectly to the damage of the environment, the text may include "*areas relating to both the movement and relocation of displaced persons*" rather than "where persons displaced by armed conflicts are located."[268]

9. Draft principle 9 – State responsibility

Environmental Law Institute

[Original: English]

[See comment under general comments.]

International Union for the Conservation of Nature

[Original: English]

IUCN welcomes draft principle 9 on State responsibility for environmental damage, although precedents for holding States liable for environmental damage caused in relation to armed conflict are limited. IUCN commends the Commission for recognizing the bases of environmental damage adopted by the International Court of Justice in the Case of *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica V. Nicaragua)* (Compensation, Judgment) (at para. 41), which referred to "the principle of full reparation" as requiring compensation for damage caused to the environment "in and of itself". IUCN would urge the Commission to repeat the wording of the International Court of Justice in the commentary, where the International Court of Justice further explains that "[s]uch compensation may include indemnification for the impairment or loss of environmental goods and services in the period prior to recovery and payment for the restoration of the damaged environment" in paragraph 42, and that such compensation may include amounts for "active restoration measures" which "may be required in order to return the environment to its prior condition, in so far as that is possible" in paragraph 43.

IUCN urges the Commission also to recognize in the commentary the growing rights of nature jurisprudence in many States that may require additional compensatory actions for damaged environments.

IUCN welcomes the approach of the draft principles in not distinguishing between international and non-international armed conflicts, and the damaging environmental effects caused by members of non-State armed groups. Thus, while it welcomes the inclusion of the principle of State responsibility, IUCN also urges the Commission to include a draft principle on ensuring the responsibility and liability of members of non-State armed groups.

[268] D. Jensen and S. Lonergan, "Natural resources and post-conflict assessment, remediation, restoration and reconstruction: lessons and emerging issues", in D. Jensen and S. Lonergan, eds., *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding* (Abingdon, Earthscan, 2012), pp. 411–450, finding that "Human displacement" is one of the "six principal pathways for direct environmental damage" in conflict.

Office of the United Nations High Commissioner for Human Rights

[Original: English]

OHCHR welcomes the reference to State responsibility for an international wrongful act, in relation to the armed conflict, that causes damage to the environment, and wishes to raise, for the Commission's consideration, the following observations in relation to the scope of this draft principle.

The principle as currently formulated would seem to overlook reference to various situation of relevance to the context of draft principles where the State might be appropriately held responsible, including in relation to its obligations under international human rights law. Responsibility for the failure, for example, to take measures during peacetime to prevent harm to the environment in situations of armed conflict would seem to fall outside the scope of principle 9. As highlighted in the present submission, the types of wrongful acts which may occur in conjunction with damage to the environment caused during armed conflict may occur before and after an armed conflict.

Further, the current language of draft principle 9 makes reference only to State responsibility. As a more flexible approach, draft principle 9 could make general reference to the law on responsibility under international law, without necessarily excluding the possibility that, for instance, an international organization or other analogous subject of international law, could also be responsible for a wrongful act in certain circumstances.[269]

In addition, draft principle 9 currently does not cover individual responsibility for international crimes causing harm to the environment. In its Part Two, the draft principles include only the duties and liability of corporate entities in principles 10 and 11, in the context of State obligations to regulate the conduct of private actors. Given the significant impact/damage that private actors may cause to the environment, it is recommended to consider inclusion of the notion of individual responsibility for international crimes causing harm to the environment in the draft principles.

If draft principle 9 were to include the issues referenced above, the wording with respect to the scope of the duty to provide reparations for environmental harm would also be amended accordingly.

Lastly, it is also encouraged that the draft principles and their commentaries further address other actors' responsible for environmental damage, in relation to an armed conflict. Organized armed groups, as defined by international humanitarian law, are under the obligation to respect international humanitarian law. Moreover, United Nations human rights mechanisms have considered that international customary human rights law has been and is gradually evolving towards recognizing certain human rights obligations on the part of *de facto* authorities and non-State armed groups exercising government-like functions and with effective control over territory, being obliged to respect human rights norms and standards, including ensuring respect of economic, social and cultural rights of persons within the territory under their control.[270]

[269] International Law Commission, articles on the responsibility of international organizations.

[270] See e.g. CEDAW/C/GC/30, para. 16; United Nations Mission in South Sudan and OHCHR, "Access to health for survivors of conflict-related sexual violence in South Sudan", May 2020, available at www.ohchr.org/Documents/Countries/SS/access_to_health_for_survivors_of_conflict-related_sexual_violence_in_south_sudan.pdf.

United Nations Environment Programme

[Original: English]

The commentary here could include reference to the 2016 International Criminal Court's Office of the Prosecutor policy paper on case selection and prioritization, at paragraph 41: "The impact of the crimes may be assessed in light of, inter alia, the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities. In this context, the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land."

10. Draft principle 10 – Corporate due diligence

Environmental Law Institute

[Original: English]

While the scope of the draft principles as a whole rightly encompasses the before, during, and after stages of the conflict cycle, draft principles 10 and 11 on corporate due diligence and liability are notable for applying only "in an area of armed conflict or in a post-armed conflict situation". Including the phrase "in a high-risk situation" or similar language would not only better align draft principles 10 and 11 with the overall scope of the draft principles, but it would also better reflect the guidance from the United Nations, the Organization for Economic Cooperation and Development (OECD), and the European Union.

Under principle 13 of the United Nations Guiding Principles on Business and Human Rights, businesses have a responsibility to "avoid causing or contributing" to adverse human rights impacts and to "seek to prevent" adverse human rights impacts linked to their businesses.[271] This language comprehends corporate due diligence and potential liability even in situations that do not involve conflict, but could be particularly susceptible to conflict. The OECD *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* applies to high-risk areas, although they may not yet have experienced conflict.[272] The OECD Guidance's "Recommendation of the Council" section notes that "due diligence for responsible supply chains of minerals from conflict-affected and high-risk areas is an ongoing, proactive, and reactive process."[273] Again, such language as "high-risk," "ongoing," and "proactive" suggests due diligence applies even before a conflict has happened. European Union regulations similarly incorporate pre-conflict due diligence by defining conflict minerals as originating in conflict-affected and post-conflict areas "as well as areas witnessing weak or non-existent governance and security".[274]

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[271] Human Rights Council, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework'"; European Union Regulation 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, p. 1, at art. 2 (f).

[272] OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 2nd ed. (2013).

[273] *Ibid*., p. 8.

[274] European Union Regulation 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, art. 2(f).

The way draft principles 10 and 11 are currently framed, all of the guidance for proactive due diligence in high-risk areas is lost. Moreover, draft principles 10 and 11 are advisory ("should"), so the non-binding nature of the United Nations Guiding Principles and OECD Guidance (not to mention the binding EU regulations) are relevant. By extending the scope of draft principles 10 and 11 to address high-risk situations more broadly, and thereby include pre-conflict settings, the Commission can both reflect existing normative guidance and support the progressive development of international law in this area.

International Atomic Energy Agency

[Original: English]

[…] Especially where armed conflicts have occurred in States that lack legislative and regulatory frameworks for the protection of the environment from hazardous materials such as radioactive material, adoption of relevant international safety standards, such as the IAEA Safety Standards, may assist affected States with regulating the activities of relevant corporations operating on their territory.

International Committee of the Red Cross

[Original: English]

ICRC welcomes draft principles 10 and 11. This being said, ICRC recommends that the commentaries to these draft principles clarify that there are existing obligations under international humanitarian law that are not restricted or impaired by these draft principles, as their formulation could indicate. For instance, international humanitarian law contains obligations related to respect for, implementation and dissemination of international humanitarian law rules, including those protecting the natural environment (see ICRC Guidelines, Part IV). This is particularly relevant taking into account that private military security companies, for instance, may be empowered to exercise elements of governmental authority in situations of armed conflict and they may themselves become parties to an armed conflict (see Montreux Document). These obligations are not reflected in the draft principle itself nor in the commentary.

ICRC recommends clarifying that States have obligations under international humanitarian law in relation to the activities of corporate and other business enterprises, in particular private military security companies , and that these draft principles in no way impair or restrict these. For instance, paragraph (3) of the commentary to draft principle 11 recommends measures aimed at ensuring that a corporation or other business enterprise can be held liable. With regard to private military security companies , for instance, the Montreux Document specifically refers to taking measures to prevent, investigate and provide effective penal sanctions for persons committing grave breaches and to investigate and, as appropriate, prosecute persons suspected of other crimes under international law. While reference is made to the Montreux Document in paragraph (9) of the commentary, it is only done with regard to obligations of home States under international human rights law.

International Union for the Conservation of Nature

[Original: English]

IUCN commends the Commission for the inclusion of draft principles 10 and 11 on corporate due diligence and liability. This area is clearly an important one, as demonstrated by the previous adverse impacts of the exploitation of natural resources during conflicts. The commentary usefully highlights the burgeoning legal

developments and guidance in this field requiring States to impose due diligence obligations on companies or enterprises to respect human rights and environmental standards, including in relation to supply chains. There are already clear synergies between human rights and environmental protection more broadly, albeit most notably through the stand-alone right to a healthy environment that is recognised by most States around the world. Therefore, IUCN suggests specific reference in the provisions to "including in relation to human health" appears to be unnecessarily narrow. It suggests instead the Commission rephrase the draft principles to refer to "including through human rights obligations". This dimension is particularly important because human rights obligations of States are recognized as clearly having a continuing nature during conflict.

The current draft principles refer to "an area of armed conflict or [] a post-armed conflict situation". While recognizing the desire to avoid overly complex language, at present the exact confines of the provisions are unclear. IUCN suggests that the Commission could mirror the formulation adopted in the OECD *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, which refers to areas affected by conflict, stating that, for example, these would include post-conflict situations and areas under occupation.

Draft principle 10 refers to due diligence obligations of the corporation "when acting" in areas affected by conflict etc., and draft principle 11 refers to "harm caused by [the corporation]". Thus, in relation to the environmental harm caused or the notion of "acting", IUCN notes that the threshold in the first sentence appears to be currently set at the level of the corporation itself directly causing that harm. While this direct causation of harm in the affected areas is possible, the more likely scenario is that the corporation or enterprise receives or sources materials from the affected area, either knowingly or recklessly being complicit in such sourcing, or otherwise contributes to such harm (for example through business partners) – as is clearly recognized in the second sentence. IUCN suggests that the current provision may perhaps create unnecessary confusion, or worse it may unduly restrict the liability and the due diligence requirements, therefore, by such wording, and so it suggests that the wording be replaced by "when operating or acting in or sourcing from".

Where States are able to hold corporations and enterprises liable for such harms, IUCN suggests that draft principle 11 encourage States to allow for environmental damages to be recovered and awarded to the affected States, as recognised by the International Court of Justice in the Case of *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (Compensation, Judgment).

Office of the United Nations High Commissioner for Human Rights

[Original: English]

OHCHR welcomes that the draft principles highlight corporate responsibility to respect human rights and the Commentaries' reference to human rights due diligence. The Committee on Economic, Social and Cultural Rights has stated that the obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence to identify, prevent and mitigate the risks of violations.[275]

[275] E/C.12/GC/24, paras. 16 and 50. See also E/C.12/COL/CO/6, para. 13 (a)-(c), A/73/163; A/75/212, para. 44; A/HRC/38/20/Add.2, para. 8; United Nations Guiding Principles on Business and Human Rights, guiding principles 18 to 21.

Draft principles 10 and 11 refer to "corporations and other business enterprises *operating in or from [a State's] territory[y]"* (emphasis added). As stated, international human rights law provides for the positive obligation to ensure the human rights of persons in their territory *or under their jurisdiction* (e.g. CCPR/C/120/D/2285/2013, para. 6.5). In particular, the Committee on Economic, Social and Cultural Rights referred to the obligation of States to control the activities of "corporations domiciled in their *territory and/or jurisdiction* (whether they were incorporated under their laws, or had their statutory seat, central administration or principal place of business on the national territory), without infringing the sovereignty or diminishing the obligations of the host States under the Covenant".[276] It is thus suggested to include in draft principles 10 and 11 a reference to corporations and other business enterprises operating in or from the territory *or under the jurisdiction* of a State. Limiting the application of draft principles 10 and 11 to entities operating in or from the territory of a State risks excluding other relevant connections between a company and States that may implicate a State's obligations under international human rights law.

