

Comments from the State of Israel on the International Law Commission's *Draft Principles on the Protection of the Environment in Relation to Armed Conflicts* as adopted by the Commission in 2019 on first reading

1. In accordance with paragraph 68 of the Report of the International Law Commission ("ILC") on the work of its 71st Session (A/74/10) and the Secretary-General's note dated 24 September 2020 (LA/COD/32), the State of Israel hereby submits its comments and observations on the ILC's draft principles on the protection of the environment in relation to armed conflicts, as adopted on first reading.
2. 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.
3. 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.

I. General Comments

4. 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: (i) the status and purported object of the propositions set out in the draft principles; (ii) the conflation of the law of armed conflict (LOAC), international human rights law (IHRL) and international environmental law (IEL) that pervades the draft principles; and (iii) the basic approach under existing LOAC towards the protection of the natural environment.

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

5. 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".¹ Israel welcomes this important clarification, but wishes to emphasize that a

¹ Draft principles, Introduction, paragraph 3.

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.

6. 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".² 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 (LOAC) together with International Human Rights Law (IHRL) and/or International Environmental Law (IEL), as elaborated below.
 - c. The draft principles set aside the important distinction between LOAC applicable to international armed conflicts and non-international armed conflicts.³
 - 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.
7. 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".⁴ 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 LOAC, IHRL and IEL

8. As mentioned above, the draft principles declaredly blur the boundaries between different branches of international law, including LOAC, IHRL and IEL: paragraph (2) of the commentary to draft principle 1 explicitly lays out the methodological

² Draft principle 1, paragraph 2 of the appended commentary.

³ Draft principle 1, paragraph 3 of the appended commentary.

⁴ 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 (draft principle 1, paragraph 2 of the appended commentary), and perhaps also the choice to identify the outcome as a compilation of "principles" (draft principles, Introduction, paragraph 3).

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.

9. First, as is well known, the relationship between LOAC and IHRL is highly contested in international law. Israel’s longstanding position is that armed conflicts are governed by LOAC. IHRL 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.⁵
10. Second, even those who assume that IHRL 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”.⁶ In this respect, the rule of *lex specialis derogat legi generali* is of great relevance. In the context of armed conflict, rules of LOAC – whether based in treaty or in customary international law – constitute the applicable *lex specialis*.
11. Importantly, the methodological technique employed through the draft principles of drafting standards that aim to encapsulate together LOAC and IHRL goes even further than the traditional debate on the relationship between the two bodies of law. The traditional debate focuses on whether and how IHRL rules apply in times of armed conflicts, but even the keenest advocates of IHRL applicability in this context do not seem to suggest the textual merging of rules from different regimes. Such merging of LOAC rules with IHRL rules is not valid under both the rules regarding identification of customary law and the rules of treaty interpretation, as the case may be.
12. Similarly, Israel does not agree with the manner in which the applicability of IEL 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 LOAC and IEL, the conflation between LOAC and IEL is mistaken. Israel emphasizes here, too, that any forced integration of IEL rules with the customary rules of LOAC or interpretation of LOAC treaties is incorrect.
13. To take a central example, the draft principles repeatedly invoke certain passages in the ICJ’s *Nuclear Weapons* advisory opinion⁷ as a primary source purportedly supporting the general relevance of IEL to armed conflicts.⁸ 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

⁵ CCPR/C/ISR/5; E/C.12/ISR/4.

⁶ *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Preliminary Objection, P.C.I.J. Reports, Series A/B, No. 77, at 90 (Judge Anzilotti, Separate Opinion).

⁷ *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*).

⁸ Draft principle 13, paragraphs (3) and (5) of the commentary; draft principle 15, paragraph (2) of the commentary; draft principle 20, paragraphs (3) and (4) of the commentary.

the outset of its analysis, that it is refraining from opining on the general question of IEL 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".⁹ The Court does not address IEL sources in the remainder of this discussion.¹⁰ When the Court addresses LOAC in the passages that follow, it merely examines whether environmental factors are taken into account *within* LOAC obligations, rather than whether IEL as a body of law applies in relation to armed conflict (the same is true for the Court's discussion of *jus ad bellum*).¹¹ Israel therefore finds that the *Nuclear Weapons* advisory opinion cannot be taken as "support for 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.¹²

14. The Commission's choice to conflate LOAC, IHRL and IEL is among the reasons warranting the classification of the draft principles as recommended guiding principles. Israel will nonetheless suggest below to remove some expressions of this conflation, both from the language of the draft principles themselves and from particularly controversial passages in the appended commentaries.

The basic approach under LOAC towards the protection of the natural environment

15. It is Israel's position that the protection of the natural environment under customary LOAC 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.
16. 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 LOAC). 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.
17. 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

⁹ *Nuclear Weapons advisory opinion*, *supra* note 7, at para. 30.

¹⁰ 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.

¹¹ The part in the Court's opinion which discusses *jus ad bellum* is mistakenly presented in the draft principles as referring to LOAC. In this regard, see our elaboration below in the comments regarding draft principle 15.

¹² Draft principle 20, paragraph (3) of the commentary.

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.

18. In treaty law, a prominent expression of the anthropocentric approach is found in article 2(4) of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) of the Convention of Certain Conventional Weapons (CCW).¹³ 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(4) to accord with rules relating to distinction in LOAC.
19. The anthropocentric approach also stems from LOAC's interchangeable name – International *Humanitarian* Law. Noteworthy in this regard is the ICJ'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”.¹⁴
20. 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 LOAC. 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.
21. In this regard, it has been suggested that article 35(3) of the First Additional Protocol to the Geneva Conventions (AP I) is an expression of the “intrinsic value” approach (as opposed, according to the argument, to article 55(1), which reflects the anthropocentric approach). Regardless of Israel's views on this particular argument, it should be stressed that article 35(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.¹⁵
22. 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.

¹³ 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, 10 October 1980, 1342 UNTS 137.

¹⁴ *Nuclear Weapons advisory opinion*, *supra* note 7, at para. 29 (emphasis added).

¹⁵ See further in this regard in the comments below in relation to draft principle 9.

23. 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 LOAC 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).
24. It should be stressed that the position laid out above, including the rejection of the “intrinsic value” approach, solely concerns the LOAC context. It is without prejudice and does not have any bearing on Israel’s fundamental approach to the natural environment outside LOAC – in either other legal or non-legal contexts.
25. 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.

II. Comments on specific draft principles

26. In the following paragraphs, 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.
27. 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.

Draft principle 1

Paragraph (3) of the commentary

28. 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 conflict”.
29. Comment: It is uncontested that LOAC 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.
30. 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”.

Draft principle 3

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

31. Current text: Draft principle 3 stipulates: “States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflict”.
32. Comment: International law imposes upon States certain obligations concerning the protection of the natural environment. The word “enhance” seems to go further than merely call 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.
33. 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 protection 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 fulfill 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

34. Current text: Paragraph (6) of the commentary to draft principle 3 states: “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”.
35. Comments: The view cited above is a highly controversial academic proposition contested by States. This proposition, recently put forth by the International Committee of the Red Cross (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 Israel’s position 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).

36. In recent years, a number of States expressed fierce opposition to the ICRC’s proposition, resulting in the ICRC itself emphasizing in its most recent publication on the matter – the commentary to the Third Geneva Convention from 2020 – the opposition to its own view.¹⁶ 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’s view.¹⁷ 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.
37. 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

38. Current text: Paragraph (9) of the commentary to draft principle 3 notes: “These rules [concerning indiscriminate weapons and superfluous injury] are not limited to international armed conflicts. 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 ...”.
39. 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