Draft principles 10 and 11 also refer to "harm caused by [the private entity] to the environment, including in relation to *human health*" (emphasis added), which may not fully capture the obligation to prevent and to ensure liability for serious human rights abuses.[277] In this regard, United Nations human rights mechanisms have addressed how environmental degradation affects the effective enjoyment of a range of human rights. The United Nations Special Rapporteur on human rights and environment has noted that "[d]amage to the biosphere is having a major impact on a wide range of human rights" including "the rights to a healthy environment, life, health, food, water, sanitation, an adequate standard of living, development and culture" (A/75/161, para. 31; see also A/HRC/47/46). The draft principles may thus emphasize that when acting in an area of armed conflict or in a post-armed conflict situation, business enterprises have responsibility to respect human rights.

Further, in relation to the reference to harm to the environment caused by corporations and other business enterprises operating "in an *area* of armed conflict" (emphasis added), it is recalled that international humanitarian law governs the determination whether an armed conflict exists within the meaning of common article 2 or common article 3 of the Geneva Conventions based on the prevailing circumstances. The reference to "area" may be understood as a fixed geographic area and leads to some ambiguity as to the timing and scope of the determination of such area. It is thus suggested to use a reference to "in *the context of an* armed conflict" in draft principles 10 and 11.

Draft principle 10 refers to corporations and other business enterprises *"acting* in an area of armed conflict or in a post-armed conflict situation*"* (emphasis added) and thus raises question whether the due diligence obligation solely covers the corporate actor's own operations. In its general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, the Committee on Economic, Social and Cultural Rights refers to "due diligence requirements to prevent abuses of Covenant rights *in a business entity's supply chain and by subcontractors, suppliers, franchisees, or other business partners*" (E/C.12/GC/24, para. 16; emphasis added).

[276] E/C.12/GC/24, para. 26 (emphasis added). See also CRC/C/GC/16, para. 43; United Nations Guiding Principles on Business and Human Rights, guiding principles 1 and 2.

[277] The rights of indigenous peoples, for example, is in many respects inherently tied to their land. There is a risk that liability for harm caused to the environment and human health would not capture the harm to the rights of the indigenous community tied to the environment damaged.

Therefore, it is suggested to include reference to the supply chain, in order to enhance effectiveness of the due diligence obligation.

In relation to draft principle 11, it is noted that the United Nations Guiding Principles on Business and Human Rights consistently refer to adverse human rights impacts caused *or contributed* to by business enterprises (Guiding Principles 15, 17, 19 and 22).[278] This is recognized in the reference to Guiding Principle 17 in draft principle 11, paragraph (2) of the commentary. Further, in its general comment No. 24, Committee on Economic, Social and Cultural Rights to negative impacts on the enjoyment of Covenant rights "caused or contributed to" by decisions and operations of business entities (E/C.12/GC/24, para. 16). In order to avoid potential circumvention of liability rules, it is recommended to amend draft principle 11, adding to the formulation in question "can be held liable for harm caused *or contributed to* by them to the environment".

Guiding Principles 25 to 27 of the United Nations Guiding Principles on Business and Human Rights outline measures to ensure access to effective remedies. Equally, in its general comment No. 24, the Committee on Economic, Social and Cultural Rights has noted that States are required to provide victims of such corporate abuses with access to effective remedies (E/C.12/GC/24, paras. 14-15).[279] It is therefore also suggested that the commentary to draft principle 11 align with the approach taken in the Guiding Principles and general comment No. 24 (2017) on State obligations to ensure access to effective remedy when abuses occur within their jurisdiction.

Note is taken of the focus in paragraph (3) of the commentary to draft principle 11 on the relationship between the parent company and the subsidiary, and its reference to de facto control. In the view of OHCHR, there may be multiple routes to liability beyond de facto control.[280] These include management or joint management of the relevant harmful activity; provision of defective advice and/or promulgating defective group-wide safety/environmental policies implemented by the subsidiary; and promulgating group-wide safety/environmental policies and taking active steps to ensure their implementation by the subsidiary. In addition, there are several different circumstances in which one corporate entity can and should be held liable for harm directly caused by a different company or actor.[281] The Committee on Economic, Social and Cultural Rights, for example, has recommended that "[c]orporations domiciled in the territory and/or jurisdiction of States parties should be required to act with due diligence to identify, prevent and address abuses to Covenant rights by […] subsidiaries and business partners, wherever they may be located" (E/C.12/GC/24, para. 33). With regards to liability, it considers that States parties must "remove substantive, procedural and practical barriers to remedies, including by establishing parent company or group liability regimes" (*ibid*., para. 44). In light of the foregoing, OHCHR recommends adjusting

[278] See E/C.12/GC/24, para. 16. See also OHCHR Accountability and Remedy Project: Improving accountability and access to remedy in cases of business involvement in human rights abuses, at www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx. See A/HRC/32/19, paras. 21-23 and policy objectives 12.312.4 (for private law claims) and 1.5-1.6 (for public law offenses) as well as A/HRC/32/19/Add.1, paras. 42-54 (and 6-20). In para. (4) of the commentary to draft principle 11, references to these reports could be added, particularly A/HRC/32/19, paras. 21-23 and policy objectives 12.3-12.4 (for private law claims) and 1.5-1.6 (for public law offenses); A/HRC/32/19/Add.1, paras. 42-54 (and 6-20).

[279] See also E/C.12/COL/CO/6, para. 13 (a)-(c).

[280] Outlined in the *Vedanta* case, which is referenced in the commentary. See also United Kingdom, Supreme Court, *Okpabi and Others v. Royal Dutch Shell Plc and Another*, Judgment, 12 February 2021 [2021] UKSC 3.

[281] See e.g. A/HRC/32/19, paras 21-23; A/HRC/32/19/Add.1, paras. 45-54.

language in the draft principles 10 and 11 taking into account the above standards and practices.

11. Draft principle 11 – Corporate liability

Environmental Law Institute

[Original: English]

[See comment on draft principle 10.]

International Committee of the Red Cross

[Original: English]

[See comment on draft principle 10.]

International Union for the Conservation of Nature

[Original: English]

[See comment on draft principle 10.]

Office of the United Nations High Commissioner for Human Rights

[Original: English]

[See comment on draft principle 10.]

United Nations Environment Programme

[Original: English]

This principle should be broadened to reference not only the relevant *de facto* test for subsidiaries of corporations, but also the oftentimes occurrence of corporations aiding and abetting parties in causing environmental damage or looting natural resources, particularly in internal armed conflicts to support civil war parties.[282]

Introduction to Part Three of the draft principles

International Union for the Conservation of Nature

[Original: English]

IUCN suggests that Part Three captures more of the law of armed conflict protections for the environment, including the rules contained in articles 54 and 56 of Additional Protocol I and their equivalent provisions at articles 14 and 15 of Additional Protocol II, as well as the rules governing the protection of property in article 23 (g) of the 1907 Hague Regulations concerning the laws and customs of war on land, and article 147 of Geneva Convention IV. This objective could be

[282] United Nations Environment Programme, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, p. 51: "Given that most armed conflicts today are non-international or civil wars, much of the existing legal framework does not necessarily apply. This legal vacuum is a major obstacle for preventing the often serious environmental damage inflicted during internal conflicts. There are also no institutionalized mechanisms to prevent the looting of natural resources during armed conflict or to restrict the granting of concessions by combatants that may lack legitimacy or legal authority. In addition, there are no systematic mechanisms to prevent States or corporations from aiding and abetting civil war parties in causing environmental damage or looting natural resources."

achieved through a draft principle that made specific reference to these provisions which are generally perceived to be customary international law.[283]

Office of the United Nations High Commissioner for Human Rights

[Original: English]

To a large extent, Part Three addresses principles relevant to the protection of the environment in the context of the conduct of hostilities. In this context, further to the discussion above, it is recalled that human rights law continues to apply, as a matter of law, within the narrower scope of the law on the conduct of hostilities (CCPR/C/GC/36, para. 64). It is suggested that the commentaries clarify that not all uses of force occurring during a state of armed conflict will necessarily be regulated by the law on the conduct of hostilities. In *Armed Activities* the International Court of Justice held that, even during armed conflict, "some rights … may be exclusively matters of human rights law" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, para. 216). Consistent with this position, human rights bodies have affirmed that the law on the conduct of hostilities is only applicable where the use of force has a nexus to the armed conflict. The Human Rights Committee has thus held that international humanitarian law is relevant in the interpretation of the Covenant only when the situation calls for their application (CCPR/C/GC/37, para. 97). Similarly, the African Commission on Human and Peoples' Rights has held that "International humanitarian law on the conduct of hostilities must only be applied during an armed conflict and where the use of force is part of the armed conflict" (African Commission on Human and Peoples' Rights, general comment No. 3 (2015), para. 33). Where there is no nexus to the armed conflict, the use of force affecting the rights of individuals is entirely regulated by international human rights law.

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

International Committee of the Red Cross

[Original: English]

ICRC welcomes this draft principle and its formulation. Rule 16 of the ICRC Guidelines replicates this formulation, which was also contained in the 1994 ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict. It strongly encourages the Commission to retain this formulation.

International Union for the Conservation of Nature

[Original: English]

IUCN welcomes and supports the inclusion of the Martens Clause with reference to the protection of the environment. It is clear from developments in human rights and environmental law that the "dictates of public conscience" must today include the protection of the environment. In recognition of the burgeoning jurisprudence in these areas, it also suggests that the commentary wording refer to "the rights of future generations".

[283] Note rules 54, 42, 50 and 156 respectively in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, volume I: *Rules* and volume II: *Practice* (Parts 1 and 2) (Cambridge, Cambridge University Press, 2005).

Office of the United Nations High Commissioner for Human Rights

[Original: English]

[See comment under Part Three.]

13. Draft principle 13 – General protection of the natural environment during armed conflict

International Committee of the Red Cross

[Original: English]

ICRC welcomes this draft principle and the inclusion of the reference to the obligation that care shall be taken to protect the natural environment against widespread, long-term and severe damage. This being said, ICRC strongly recommends that the draft principle also include the obligation, based on articles 35, paragraph 3, and 55, paragraph 1, of Additional Protocol I and established as a rule of customary international law, prohibiting the use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment (see ICRC customary international humanitarian law study, first sentence of rule 45). As reiterated in the ICRC Guidelines (see para. 48), it appears that the United States is a "persistent objector" to the customary rule, and France, the United Kingdom and the United States are persistent objectors with regard to the application of the customary rule to the use of nuclear weapons. The ICRC Guidelines further note that there is a certain amount of practice contrary to this rule and there are diverging views on its customary nature.

Based on the above, ICRC suggests the following formulation, following the care obligation already included in the draft principle: *"The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited*". Furthermore, the commentary of this draft principle could also be redrafted to include a discussion on this rule. First, ICRC would recommend deletion of paragraph (9) of this commentary. Second, in drafting the commentary, reference could be made to elements that should inform a contemporary understanding of "widespread", "long-term" and "severe" (see ICRC Guidelines, rule 2 and commentary thereto).

For instance, the ICRC Guidelines note the following:

- What is certain is that in assessing the degree to which damage meets the threshold, current knowledge, including on the connectedness and interrelationships of different parts of the natural environment as well as on the effects of the harm caused, must be considered (para 54). Those employing methods or means of warfare must inform themselves of the potential detrimental effects of their planned actions and refrain from those intended or expected to cause the prohibited damage (para 55).
- Other specific elements that should inform a contemporary understanding of these terms include the recommendation of the United Nations Environment Programme to use the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques precedents as a starting point. The ICRC Guidelines commentary states:
    - "Widespread" should be understood as referring to damage extending to "several hundred square kilometers" (para. 60). This is based on several factors, including the meaning that should be given to the "area affected" (para. 57) and knowledge of the transregional nature of the effects of

damage, which can go beyond the area directly affected by the use of a method or means of warfare (para. 58).

- "Long-term" would cover damage somewhere between the range of that not considered to be short term or temporary, such as artillery bombardment, and that with impacts in the range of years (possibly a scale of 10 to 30 years) (para. 63). But additional precision is needed if this rule is to provide protection where damage falls outside of the clearly accepted higher limits and a number of touchstones should inform this. For instance, the duration of the indirect – not only direct – effects of the use of a given method or means of warfare, such as the ability of certain substances to persist in particular natural environments, should be considered (paras. 64-66).

- "Severe" should be understood to cover the disruption or damage to an ecosystem or harm to the health or survival of the population on a large scale, with normal damage caused by troop movements and artillery fire in conventional warfare generally falling outside the scope of this prohibition (para. 72). In further determining what type of damage could be covered, effects "involving serious or significant disruption or harm to human life" or "natural resources" should be considered. At least to the extent that effects on "economic resources or other assets" also result in disruption or damage to the ecosystem or harm to the health or survival of the population, these should also be considered.

Principle 13, paragraph 3, is critical, and ICRC welcomes its inclusion as well as paragraphs 10-12 of the commentary, aside from the handful of comments it has submitted on certain detail in the commentary text.

[See also comment on draft principle 17.]

International Union for the Conservation of Nature

[Original: English]

IUCN reiterates the point in the introductory comments about undertaking further work with States to elucidate where the controversies remain in relation to maintaining reference to "natural" environment with a view to specifically addressing these in the draft principles, or else referring instead throughout only to the "environment" to maintain consistency.

However, it further suggests that since the first paragraph is not a direct formulation of a provision applicable in the law of armed conflict there is no need to include the "natural" qualifier of the word environment. Specific rules of the law of armed conflict that relate to the "natural environment" would be equally constrained by the draft principle whether or not it contained the term "natural" (due to the reference to "in accordance with applicable international law"), but it unnecessarily constrains continuing rules of international environmental law or human rights law. IUCN, therefore, suggests the Commission delete the word "natural" in paragraph 1.

IUCN welcomes the inclusion in paragraph 2 of a general duty of taking "care" or due diligence towards the environment during armed conflict, which serves as a conflict-specific application of the environmental law principle of prevention or the "no harm" principle. It notes that the obligation in paragraph 2 applies throughout the territory of the parties to the conflict, due to the omission of the more limiting "in warfare" phrasing of article 55, paragraph 1, of Additional Protocol I, and, thus, does not repeat the exact wording of article 55, paragraph 1. IUCN recognizes the continued inclusion of the three-fold threshold of harm, which has severely hampered the protective scope of the obligation in practice.

Alternatively, IUCN suggests the Commission could mirror the obligation in article 57, paragraph 1, of Additional Protocol I, in relation to military operations more specifically. Here the obligation would be that "constant care shall be taken to spare the civilian population, civilians and civilian objects" – with the environment being generally now recognized as a *prima facie* civilian object. IUCN suggests that the Commission could further elucidate what actions, steps or considerations States should take into account when fulfilling the care obligation, such as the importance of ecologically rich environmental areas, or vulnerable or fragile ecosystems. Notably, this obligation could include the removal of military objectives from the vicinity of a State's national parks, for example, and could include the closure of particularly sensitive chemical facilities. During the conflict in Kosovo, for example, the operators of some facilities attempted to remove or make safe hazardous chemicals on site so that if attacked the damage would be minimized.[284]

While a number of States have questioned the lack of State practice to evidence a customary obligation of "care" for non-State armed groups, IUCN nonetheless encourages the Commission to engender State support for this recognition by the Commission, which builds on the work of ICRC and would provide valuable State practice and *opinio iuris*. Requiring non-State armed groups to adhere to the general duty of vigilance towards the environment could be viewed as part of State obligations to respect and protect the environment outlined in draft principle 13, paragraph 1.

IUCN suggest that it is unclear why draft principle 13, paragraph 3, retains reference to the "natural" environment, since this is not a precise formulation of a rule of the laws of armed conflict. The provision merely applies the rule of distinction to the environment. IUCN submits that the provision would have the same meaning with or without the reference to "natural" environment, because no part of the environment, natural or otherwise, could be attacked unless it fulfilled the definition of a "military objective".

Office of the United Nations High Commissioner for Human Rights

[Original: English]

Paragraph 3 of draft principle 13 states that "No part of the natural environment may be attacked, unless it has become a military objective". Geneva Convention IV[285] and Additional Protocol I[286] provide that the civilian population, individual civilians and civilians objects shall not be the object of attack.[287] This wording allows for an attack to be lawful as long as it is directed against a military objective and the incidental damage to civilian objects is not excessive, reflecting principles of distinction and proportionality and removing potential ambiguity in relation to the question of wilfulness. Moreover, rather than determining that an

[284] United Nations Environment Programme and United Nations Centre for Human Settlements (Habitat), *The Kosovo Conflict: Consequences for the Environment and Human Settlements*, (Switzerland, 1999), p. 34.

[285] Geneva Convention IV, art. 14 (in relation to hospital and safety zones) and art. 18 (in relation to civilian hospitals). Article 22 provides that aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases, or for the transport of medical personnel and equipment "shall not be attacked".

[286] Additional Protocol I, arts. 51, para. 2, and 52, para. 1. The same terminology is used in relation to medical units (Article 12(1), enemy *hors de combat* (art. 41, para. 1), occupants of aircraft (art. 42, paras. 1, and 2), works and installations containing dangerous forces (art. 56, paras. 1 and (5), as well as grave breaches (art. 85, paras. 3 and 4).

[287] Rule 7 on the principle of distinction between civilian objects and military objectives of the ICRC study on customary international humanitarian law states that "Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects", again emphasizing that an attack affecting civilian objects may not unlawful as long as it is directed against a military objective and the incidental damage to civilian objects is not excessive.

object becomes a military objective permanently, international humanitarian law looks at whether at the given time an object by its nature, location, purpose or use makes an effective contribution to military action and its destruction, capture or neutralization offers a definite military advantage.[288] To ensure harmonious and consistent reading, it is thus suggested to formulate draft principle 13, paragraph 3, as follows: "No part of the natural environment shall be the object of attack, unless it constitutes a military objective under international humanitarian law."

[See also comment under Part Three.]

United Nations Economic and Social Commission for Asia and the Pacific

[Original: English]

In addition to the three proposed paragraphs in this principle, ESCAP believes is it fundamental to include a provision to "4. Avoid whenever possible, or minimize, any form of pollution on land or marine pollution, including chemicals and other bio-hazards." While recognizing the balance of these principles (para. (13) of the commentary), the explicit action of polluting and avoiding pollution are fundamental for the protection of the environment, as they may denote motive and intent.

United Nations Environment Programme

[Original: English]

[…] [T]he principle and commentary should clarify determining the ongoing obligations of multilateral environmental agreements.

Part Three omits the complete formulation of rule 43 of the ICRC customary international humanitarian law study, which (a) allows the natural environment to be attacked as a military objective. The two other components of rule 43 should be included: (b) that destruction of any part of the natural environment is prohibited, unless required by imperative military necessity; and (c) that launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.[289]

United Nations Office for Disarmament Affairs

[Original: English]

The United Nations Office for Disarmament Affairs (ODA) notes the general nature of draft principle 13, as explained in paragraph (9) of the commentary, in

[288] See Additional Protocol I, art. 52, para. 2; ICRC study on customary international humanitarian law, rule 8 on the definition of military objectives.

[289] United Nations Environment Programme, *Protecting the Environment During Armed Conflict: an Inventory and Analysis of International Law*, pp. 5, 43-58, noting that "the provisions of multilateral environment agreements (MEAs) should be regarded as continuing to apply during both international and non-international armed conflict, unless they specifically stipulate otherwise …. MEAs deal with various areas and subjects of protection." Additional sources on the threshold definition of "widespread, long-term and severe damage" to a natural environment include Dieter Fleck, "Legal protections of the environment: the double challenge of non-international armed conflict and post-conflict rebuilding", pp. 203-219, in Carsten Stahn, Jens Iverson, and Jennifer S. Easterday, eds., *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (2017), at pp. 203-204 ; ICRC, *Customary International Humanitarian Law*, Vol. 1: *Rules*; see also the United Nations Environment Programme, *Protecting the Environment During Armed Conflict: an Inventory and Analysis of International Law*, p. 21.

light of Article 55 of Additional Protocol I to the 1949 Geneva Conventions.[290] This approach provides space for consideration of policies and practices, short of legal prohibitions, applicable to certain methods or means of warfare which may cause widespread, long-term and severe damage to the natural environment apart from the prohibition contained in article 55.

In this connection, ODA considers that the effects of the use of armaments and ammunitions containing depleted uranium are relevant. ODA notes, in this connection, the observation of the United Nations Environment Programme, as contained in A/65/129/Add.1, that there are major scientific uncertainties on the long-term environmental impacts of depleted uranium, particularly with respect to long-term groundwater contamination. For this reason, ODA supports a call for a precautionary approach to the use of armaments and ammunitions containing depleted uranium as well as a recommendation for action to be taken to clean up and decontaminate polluted sites, includes sites polluted during armed conflict. In light of the ubiquitous manner in which ammunition containing depleted uranium may be used, it is possible that their environmental impacts could be widespread. Due to the uncertainties regarding their long-term impacts, the possible severity of such impacts is at present difficult to qualify.

14. Draft principle 14 – Application of the law of armed conflict to the natural environment

International Committee of the Red Cross

[Original: English]

Remove the reference to "military necessity". While military necessity is an essential component and principle of international humanitarian law (its counter-balance being considerations of humanity), its inclusion here alongside more specific rules may lend credence to the understanding that military necessity can be invoked as a general exception to international humanitarian law. It is well-established that no such exception exists, unless expressly stated by a given rule. It is not included here in connection to a specific rule. (This is explained in, *inter alia*, ICRC, International Expert Meeting Report, "The principle of proportionality in the rules governing the conduct of hostilities under international humanitarian law", p. 28, available from www.icrc.org/en/document/international-expert-meeting-report-principle-proportionality; ICRC Guidelines, paras. 176 and 180.) If military necessity is included as a general principle, its counter-balance, "considerations of humanity", would also have been needed, but this is not advised as it is likely to create confusion – hence the ICRC recommendation to remove the reference altogether (ICRC Guidelines, paras. 176 and 180).

Refer to the principles and rules of "precautions" rather than "precautions in attack." Obligations of precautions also apply to military operations, i.e. more broadly than to attacks. This is explained in ICRC Guidelines (paras. 125-128). It is also already explained, accurately, in paragraph (10) of the commentary on this draft principle. The relevant law includes:

[290] Article 55 – Protection of the natural environment reads:
"1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited."

- Rule 44 of the ICRC study on customary international humanitarian law: Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. *In the conduct of military operations, all feasible precautions must be taken to avoid*, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions.

- Rule 8 of the ICRC Guidelines: "Precautions. *In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects, including the natural environment*. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects, including the natural environment."

- In addition, there is the obligation of "passive precaution", applicable in both international and non-international armed conflict, see ICRC Guidelines, rule 9, reflecting article 58 of Additional Protocol I and rule 22 of the ICRC study on customary international humanitarian law.

Remove "with a view to its protection". As the formulation of "with a view to" is not legal terminology, its meaning may not be clear. It may therefore be read to have the effect of conditioning, and therefore potentially weakening, the protection that it inherent in the application of the rules already mentioned in the principle. The rules should simply be applied.

[See also comments under general comments and on draft principle 15.]

International Union for the Conservation of Nature

[Original: English]

Albeit recognizing that the draft principles will sit alongside the laws of armed conflict and the new Guidelines on the Protection of the Natural Environment in Armed Conflict adopted by ICRC, IUCN nevertheless suggests that a key element is missing from draft principle 14 in relation to the fundamental limitation that "the rights of parties to an armed conflict to choose methods or means of warfare is not unlimited", and it suggests the Commission to rephrase the provision to ensure its inclusion. By its nature this provision also requires States to undertake an assessment, akin to article 36 of Additional Protocol I, before using any weapons in armed conflict.

Taking these two draft principles together, there is an apparent overlap in that the principle of proportionality is mentioned in both provisions. While a suggestion may be to delete draft principle 15 as otiose, IUCN suggests that the rule of proportionality is of such importance to the protection of the environment that the draft principle be retained and strengthened. Draft principle 15 could be strengthened by specific reference to the notion that States need to take into account harm due to the foreseeable direct and indirect ("reverberating") impacts on the environment when applying the principle of proportionality. IUCN strongly welcomes and commends the Commission's recognition in the commentary to draft principle 15 (at para. (5)) that "environmental considerations cannot remain static over time, they should develop as human understanding of the environment develops".

Office of the United Nations High Commissioner for Human Rights

[Original: English]

[See comment under Part Three.]

United Nations Environment Programme

[Original: English]

Noting that the draft principle is of general character and does not elaborate on how to interpret the well-established principles of law contained in principle 14, it may include precautions [*in the absence of scientific certainty about the likely effects of a weapon*] on the environment.[291]

United Nations Office for Disarmament Affairs

[Original: English]

ODA notes that the preamble to the Treaty on the Prohibition of Nuclear Weapons[292] includes references to the environmental impact of nuclear weapons, including in the context of the law of armed conflict:

> "*Cognizant* that the catastrophic consequences of nuclear weapons cannot be adequately addressed, transcend national borders, pose grave implications for human survival, the environment, socioeconomic development, the global economy, food security and the health of current and future generations, and have a disproportionate impact on women and girls, including as a result of ionizing radiation"
>
> "*Basing themselves* on the principles and rules of international humanitarian law, in particular the principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited, the rule of distinction, the prohibition against indiscriminate attacks, the rules on proportionality and precautions in attack, the prohibition on the use of weapons of a nature to cause superfluous injury or unnecessary suffering, and the rules for the protection of the natural environment"

ODA notes that the States Parties to the Treaty are prohibited from, inter alia, using or threatening to use nuclear weapons or other nuclear explosive devices.

15. Draft principle 15 – Environmental considerations

International Atomic Energy Agency

[Original: English]

[…] It is noted that IAEA Safety Standards provide assessment methodologies and criteria to define the level of harm or risk of harm to people and the environment emanating from ionizing radiation, ranging from negligible and acceptable, to harmful and severely harmful for instance: IAEA Fundamental Safety Principles,[293] IAEA General Safety Requirements Part 3;[294] IAEA General Safety

[291] United Nations Environment Programme, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, pp. 5, 18, emphasizes the importance of taking a precautionary approach in the absence of scientific certainty about the likely effects of a particular weapon on the environment.

[292] Treaty on the Prohibition of Nuclear Weapons (New York, 7 July 2017), *Status of Multilateral Treaties*, chap. XXVI.9.

[293] In particular Principle 5 of SF-1 (Optimization of protection).

[294] "Radiation protection and safety of radiation sources: international basic safety standards".

Requirements Part 7[295]; IAEA General Safety Guide No GSG-8";[296] IAEA General Safety Guide No GSG-10.[297] Perhaps, these methodologies and criteria may prove useful in the context of applying the principle of proportionality with a view to environmental considerations associated with hazardous materials, in particular munitions.

International Committee of the Red Cross

[Original: English]

ICRC understands the rationale underpinning the Commission's decision to include this draft principle separately from draft principle 14. It nevertheless strongly recommends considering deleting this draft principle, and moving its commentary to the explanation of the principle of proportionality already contained under draft principle 14 (paras. (5)–(8) of the commentary). There are several reasons for its recommendation:

Draft principle 15 adds no further protection beyond the principle of proportionality already included expressly in draft principle 14. It appears to us that the added value identified in paragraph (3) of the commentary of draft principle 15 – i.e. specificity – would be better achieved in the commentary on principle 14. Most concerningly, this principle **raises a risk** that the rule of proportionality would be applied to the environment with a caveat, because the reference to "environmental considerations" is vague and subject to interpretation. ICRC invites the Commission to consider paragraphs 117-122 of the ICRC Guidelines, which set out the ICRC view on how the rule of proportionality must be applied to the natural environment.

Draft principle 15 raises a risk of fragmentation of the international law governing proportionality as applied to the natural environment. Three different formulations would now exist regarding the application of proportionality to the natural environment: rule 43 B of the ICRC study on customary international humanitarian law, draft principle 14, and draft principle 15.

Draft principle 15 refers to the notion of "rules of military necessity", which do not exist as such under international humanitarian law. As explained in previous comments, while military necessity is an essential component and *principle* of international humanitarian law (its counter-balance being considerations of humanity), it is not a "rule" in and of itself. This reference will lend credence to the inaccurate understanding that military necessity can be invoked as a general exception to international humanitarian law, and it is well-established that no such exception exists, unless expressly stated by a given more specific rule. (This is explained in ICRC International Expert Meeting Report, "The principle of proportionality in the rules governing the conduct of hostilities under international humanitarian law", p. 28; ICRC Guidelines, paras. 176 and 180.) The International Court of Justice Advisory Opinion referred to in the commentary does not refer to "rules of military necessity".

Implications for the commentary: Paragraph (5) of the commentary to draft principle 15 adds new information on proportionality beyond what is already referenced in paragraphs (5)-(8) of the commentary to draft principle 14. ICRC therefore propose that paragraph (5) be retained and added to the commentary on draft principle 14 regarding proportionality. The other paragraphs, in its view, aim to

[295] "Preparedness and response for a nuclear or radiological emergency".
[296] "Radiation protection of the public and the environment".
[297] "Prospective radiological environmental impact assessment for facilities and activities".

justify a relationship with principle 14 that does not add value, and could be read as a caveat to the protection of draft principle 14.

International Union for the Conservation of Nature

[Original: English]

[See comment on draft principle 14.]

Office of the United Nations High Commissioner for Human Rights

[Original: English]

[…] [I]t is recalled that, under international humanitarian law, in the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects.[298] This principle of precaution applies to the natural environment in as much as at the given time it does not constitute a military objective under international humanitarian law. It is thus suggested to include the principle of precaution in draft principle 15.

[See also comment under Part Three.]

16. Draft principle 16 – Prohibition of reprisals

International Committee of the Red Cross

[Original: English]

ICRC welcomes this draft principle and its inclusion and strongly recommend it be maintained. While it agrees with the formulation of the draft principle itself, ICRC recommends that the commentary address more clearly the relationship of this draft principle with other customary and treaty rules related to reprisals more generally, notably against protected objects, as it is not always clear that – regardless of the existence of a specific rule prohibiting reprisals against the natural environment – there are other relevant rules of international humanitarian law that would bind States (see ICRC Guidelines, rule 4). Furthermore, according to the ICRC customary international humanitarian law study, parties to non-international armed conflicts may not resort to belligerent reprisals (ICRC customary international humanitarian law study, rule 148; see also ICRC Guidelines, para. 94). This rule is not reflected in the commentary of the draft principles and ICRC recommends that it should be addressed in order to ensure that the commentary does not fall below existing obligations.

Office of the United Nations High Commissioner for Human Rights

[Original: English]

[See comment under Part Three.]

17. Draft principle 17 – Protected zones

International Committee of the Red Cross

[Original: English]

While ICRC welcomes this draft principle, ICRC strongly suggests its reformulation as follows: “Including when they are areas of major cultural

[298] Additional Protocol I, art. 57, para. 1; ICRC study on customary international humanitarian law, rule 15 on the principle of precautions in attack.

importance, an area of major environmental importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective, and shall benefit from any additional agreed protections."

If this draft principle is to provide guidance beyond existing draft principles 4 and draft principle 13, paragraph 3 – and avoid weakening the protections therein – it should be reformulated.

First, the current formulation of the principle does not reflect the additional protection that paragraphs (2) and (5) of the commentary convey ("principle 17 seeks to *enhance* the protection established in draft principle 13, paragraph 3" (emphasis added)). To do so, ICRC recommends acknowledging the possibility of "additional agreed protections" such as those foreseen in paragraph (5) of the commentary. If protection *beyond* protection from attack is not included in this draft principle, ICRC recommends **deleting** the principle to avoid generating confusion about the scope of principle 13, paragraph 3; principle 13, paragraph 3, already covers principle 17 in its current formulation. If draft principle 17 is deleted, the commentary currently included in paragraph (5) could be included instead under draft principle 4, as it adds important value.

Second, the comment of ICRC on the formulation of draft principle 4 also applies here; ICRC recommends that the formulation of this draft principle be changed to avoid the requirement that an area of major environmental importance can only be protected by this principle if it is also an area of cultural importance. Please see the rationale in the comment of ICRC on draft principle 4, as well as recommendation 17 of the ICRC Guidelines.

International Union for the Conservation of Nature

[Original: English]

IUCN welcomes the draft principle providing for the concept of "protected zone" designation for environmental areas during armed conflict and recognizes the work undertaken in linking draft principle 4 with draft principle 17 so as to continue that protection during conflict. IUCN recognizes that under the law of armed conflict an environmental area, for example a forest, is subject to attack when it fulfils the criteria for a military objective. Civilian status is lost when the area by its "nature, location, purpose or use" makes an effective contribution to military action etc. Thus, IUCN strongly welcomes the clarification in draft principle 17 that unless the environmental area (or part of it) contains a military objective – by purpose or use – that the zone would not be subject to attack. Thus, as IUCN reads it, the draft principle supports the proposition that the "location" or "nature" of an environmental zone would not be sufficient to lose its protected status from attack.

The article 60 formulation of Additional Protocol I for "demilitarised zones", is recognizably broader than the draft principle 17 provision in that it extends beyond a prohibition of "attack" to also include a prohibition on the "Parties to the conflict to extend their military operations to [such] zones". This latter aspect is particularly important for the protection of the environment, especially habitats and biodiversity rich or fragile ecosystems, due to the destructive effects of the "footprint" of conflict. Thus, IUCN would urge the Commission to include wording to similar effect in draft principle 17.

IUCN also recognizes that there is no explicit prohibition in the draft principles on siting military installations inside nature reserves or other protected areas, although such an obligation is certainly implied in article 58 of Additional Protocol I, which requires States to take "necessary precautions" to protect such civilian objects under their control "against the dangers resulting from military operations". Furthermore, in accordance with recognition by the Commission in its work on the 2011 draft articles on the effects of

armed conflicts on treaties,[299] environmental law treaty obligations *prima facie* continue to apply during armed conflict. Thus, the State is under an obligation to continue to protect those areas during armed conflict, which would include not siting military objectives in those areas. IUCN also reiterates the tenor of the formulation of the draft article 32 of the 2000 IUCN Draft International Covenant on Environment and Development. Thus, it would urge the Commission to consider adding such wording to draft principle 17.

Similar to the suggested reformulation of draft principle 4, IUCN suggests that the additional requirement of the area being of "cultural" importance be disjunctive. Such a change would enhance the protection of wildlife and habitats.

Thus, IUCN suggests the Commission redraft the draft principle, such that,

"The Parties to the conflict:

(a) shall, to the maximum extent feasible, take the necessary precautions to protect the protected zones within Principle 4 in areas under their control against the dangers resulting from military operations;

(b) shall observe, outside areas of armed conflict, all protected zones subject to international environmental law treaty obligations;

(c) should designate further environmental and/or cultural areas, by agreement or otherwise, as a protected zone, which shall be protected against attack so long as it does not contain a military objective. It is also prohibited for the Parties to the conflict to extend their military operations to such zones."

[See also comment on draft principle 4.]

Office of the United Nations High Commissioner for Human Rights

[Original: English]

[See comment under Part Three.]

United Nations Environment Programme

[Original: English]

[…] [T]he commentary should explicitly contemplate the ongoing obligations of multilateral environmental agreements, and whether the commentary's definition of "agreement", understood in its broadest sense as including mutual as well as unilateral declarations accepted by the other party, treaties and other types of agreements, as well as agreements with non-State actors, also includes multilateral environmental agreements which do not explicitly suspend provisions during times of armed conflict.[300]

[299] *Yearbook of the International Law Commission, 2011*, vol. II (Part Two), chap. VI, sect. E.

[300] International Institute for Sustainable Development, *MEAs, conservation and conflict – A case study of Virunga National Park, DRC* (2008). United Nations Environment Programme, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, pp. 5, 43-58, noting that "the provisions of multilateral environment agreements (MEAs) should be regarded as continuing to apply during both international and non-international armed conflict, unless they specifically stipulate otherwise." Britta Sjostedt, "Protecting the environment in relation to armed conflict: the role of multilateral environmental agreements", Dissertation, Faculty of Law, Lund University (2016).

18. Draft principle 18 – Prohibition of pillage

International Committee of the Red Cross

[Original: English]

ICRC welcome the inclusion of this draft principle and the formulation of the principle itself. It has suggested minor reformulations and additions in the commentary to this draft principle, for instance to include the ICRC views on how this rule applies to the protection of the natural environment and on the prohibition of pillage itself (see ICRC Guidelines, rule 14). Notably, ICRC would suggest referring more clearly in the commentary to the exceptions under which appropriation of property is lawful under international humanitarian law (see ICRC Guidelines, para. 184).

Office of the United Nations High Commissioner for Human Rights

[Original: English]

[See comment under Part Three.]

19. Draft principle 19 – Environmental modification techniques

International Committee of the Red Cross

[Original: English]

ICRC welcomes inclusion of this draft principle which is based on the Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques. The obligation set down in this draft principle is also included in the ICRC Guidelines in rule 3.B; if considered helpful, the commentary to that rule could also be referred to (for instance, paragraph 85 provides examples of techniques that are or could be covered by this prohibition; paragraphs 87-88 refer to the requirement that States parties to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques inform themselves as far as possible of the potential effects of their planned military or hostile actions).

Although the draft principle focuses on the obligations under the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, ICRC would have a preference to see the commentary to the draft principle address in more detail the customary international humanitarian law rule that "Destruction of the natural environment may not be used as a weapon" (ICRC customary international humanitarian law study, second sentence of rule 45; see also ICRC Guidelines, rule 3 A).

Furthermore, additional clarity could be provided on the relationship between these two rules (see ICRC Guidelines, para. 83). Finally, ICRC recommends that paragraph (3) of the commentary clarify that to the extent that the obligation under the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques overlaps with other customary obligations (other than the one mentioned above), the draft principle would also be an obligation under customary international law.

Office of the United Nations High Commissioner for Human Rights

[Original: English]

[See comment under Part Three.]

United Nations Environment Programme

[Original: English]

Although the principles are generally understood to address both internal and international armed conflicts, this provision relates only to State actors and should include [non-State actors].

United Nations Office for Disarmament Affairs

[Original: English]

ODA supports the inclusion of this principle, which is modelled on the 1976 Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques. ODA supports the view attributed to ICRC that obligations on the destruction of the natural environment as a weapon are norms of customary international law "applicable in international armed conflicts and arguably also in non-international armed conflicts", as contained in paragraph (4) of the commentary for this principle.

Introduction to Part Four of the draft principles

International Committee of the Red Cross

[Original: English]

In general, ICRC welcomes the draft principles on occupation and the formulation of these and their commentaries.

In the introduction to these draft principles, ICRC recommends that the references to occupation not typically being characterized by active hostilities and to a stable occupation sharing characteristics with a post-conflict situation in paragraph (1) be nuanced, as occupation carries with it the condition of military dominion of the Occupying Power over the Occupied Territory through military means and methods. Furthermore, ICRC provided a few other minor comments on this commentary to more accurately reflect the law of occupation.

20. Draft principle 20 – General obligations of an Occupying Power

International Committee of the Red Cross

[Original: English]

[…] ICRC recommends the title be amended to add "in relation to the protection of the environment" in the title itself as there are other general obligations of Occupying Powers than those listed. Furthermore, in paragraph 3 of the draft principle, ICRC recommends adding "unless absolutely prevented" after "shall respect" to more accurately reflect article 43 of the Hague Regulations. In general, ICRC agrees with what is reflected in paragraph (3) of the commentary on the relationship between different bodies of law, but recommends that the commentary also mention that the exact relationship between these is more complex (see ICRC Guidelines, paras. 25-41, for a full discussion on other bodies of law).

International Union for the Conservation of Nature

[Original: English]

IUCN welcomes the draft principles governing occupation as recognizing that Occupying Powers already have clear obligations towards the environment under a modern view of the law of occupation, together with the complementarity of other legal regimes,

particularly environmental law (including the Convention on Biological Diversity and the Convention on Wetlands of International Importance especially as Waterfowl Habitat etc.) and human rights law, as reflected in the reference to "applicable international law".

IUCN welcomes paragraph 2 which refers to the growing body of environmental human rights requiring the prevention of significant environmental damage likely to prejudice the health and well-being of the occupied population. And it commends the commentary to paragraph 2 which refers to the importance to human health of biodiversity, healthy soils and water quality (para. (5)). However, IUCN recognizes that a number of States will have more substantial human rights obligations drawn from a stand-alone right to a healthy environment or from a rights of nature approach that move beyond seeing nature only as having value to humans.

Adopting the human rights formulation of "prevent" in paragraph 2, IUCN welcomes the inclusion of the obligation on the occupying power to minimize environmental damage caused by non-State actors in areas under its control, such as individuals and companies. However, IUCN suggests that the wording "of the occupied territory" is unnecessary, with the scope of the provision being clearly covered by the titles to Part Four and the principle itself.

In the commentary to paragraph 3, IUCN welcomes the notion that States may need to take proactive measures in protecting the environment in occupied territories, but would urge the Commission to draw that possibility more specifically into the wording of the provision.

Office of the United Nations High Commissioner for Human Rights

[Original: English]

OHCHR welcomes the inclusion of draft principle 20 on the general obligations of occupying powers. Mindful of the application of international humanitarian law,[301] it is also welcomed that the accompanying commentary, in paragraph 3, recognizes the complementary application of international human rights law situations of occupation.[302] Human rights treaties have recognized occupation, directly or through a subordinate local administration, as a form of exercise of jurisdiction.[303] An occupying power is under an obligation to respect and to ensure the human rights within the occupied territory (E/C.12/ISR/CO/4; CCPR/C/ISR/CO/4), within the parameters set forth in the 1907 Hague Regulations and the 1949 Geneva Convention IV. The general duty to prevent, addressed above, will thus also be applicable in situations where environmental harm is likely to prejudice the enjoyment of human rights.

Paragraph 2 of draft principle 20 provides that the occupying power shall take appropriate measures to prevent *significant* harm to the environment of the occupied territory that is likely to prejudice the health and well-being of the population of the occupied territory. In line with the purpose of the provision to indicate that environmental harm can have adverse effects, including on human rights of the population in the occupied territory (para. (5) of the commentary to principle 20), it is suggested to reconsider the reference to "significant" in the draft principle to

[301] See 1907 Hague Regulations; Geneva Convention IV; Additional Protocol I.

[302] In associated footnote 1294 of the commentary, OHCHR suggests adding reference to E/C.12/ISR/CO/4, paras. 14-15.

[303] CCPR/C/21/Rev.1/Add.13, para. 10; CCPR/C/GC/36, para. 63; European Court of Human Rights, *Loizidou v Turkey*, application No. 15318/89, judgment (preliminary objections) of 23 March 1995; European Court of Human Rights, *Ilaşcu and others v Moldova and Russia* [GC], application No. 48787/99, judgment of 8 July 2004.

ensure that the draft principle is consistent with the duty to prevent under international human rights law. It would also be consistent with the best interests principle anchored in the underlying norms of the laws of occupation, as the 1907 Hague Regulations and the 1949 Geneva Convention IV preserve the rights of protected people and strictly regulate the actions of the occupying power (A/72/556, paras. 34-35).

Further, in relation to the reference to "health and well-being" in paragraph 2 of draft principle 20, the commentaries reference certain sources, explaining the reasons for the choice and the meaning of these concepts, in particular article 55 to Protocol I Additional to the Geneva Conventions forming part of the general protection of the civilian population against the effects of hostilities. It prohibits the use of means and methods of warfare which may be expected to cause widespread, long-term and severe damage to the natural environment, and thereby cause prejudice to the health and survival of the population. The obligations of the occupying power in paragraph 2 go beyond such provision. In addition, the commentaries make a general reference to human rights law, albeit without specific reference to human rights instruments or practice by human rights bodies. Thus, it is suggested to broaden the scope of protected interests to ensure that draft principle 20 includes duty to prevent harms to the environment that are likely to affect human rights that may not necessarily be directly related to the health or well-being of individuals.[304]

21. Draft principle 21 – Sustainable use of natural resources

International Committee of the Red Cross

[Original: English]

ICRC recommends that the commentary address more clearly the exceptions expressly authorized by applicable international humanitarian law provisions to the rule that immovable public property must be administered according to the rules of usufruct (see ICRC Guidelines, para. 197). More generally, reference could be made to ICRC Guidelines, rule 15, including B. "immovable public property, including objects forming part of the natural environment, must be administered according to the rule of usufruct". In paragraph (8) of the commentary, ICRC considers that the last sentence suggests excessive flexibility in the application of an obligation under occupation and therefore ICRC suggests "shall" be used instead.

International Union for the Conservation of Nature

[Original: English]

IUCN recognizes that the draft principle leaves the issue of the legality of when an occupying power can use the natural resources of the occupied territory to the law of occupation, referencing that such occupying powers must do so in a way that "ensures their sustainable use and minimizes environmental harm". However, the law in this area is not entirely straightforward and IUCN would welcome further guidance in the commentary.

IUCN welcomes the specific reference to the need to ensure the minimization of environmental harm and the legal basis for this, as well as the new phrasing of "sustainable use" rather than the historic notion of usufruct. It appreciates the concern of some States that this formulation might appear to weaken the existing standard, however it views both

[304] Paragraph (5) of the commentary to draft principle 20 also contains a reference to "key" human rights, closely linked to the protection of the quality of soil, water, and biodiversity. The Commission way wish to refer to "human rights" without a qualifier. In the associated footnote 1307, references to human rights mechanisms may be added (e.g. A/HRC/34/49; and A/75/161).

concepts as being designed to prevent the overexploitation of natural resources, and so the new formulation should continue to safeguard the occupied State's property and means of subsistence. It recognizes that this is the only specific reference made in the draft principles to the fundamental environmental law concept of sustainable development and repeat its suggestion that the Commission include a preamble or opening statement, that would set the principles into the context of the importance of nature, biodiversity and other environmental law concepts.

In terms of wording, IUCN suggests clarifying that the locus of the "benefit" is with the protected population within the occupied territory, as understood in the Geneva Convention IV, and that this provision should not be open to abuse through the transfer of persons into the territory or out of the territory (Geneva Convention IV, art. 49). Thus, it suggests the addition of the word "protected" before population in draft principle 21. Equally, it suggests, such "administration and use" must be carried out in adherence with international human rights obligations, including without discrimination and ensuring effective participation in decision-making.

Office of the United Nations High Commissioner for Human Rights

[Original: English]

Draft principle 21 concerns the use of natural resources in occupied territory by an Occupying Power. The provision contains a reference to "under the law of armed conflict". As highlighted in paragraph (5) of the commentary to draft principle 21, the international legal framework for the exploitation of natural resources is regulated by international humanitarian law and other areas of international law, including international human rights law. Accordingly, it is recommended that the draft principle be amended more generally to "provided by international law" or comparable formulation.

22. Draft principle 22 – Due diligence

International Committee of the Red Cross

[Original: English]

[…] ICRC wonders why it is limited to the occupation context. If maintained in the occupation section, ICRC recommends that the commentary clarify that this draft principle applies to all temporal phases, except for those parts of the commentary that focus on situations of occupation.

Office of the United Nations High Commissioner for Human Rights

[Original: English]

OHCHR welcomes draft principle 22 on due diligence, in relation to which the Commission may wish to consider the observations made above regarding the use of the qualifier "significant" and further referring to human rights mechanisms in the relevant commentary.[305]

[See also comment on draft principle 20.]

[305] CCPR/C/GC/36, para. 22. As mentioned, the Human Rights Committee has affirmed that effective control over territory through occupation constitutes the exercise of jurisdiction within the meaning of the International Covenant on Civil and Political Rights, article 2, paragraph 1.

23. Draft principle 23 – Peace processes

Food and Agriculture Organization of the United Nations

[Original: English]

It is recommended that principle 23, paragraph 2, be expanded as follows: Instead of "Relevant international organizations should, where appropriate, play a facilitating role in this regard", please use: "Relevant international organizations in cooperation across the humanitarian system, in particular between local, national and international actors should ensure a continuum of efforts to manage environmental risks and to develop sustainable development interventions".

International Atomic Energy Agency

[Original: English]

[…] In this context reference is made to the comments above relating to the application of IAEA safety standards pursuant to article III(A), paragraph 6, of the IAEA Statute upon request from States [for instance, IAEA Safety Guide No WS-G-3.1[306]], and previous instances where IAEA has been requested to assist with remediation in post-conflict situations, for example, where environmental risks arose subsequent to use of depleted uranium ammunitions.

[See also comment under general comments.]

International Committee of the Red Cross

[Original: English]

In general, ICRC has some questions on the formulation of the commentary of this draft principle, as in some cases references to the end of an armed conflict are not always fully in line with what is provided in international humanitarian law, as well as on the temporal (and personal) scope of this draft principle. More specifically, ICRC recommends that paragraph (3) of the commentary clarifies that the expression "parties to an armed conflict" includes former parties to an armed conflict in the event that an armed conflict has ended.

International Union for the Conservation of Nature

[Original: English]

IUCN commends the Commission on the inclusion of draft principle 23, which suggests that parties to the conflict should include environmental protection and restoration within peace processes, thus recognizing the importance of environmental peacebuilding. This development is certainly a very positive one. Many armed conflicts have included at least one environmental issue, whether it is environmental damage, scarcities or inequalities as a causal factor in the conflict, or exploitation of natural resources as a war-sustaining or financing activity, or simply environmental damage caused in warfare. It suggests, however, that the current wording could be rephrased to read, "damaged in relation to the conflict" since not all environmental damage will be attributable directly to being caused "by the conflict". Thus, the new wording would help to ensure that there are no gaps in protection.

IUCN suggests that the commentary to paragraph 2 include mention of the important role of local communities in the peacebuilding process, as required by international human

[306] "Remediation Process for Areas Affected by Past Activities and Accidents". This guide is being revised and will be superseded by IAEA General Safety Guide No GSG-15 (forthcoming).

rights law, including obligations of effective participation in decision-making and access to justice.

It encourages the Commission in the commentary to recognize the particular situation of vulnerable persons who have historically borne the brunt of long-term environmental damage. Such phrasing could be taken from the United Nations Environment Assembly resolution 2/15, "Recognizing also the need to mitigate and minimize the specific negative effects of environmental degradation … post-conflict on people in vulnerable situations, including children, youth, persons with disabilities, older persons, indigenous peoples, [ethnic minorities], refugees and internally displaced persons, and migrants, as well as to ensure the protection of the environment in such situations".[307]

Office of the United Nations High Commissioner for Human Rights

[Original: English]

The right to full and equal participation of women in decision-making, planning and implementation as regards protection of the environment should be referenced in the commentary to draft principles 23 and 24.[308] The Committee on the Elimination of Discrimination against Women has issued a number of relevant observations and recommendations (e.g. CEDAW/C/GC/30; CEDAW/C/GC/37; CEDAW/C/GC/34; CEDAW/C/GC/35). Also relevant is the United Nations Environment Assembly resolution 4/17 on promoting gender equality and the human rights and empowerment of women and girls in environmental governance (UNEP/EA.4/Res.17).

[See also comment under general comments.]

24. Draft principle 24 – Sharing and granting access to information

International Atomic Energy Agency

[Original: English]

[…] Once more referring to the examples provided under general comments above regarding the IAEA experience in post-conflict situations, it is noted that individual States have provided IAEA with information which was necessary to perform assessments and develop recommendations for relevant remedial actions. Similarly, as regards cooperation, reference is made to the comments relating to depleted uranium ammunitions and nuclear installations, with respect to which IAEA supported environmental assessments and advised on remedial measures, in cooperation with affected States, other parties to armed conflicts, assisting States and international organizations such as the United Nations Environment Programme and the World Health Organization.

International Committee of the Red Cross

[Original: English]

ICRC welcomes this draft principle and the references in the commentary to relevant obligations under international humanitarian law. It recommends that, while

[307] United Nations Environment Assembly, Resolution 2/15, Protection of the environment in areas affected by armed conflict, 4 August 2016, UNEP/EA.2/Res.15, preamble.

[308] On the right to participation, see e.g. A/HRC/39/28. See also Rio Declaration, principle 20. See also Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (Maputo, 1 July 2003), available at https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa, art. 18.

the draft principle focuses on States and international organizations, the commentary should more clearly address the relevance of this draft principle also for non-State armed groups parties to non-international armed conflicts, particularly given that there are obligations under international humanitarian law that would also apply to them. For instance, it suggests further clarity in paragraph (1) of the commentary, which should clarify that even if the draft principle does not apply as such to non-State armed groups, this does not restrict or impair the relevant obligations of non-State armed groups parties to a conflict under international humanitarian law.

International Union for the Conservation of Nature

[Original: English]

IUCN welcomes the inclusion of draft principle 24 on access to information. In light of the global recognition of the participatory rights of local communities in the environmental decision-making process [309] IUCN urges the Commission to add the following words to the end of paragraph 1: "in particular those obligations that ensure the rights of local communities in environmental decision-making".

Office of the United Nations High Commissioner for Human Rights

[Original: English]

Draft principle 24 regulates the sharing or granting of access to information. The right of access to information is an important and established principle under international human rights law.[310] While recognizing that human rights treaties are directly binding on States, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has asserted that the obligation to provide access to information is applicable *mutatis mutandis* to international organizations (A/72/350), and such a right has been recognized explicitly by some such organizations.[311]

Paragraph 1 of the draft principle may imply two limitations on the scope of rights of access to information: the purpose of granting access is expressly to facilitate remedial measures; and the type of information subject to disclosure should be "relevant" to achieve that purpose. Under international human rights law, the right covers, in principle, all information held by public authorities.[312] Access to information may facilitate remedial measures, but such effect should not be

[309] Aarhus Convention, art. 3; 2018 Escazú Agreement, arts. 1 and 7;International Covenant on Civil and Political Rights, art. 19; 1981 African Charter on Human and Peoples' Rights, art. 24, ; 1950 European Convention on Human Rights, art. 8.

[310] International Covenant on Civil and Political Rights, art. 19, para. 2; International Covenant on Economic, Social and Cultural Rights, art. 12; E/C.12/2000/4, paras. 11 and 12 (b). See also Convention on the Elimination of All Forms of Discrimination against Women, art. 12; American Convention on Human Rights, art. 13; Inter-American Court, *Claude Reyes et al v. Chile*, Judgment of 19 September 2006; European Convention on Human Rights, arts. 8 and 10; European Court of Human Rights, *K.H. and others v. Slovakia*, application No. 32881/04, judgment of 28 April 2009, para. 44, and *Magyar Helsinki Biyottsag v. Hungary*, Judgment of 8 November 2016; and African Charter on Human and Peoples' Rights, art. 9. See also Council of Europe Convention on Access to Official Documents (Tromsø, 18 June 2009) , *Council of Europe Treaty Series* No. 205 (Tromsø Convention); European Union Charter of Fundamental Rights, art. 42; Aarhus Convention; Escazú Agreement.

[311] See Treaty on the Functioning of the European Union, art. 15.

[312] Tromsø Convention, art. 2; CCPR/C/GC/34, para. 18; African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression and Access to Information in Africa, principles 26, 28 and 31.

interpreted to restrict the scope of the right itself. Further, restricting access to information "relevant" to remedial measures also suggests substantive restriction to the right of access to information. In order to be lawful as a matter of human rights law, such a restriction must be justified under the cumulative conditions applicable under the applicable human rights treaty.

In addition, the first sentence of paragraph 2 of the draft principle may be understood as limiting the right of access to information beyond permissible limits set out in international human rights law. Article 19, paragraph 3, of the International Covenant on Civil and Political Rights recognizes restrictions on the basis of national security, which while a legitimate ground, must also be provided by law, necessary and proportionate, in order to be justified, including in form of denial of access.[313] The relevant sentence also seems arguably unnecessary, as draft principle 24, paragraph 1, *in fine* already includes the caveat "in accordance with their obligations under international law", which permits restrictions based on national security considerations.

Lastly, it is recalled that the right of access to information applies before, during and after an armed conflict. With particular relevance for draft principles 12 to 19, and the need for transparency and accountability for harm caused to the environment, the Human Rights Committee has for example recommended that States should "disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered" (CCPR/C/GC/36, para. 64).

[See also comments under general comments and on draft principle 23.]

United Nations Economic and Social Commission for Asia and the Pacific

[Original: English]

Effective environmental justice demands access to information. In this regard, States should disclose and enforce the disclosure by other parties, of any environmental information that can help determine relief and remedy, but also, any vital information that secures the integrity of the affected communities by armed conflict. This is crucial for communities that have been displaced, so that they can determine the feasibility of returning to the conflict areas. This information should include any potential biohazards, reporting pollution and structural damages that may jeopardize the health, nutrition, safety and security of these populations (beyond the current obligations "under international law", as the case of landmines highlighted in the commentary). This should occur before any decisions on reconstruction and reintegration post-displacement.

United Nations Environment Programme

[Original: English]

Noting the commentary's references to international and regional environmental obligations on granting access to information, here, too, it should be

[313] On the interpretation of these requirements, see e.g. CCPR/C/GC/34, paras. 25 and 34.

noted that vulnerable groups, including women, children, and indigenous communities are accorded additional protections relating to the environment.[314]

25. Draft principle 25 - Post-armed conflict environmental assessments and remedial measures

International Atomic Energy Agency

[Original: English]

[See comment on draft principle 24.]

International Committee of the Red Cross

[Original: English]

From an international humanitarian law perspective, there are relevant obligations that impose requirements regarding cooperation. The term "encouraged" used in this draft principle could be read to fall below these. For instance, there are obligations regarding international cooperation for mine clearance, environmental remediation (e.g. Treaty on the Prohibition of Nuclear Weapons) and victim assistance.

International humanitarian law also contains relevant and detailed rules regulating humanitarian access that impose certain constraints on governments' discretion to refuse and control outside humanitarian assistance. As this draft principle is focused on cooperation (and formulated as an encouragement) it could leave out such humanitarian activities (e.g. related to mine clearance, explosive remnants of war) or fall below what is required.

ICRC therefore proposes a "without prejudice" paragraph be added to the commentary. This could read, for example: "States have specific obligations related to the survey, clearance, removal, and facilitation of removal of remnants of war under international law. Compliance with these can contribute to the remediation encouraged by this principle. Principle 25 is without prejudice to these existing obligations."

International Union for the Conservation of Nature

[Original: English]

IUCN welcomes the draft principle and recognition of the importance of post-conflict environmental reviews. It notes that questions have been raised as regards the legal basis for the principle.

While it appreciates that there is no specific principle of international environmental law, human rights law or humanitarian law which calls specifically for such post-conflict environmental assessments, it is the case that most environmental law treaties contain the basic requirement of protection of sites or species, or the reduction of pollution. Thus, States would have to undergo such assessments as these in order to fulfil their environmental law treaty obligations in any event. The 1992 Convention on Biological Diversity, for example, requires ongoing monitoring of conservation sites and protection of

[314] United Nations Environment Programme, *Environmental Rule of Law: First Global Report*, p. 162, recognizing that indigenous communities are often accorded additional protections given their close economic and cultural association with the environment and their traditional disempowerment from legal and governmental systems. UNEP/EA.2/Res.15 (27 May 2016): "Recognizing further the specific negative effects of environmental degradation on women and the need to apply a gender perspective with respect to the environment and armed conflicts."

biodiversity more generally, and, thus, would, by implication, require an assessment following any major incident, such as armed conflict. The same would undoubtedly be true for the obligations under the 1972 Convention for the Protection of World Cultural and Natural Heritage. One could also argue the same point for many human rights obligations, such as the environmental health dimensions of the right to health, water, food and life.[315] IUCN, therefore, suggests that the Commission's commentary could be expanded to include such recognition. Environmental assessments can also aid the State in its recovery by pinpointing the worst affected environmental areas and so help with planning and prioritization of resources, as well, of course, as building an evidential basis for any legal claim of responsibility for harm, and thus aligns with draft principle 9.

Office of the United Nations High Commissioner for Human Rights

[Original: English]

OHCHR welcomes the inclusion of the principle of cooperation with respect to post-armed conflict environmental assessments and remedial measures. The Commission may wish to consider amending the draft principles to reflect that under international human rights law, cooperation may, depending on the circumstances, also constitute a legal obligation. The International Covenant on Economic, Social and Cultural Rights, for example, places a general legal obligation "to take steps, individually and through international assistance and co-operation" to progressively achieve the full realization of the rights enshrined in the Covenant (art. 2, para. 1). The obligation of States to ensure progressive realization of economic, social and cultural rights also in conflict settings, has been expanded upon by the Committee on Economic, Social and Cultural Rights.[316] Moreover, the Committee on Economic, Social and Cultural Rights has interpreted the scope of the duty to cooperate, including in the context of the right to water.[317] With respect to the relationship between environmental degradation and the right to life, the Human Rights Committee has recommended States to cooperate with other States concerned about natural disasters and emergencies (CCPR/C/GC/36, para. 62).

Moreover, the duty to cooperate under human rights law is broader than the specific contexts of environmental assessments and remedial measures covered by draft principle 25, and may, for example, include relief and assistance measures addressed under draft principle 26. As for example held by the Committee on Economic, Social and Cultural Rights with respect to the right to water, "States should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required" (E/C.12/2002/11, para. 34). It is thus suggested to consider whether the principle of cooperation should be stated beyond the scope of environmental assessments and remedial measures.

[See also comment under general comments.]

[315] For example, see Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health, E/C.12/2000/4, para. 15.

[316] E/C.12/COD/CO/4, para. 6.

[317] The Committee on Economic, Social and Cultural Rights stated that "it is particularly incumbent on States parties, and other actors in a position to assist, to provide international assistance and cooperation, especially economic and technical which enables developing countries to fulfil their core obligations", E/C.12/2002/11, para 38.

United Nations Environment Programme

[Original: English]

Principle 25 should highlight the importance of public participation and access to information. There should be added "*and other follow-up measures*", to increase systematic attention to remedial measures following assessment.[318]

United Nations Office for Disarmament Affairs

[Original: English]

ODA notes that the Treaty on the Prohibition of Nuclear Weapons requires each State Party, with respect to areas under its jurisdiction or control contaminated as a result of activities related to the testing or use of nuclear weapons or other nuclear explosive devices, to take necessary and appropriate measures towards the environmental remediation of areas so contaminated. The Treaty will also establish a right of each State Party to seek and receive assistance, where feasible, from other States Parties. Each State Party in a position to do so shall provide technical, material and financial assistance to States Parties affected by nuclear-weapons use or testing, to further the implementation of this Treaty.

26. Draft principle 26 – Relief and assistance

Food and Agriculture Organization of the United Nations

[Original: English]

It is recommended that principle 26 on Relief and assistance be expanded by adding that States and international organizations should direct relief and assistance efforts towards urgent and more ambitious climate action and environmental protection to step up implementation of relevant international obligations and national laws, standards, policies and plans for stronger climate action and environmental protection.

Office of the United Nations High Commissioner for Human Rights

[Original: English]

[See comments under general comments and on draft principle 25.]

United Nations Economic and Social Commission for Asia and the Pacific

[Original: English]

When States are involved in the armed conflict, it is important to engage neutral third parties and international organizations for the assessment of damages and to determine appropriate compensation and remedy in an objective manner. As elaborated in the commentary (para. (5)), States may channel relief and assistance through international organizations. However, the assessment of the due damages should be performed by a third party, as States involved may be subjective.

[318] United Nations Environment Programme, "Integrating environment in post-conflict needs assessments: UNEP guidance note" (March 2009). Recognizing that, often, "natural resource allocation and management is done in an ad-hoc, decentralized, or informal manner" in post-conflict contexts.

United Nations Environment Programme

[Original: English]

This principle should include States [*and international organizations*] to take appropriate measures.

United Nations Office for Disarmament Affairs

[Original: English]

ODA notes that the provisions on environmental remediation and international cooperation contained in the Treaty on the Prohibition of Nuclear Weapons will be applicable in situations in which the source of environmental damage resulting from the use of a nuclear weapon is unidentified, or reparation is unavailable.

27. Draft principle 27 – Remnants of war

International Atomic Energy Agency

[Original: English]

[…] IAEA Safety Standards provide for identification and quantitative assessment of hazards and risks of hazards, as well as for the remediation or removal and safe management of radioactive remnants and wastes related to radioactive and nuclear materials which may result from armed conflicts [for instance, IAEA Safety Guide No WS-G-3.1]. The practice of IAEA has thus included applying Safety Standards as a basis for providing assistance in post-conflict situations with a view to the removal of hazardous materials.

International Committee of the Red Cross

[Original: English]

First, ICRC proposes that paragraph 1 of principle 27 be reformulated to "at the end of active hostilities" or "after the cessation of active hostilities," in place of "after an armed conflict." This is because the actions contained in the draft principle can begin before the end of a conflict, and in practice do. This would also more closely reflect the temporal scope of the following obligations: rule 83 of the ICRC customary law study; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction , article 5, paragraph 1; Protocol II of the United Nations Convention on Certain Conventional Weapons, art. 10, para. 2; Protocol V of the United Nations Convention on Certain Conventional Weapons, art. 4; Convention on Cluster Munitions, art. 4, para. 1).

Second, ICRC suggests that the reference to "toxic and hazardous" substances is changed to "toxic or hazardous substances". This is because the definition of "hazardous" given in paragraph (3) of the commentary indicates that "toxic" is by definition "hazardous" ("forms a hazard to humans and ecosystems"), but is narrower such that it places a condition on "hazardous". It would therefore be preferable to ensure that the meaning here is widened to included non-toxic hazardous remnants. This disjunctive use of "or" is particularly merited by the fact that principle 27 aims to strengthen the protection of the environment, as stated in paragraph (1) of the commentary.

[See also comment on draft principle 28.]

International Union for the Conservation of Nature

[Original: English]

IUCN welcome the specific post-conflict remedial obligation contained in draft principle 27 on remnants of war, and the recognition that such remnants should be removed because of the damage or risk of damage that they are causing *to the environment*. This phraseology that specifically relates clearance to the potential for environmental harm is a very welcome one for the protection of the environment, including nature and habitats that will benefit from such protection.

IUCN suggests, however, the removal of the conjunctive nature of "toxic" and "hazardous" remnants as this better reflects the post-conflict obligations of States under human rights law, particularly to fulfil the obligations to respect and ensure the rights to life and health. Similarly, it is unclear why States are mandated only to "seek to" remove, and it is unclear exactly what this obligation might entail. IUCN encourages the Commission to reformulate the provision to refer to a mandatory obligation, as evidenced in human rights law (such as the right to life).

It recognizes, however, that the current formulation that applies this obligation to non-State armed groups is unclear. It is unlikely that many non-State armed groups would be able to do more than provide location information of such remnants and to provide access to affected areas.

Organisation for the Prohibition of Chemical Weapons

[Original: English]

The following discussion focuses on principle 27 […] and principle 28 […], as these are directly relevant to the detailed procedures and obligations set out in the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction concerning abandoned chemical weapons (ACWs), old chemical weapons (OCWs), and sea-dumped chemical weapons (SDCWs).

[…]

Abandoned chemical weapons

Under the Chemical Weapons Convention, each State Party undertakes to destroy all chemical weapons it abandoned on the territory of another State party.[319] ACWs are defined as "[c]hemical weapons, including old chemical weapons, abandoned by a State after 1 January 1925 on the territory of another State without the consent of the latter".[320] The rules governing ACWs are contained in Part IV(B), Section C, of the Verification Annex.[321] The Chemical Weapons Convention is silent on chemical weapons abandoned by non-State actors.

No later than 30 days following the entry into force of the Chemical Weapons Convention for them, States Parties are under the obligation to declare whether there are ACWs on their territory and whether they have abandoned chemical weapons on the territory of other States.[322] States Parties discovering ACWs after the entry into force of the Chemical Weapons Convention for them must declare those ACWs not

[319] Chemical Weapons Convention, art. I, para. 3.
[320] *Ibid.*, art. II, para. 6.
[321] *Ibid.*, art. IV, para. 1; Annex on Implementation and Verification ("Verification Annex"), Part IV(B), para. 2.
[322] *Ibid.*, art. III, para. 1 (b)(ii) and (iii).

later than 180 days following discovery.[323] States Parties shall provide to the Technical Secretariat all available information concerning ACWs, including, to the extent possible, the location, type, quantity, and information on the abandonment and the condition of the ACWs.[324] Once declared, ACWs will be inspected by the Technical Secretariat. If necessary, the origin of ACWs will be verified and evidence concerning the abandonment and the identity of the abandoning State will be established.[325]

The Territorial State Party ("TSP") has the right to request the Abandoning State Party ("ASP") to enter into consultations for the purpose of destroying ACWs in cooperation with the TSP.[326] Consultations shall then take place between the two States Parties with a view to establishing a mutually agreed plan for destruction.[327] The ASP is responsible for providing all necessary financial, technical, expert, facility, as well as other resources. The TSP must provide appropriate cooperation.[328] If the Abandoning State either cannot be identified or is not a State Party, the Territorial State Party may request the OPCW and other State Parties to provide assistance in the destruction of the ACWs.[329]

ACWs are to be destroyed in accordance with article IV of the Chemical Weapons Convention and Part IV (A) of the Verification Annex. This includes the obligation, under paragraph 10, that "[e]ach State Party, during transportation, sampling, storage and destruction of chemical weapons, shall assign the highest priority to ensuring the safety of people and to protecting the environment".[330] In addition, Part IV (A) of the Verification Annex stipulates that States Parties shall determine how to destroy chemical weapons, but that they may not be dumped in any body of water, buried on land, or destroyed using open-pit burning, as noted above. Furthermore, chemical weapons may only be destroyed at specifically designated and appropriately designed and equipped facilities.[331] Finally, States Parties must provide the environmental permits obtained for each chemical weapon destruction facility.[332]

There are two exceptions to the application of article IV of the Chemical Weapons Convention and Part IV (A) of the Verification Annex to the destruction of ACWs. First, in case of ACWs that also meet the definition of OCWs, the Executive Council, upon request, is granted the authority to modify or, in exceptional cases, suspend the application of provisions on destruction, if doing so would not pose a risk to the object and purpose of the Chemical Weapons Convention. Second, in case of ACWs that do not meet the definition of OCWs, the Executive Council, upon request and in exceptional circumstances, is granted the authority to modify the provisions on the time limit and the order of destruction, if it determines that doing so would not pose a risk to the object and purpose of the Chemical Weapons Convention.[333]

Agreements or arrangements concerning the destruction of ACWs may also be concluded between State Parties. In such a case, the Executive Council may, upon

[323] Verification Annex, Part IV (B), para. 9.
[324] *Ibid.*, paras 8–10.
[325] *Ibid.*, para. 11.
[326] Chemical Weapons Convention, art. I, para. 3; Verification Annex, Part IV (B), para. 13.
[327] Verification Annex, Part IV (B), para. 14.
[328] *Ibid.*, para. 15.
[329] *Ibid.*, para. 16.
[330] *Ibid.*, para. 17; see also *ibid.*, Part IV(A); *ibid.*, Part IV (B), paras 8-16.
[331] *Ibid.*, Part IV (A), para. 13.
[332] *Ibid.*, para. 32.
[333] Verification Annex, Part IV (B), para. 17.

request, decide that selected provisions of such agreements or arrangements take precedence over provisions of Part IV (B), Section C, of the Verification Annex, if the Executive Council determines that the agreement or arrangement ensures the destruction of the ACWs in accordance with Part IV(B), Section C, paragraph 17 of the Verification Annex.[334]

The example of the operations of Japan to destroy chemical weapons that it abandoned in the People's Republic of China demonstrates the priority given to the protection of the environment when addressing ACWs. Japan has noted that "[e]xcavation and recovery operations are conducted in various locations, including mountainous areas, riverbeds and urban districts" and that "[m]ost ACW items are highly corroded or deformed as a result of remaining underground or underwater for a long time".[335] Japan emphasized that it "places the highest priority on the safety of the local community and personnel, as well as the protection of the environment in moving this unprecedented project forward, which involves dangerous tasks".[336]

Old chemical weapons

Article I, paragraph 3, contains the undertaking by States Parties to destroy all chemical weapons abandoned on the territory of another State Party. As stated above, ACWs are defined as "[c]hemical weapons, including old chemical weapons, abandoned by a State after 1 January 1925 on the territory of another State without the consent of the latter".[337] The Chemical Weapons Convention defines OCWs as "[c]hemical weapons which were produced before 1925; or [c]hemical weapons produced in the period between 1925 and 1946 that have deteriorated to such extent that they can no longer be used as chemical weapons."[338]

Similar to ACWs, States Parties are under the obligation to declare whether there are OCWs on their territory, no later than 30 days following the entry into force of the Chemical Weapons Convention.[339] With regard to OCWs produced before 1925, a State Party is required to provide the Technical Secretariat with all available relevant information, including, where possible, the location, type, quantity, and condition of these chemical weapons.[340] Concerning OCWs in the second category (i.e., those produced between 1925 and 1946 that have deteriorated to such extent that they can no longer be used as chemical weapons), a State Party is required to declare these to the Technical Secretariat and provide, to the extent possible, certain information specified in Part IV (A) of the Verification Annex.[341]

A State Party that discovers OCWs after the Chemical Weapons Convention enters into force for it shall submit to the Technical Secretariat the required information referred to above not later than 180 days after the discovery of the OCWs. Following the receipt of the required declaration and information, the

[334] *Ibid.*, para. 18.

[335] OPCW, Executive Council, "Japan: Report on the current status of the ACW projects in China in accordance with Executive Council Decision EC-67/DEC.6 (dated 15 February 2012)" (EC-91/NAT.5, dated 20 June 2019), para. 2.1. See also OPCW, Review Conference, "Japan: Japan's efforts and the progress on the destruction of abandoned chemical weapons in China" (RC-3/NAT.20*, dated 4 April 2013).

[336] OPCW, Executive Council, "Japan: Report on the current status of the ACW projects in China in Accordance with Executive Council Decision EC-67/DEC.6 (dated 15 February 2012)" (EC-91/NAT.5, dated 20 June 2019), para. 2.4.

[337] Chemical Weapons Convention, art. II, para. 6.

[338] *Ibid.*, art. II, para. 5.

[339] *Ibid.*, art. III, para. 1 (b) (i).

[340] Verification Annex, Part IV (B), para. 3.

[341] *Ibid.*. The information requested is listed in paragraphs 1-3 of Part IV (A) of the Verification Annex.

Technical Secretariat inspects the OCWs to verify the information submitted and to determine whether the OCWs fall into either of the two categories.[342] OCWs that are confirmed by the Technical Secretariat as having been produced before 1925 shall be treated by States Parties as toxic waste. States Parties are required to inform the Technical Secretariat of the steps being taken to destroy or otherwise dispose of such OCWs as toxic waste in accordance with their national legislation.[343] OCWs that are confirmed by the Technical Secretariat to fall within the second category (i.e., those produced between 1925 and 1946 that have deteriorated to such extent that they can no longer be used as chemical weapons) shall be destroyed by States Parties in accordance with article IV of the Chemical Weapons Convention and Part IV (A) of the Verification Annex. However, as referred to above in relation to ACWs, a State Party may request the Executive Council to modify the time limit and order of destruction of these OCWs, if the Executive Council determines that doing so would not pose a risk to the object and purpose of the Chemical Weapons Convention.[344]

The protections of the environment incorporated into the Chemical Weapons Convention, particularly article IV, paragraph 10 noted above, thus apply to States Parties destroying OCWs produced between 1925 and 1946 that have deteriorated to such extent that they can no longer be used as chemical weapons. On this basis, States Parties may not dump such OCWs in any body of water, bury them on land, or destroy them using open-pit burning.[345]

In 2017, the Technical Secretariat was called upon to verify the destruction of OCWs on San José Island in the Republic of Panama. In its concept plan for the destruction of the OCWs, the Republic of Panama stated that the selected destruction technology was consistent with its national laws pertaining to public health, safety, and the environment.[346]

United Nations Office for Disarmament Affairs

[Original: English]

ODA notes the explanations in the commentary that explosive remnants of war are one form of potentially toxic and hazardous remnants of war as well as that some remnants of war are not dangerous to the environment at all or may be less dangerous if they remain where they are after the conflict is over.

The objective of draft principle 27, as specified in the commentary, to strengthen the protection of the environment in a post-conflict situation, may conflict in certain situations with the objective of Protocol V of the Convention on Certain Conventional Weapons.

In particular, pursuant to Protocol V of the Convention, a High Contracting Party and party to an armed conflict has a duty to mark and clear, remove or destroy explosive remnants of war in affected territories under its control. This obligation applies even in situations where removal may pose a higher environmental risk than leaving the remnants where they are. In such a situation, a High Contracting Party to

[342] Verification Annex, Part IV (B), paras. 3 and 5.
[343] *Ibid.*, para. 6.
[344] *Ibid.*, para. 7.
[345] *Ibid.*, Part IV (A), para. 13; see also *ibid.*, para. 32.
[346] OPCW, Executive Council, Statement by the Permanent Representative of Panama to the OPCW (EC-86/NAT.20, dated 10 October 2017); OPCW, Executive Council, "Concept plan for the destruction of eight old chemical weapons" (EC-85/NAT.2, dated 16 June 2017), para. 3.

Protocol V would not have recourse to the environmentally appropriate option to "do nothing", in accordance with its obligations under that Protocol.

It is important, in this connection, that paragraph 3 of principle 27 specifies that 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.

28. Draft principle 28 – Remnants of war at sea

International Atomic Energy Agency

[Original: English]

[…] [I]t is of particular note that IAEA acts, in cooperation with the International Maritime Organization, as a technical advisor under the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, also known as the London Convention.[347] The Convention addresses dumping, accidents and losses at sea and encompasses, among others, radioactive material within its scope. It may be of interest to the Commission that IAEA has established and maintains a relevant international database, which includes information on military equipment or remnants which are radioactive, as well as nuclear material resulting from past dumping activities and accidents, listing, inter alia, military aircraft, nuclear reactors, nuclear weapons and nuclear vessels (see the Inventory of Radioactive Material Resulting from Historical Dumping, Accidents and Losses at Sea: For the Purposes of the London Convention 1972 and London Protocol 1996, (most recently published in October 2015 [IAEA-TECDOC-1776]).

International Committee of the Red Cross

[Original: English]

ICRC suggests that the commentary to this draft principle clarify whether the meaning of "remnants of war" used is understood in the same manner as in draft principle 27 and is also limited to "toxic or hazardous remnants of war". As recommended for draft principle 27, this draft principle should also apply before the end of an armed conflict and this could be clarified in paragraph (1) of the commentary.

International Union for the Conservation of Nature

[Original: English]

IUCN welcomes the recognition by the Commission of the many long-standing issues of environmental harm due to remnants at sea. Such wreckage is often located in the marine environments of States that took no part in conflict and who can least afford both the costs of remediation and the ongoing impact on their marine life and environmental human rights. It, therefore, welcomes the draft principle, which imposes no time limit on the need to address all remnants where they constitute a danger to the environment. It does, however, suggest the Commission add reference also to avoiding the risk of such remnants endangering the enjoyment of human rights.

[347] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Mexico City, Moscow, Washington, D.C., 29 December 1972), *ibid*., vol. 1046, No. 15749, p. 120.

Organisation for the Prohibition of Chemical Weapons

[Original: English]

Sea-dumped chemical weapons

During the negotiation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction in the United Nations Conference on Disarmament, the impermissibility of dumping chemical weapons into the ocean as a destruction methodology was discussed among States.[348] It was generally agreed that such a means of destruction was not consistent with domestic and international environmental norms.

Dumping chemical weapons into any body of water was therefore prohibited in Part IV(A), paragraph 13, of the Verification Annex. However, two provisions were placed into the Chemical Weapons Convention dealing with sea-dumped chemical weapons (SDCWs): (a) article III, paragraph 2, states that the provisions of article III (declarations) and the relevant provisions of Part IV of the Verification Annex (destruction of chemical weapons) shall not, at the discretion of a State Party, apply to chemical weapons that had been dumped at sea before 1 January 1985; and (b) article IV, paragraph 17, states that the provisions of article IV (chemical weapons) and the relevant provisions of Part IV of the Verification Annex shall not, at the discretion of a State Party, apply to chemical weapons that had been dumped at sea before 1 January 1985.

The OPCW Conference of States Parties has decided that the Technical Secretariat shall inspect chemical weapons dumped at sea after 1984 on the basis of declarations submitted under article III and in accordance with article IV and the relevant provisions of Part IV of the Verification Annex.[349] With respect to chemical weapons dumped at sea before 1985, the relevant Chemical Weapons Convention provisions (cited in the foregoing paragraph) demonstrate that a State Party exercises its discretion to declare and destroy (or not) such chemical weapons.[350] In the event that a State party decides — on a voluntary basis — to recover, declare, and destroy SDCWs, such activities are subject to the relevant provisions of the Chemical Weapons Convention. The Technical Secretariat has assisted States parties when such requests for assistance have been made.

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[348] In 1971, Italy submitted a working paper to the Conference of the Committee on Disarmament expressing the view that the destruction of large stockpiles of chemical weapons by dumping them into the ocean was "unthinkable". Chemical Weapons Convention *Travaux Préparatoires*, "Working Paper on some problems concerning the prohibition of chemical weapons" (8 July 1971) CCD/335 (Book 4).

[349] OPCW Conference of the States Parties Decision, "All aspects of the issue of chemical weapons buried by a State party on its territory after 1976 or dumped at sea after 1984, including a possible challenge inspection, and its implications for the Technical Secretariat's responsibilities" (C-III/DEC.12, dated 20 November 1998).

[350] OPCW Conference of the States Parties Decision, "Declaration requirements for chemical weapons buried by a State party on its territory after 1976 or dumped at sea after 1984" (C-I/DEC.30, dated 16 May 1997), which adopted an understanding with respect to the declaration requirements for chemical weapons buried by a State party on its territory after 1976 or dumped at sea after 1984; OPCW Conference of the States Parties Decision, "Understanding with respect to the terms 'buried by a State party on its territory' and 'dumped at sea'" (C-I/DEC.31, dated 16 May 1997), which adopted an understanding with respect to the terms "buried on its territory" and "dumped at sea" contained in the Chemical Weapons Convention at article III, paragraph 2, and article IV, paragraph 17.

The issue of SDCWs has regularly been on the OPCW agenda.[351] Moreover, the United Nations General Assembly has encouraged Member States to undertake a wide variety of activities to strengthen existing efforts to deal with SDCWs.[352] The OPCW Conference of States Parties, at its Third Review Conference, noted the United Nations General Assembly's resolution on this issue and invited States parties to support voluntary sharing of information, awareness raising, and cooperation on the issue of SDCWs.[353] The Conference's action, in this regard, is consistent with article VIII, paragraph 1, of the Chemical Weapons Convention, which provides that the purpose of the OPCW is to provide a forum for consultation and cooperation among States Parties on chemical weapons issues.

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[351] OPCW, Preparatory Commission, "Final Report of the Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons to the First Session of the Conference of the States Parties of the Organisation for the Prohibition of Chemical Weapons and to the First Meeting of the Executive Council of the Organisation for the Prohibition of Chemical Weapons" (PC-XVI/37, dated 15 April 1997), paras. 2 and 96; OPCW, Technical Secretariat, Office of the Director-General, "Note by the Director-General: Report of the Advisory Panel on future priorities of the Organisation for the Prohibition of Chemical Weapons" (S/951/2011, dated 25 July 2011), paras 31, 101 and 107; OPCW, Review Conference, "Bulgaria, Colombia, Estonia, Georgia, Latvia, Lithuania, Mexico, Poland, Romania and Ukraine: Broadening international cooperation on sea-dumped chemical weapons and promoting the OPCW as a forum for voluntary cooperation on the issue" (RC4/WP.3/Rev.2, dated 28 November 2018), p. 2; OPCW, Scientific Advisory Board, Temporary Working Group on Verification, "Summary of the Fourth Meeting of the Scientific Advisory Board's Temporary Working Group on Verification" (SAB-22/WP.1, dated 1 October 2014), annex, para. 2.7; OPCW, Technical Secretariat, Office of Strategy and Policy, "Note by the Technical Secretariat: The OPCW in 2025: ensuring a world free of chemical weapons" (S/1252/2015, dated 6 March 2015), annex, paras. 24 and 38; OPCW, Scientific Advisory Board, "Report of the Scientific Advisory Board at its twenty-seventh session, 19–23 March 2018" (SAB-27/1, dated 23 March 2018), paras 6.15 and 6.17 (c); OPCW, Executive Council, "Note by the Director-General: Response to the Report of the twenty-seventh session of the Scientific Advisory Board" (EC-88/DG.5, dated 9 May 2018), para. 15; OPCW, Review Conference, "Report of the Scientific Advisory Board on Developments in Science and Technology for the Fourth Special Session of the Conference of the States Parties to Review the Operation of the Chemical Weapons Convention" (RC-4/DG.1, dated 30 April 2018), para. 45, and annex 1, paras. 237– 240; OPCW, Review Conference, "Open-Ended Working Group on future priorities of the OPCW recommendations to the fourth special session of the Conference of the States Parties to review the operation of the Chemical Weapons Convention" (RC-4/WP.1, dated 16 July 2018), para. 55.

[352] General Assembly resolution, "Cooperative measures to assess and increase awareness of environmental effects related to waste originating from chemical munitions dumped at sea" (A/RES/68/208, adopted 20 December 2013 and issued 21 January 2014).

[353] OPCW, Review Conference, "Report of the third special session of the Conference of the States Parties to review the operation of the Chemical Weapons Convention" (RC-3/3*, dated 19 April 2013), para. 9.147.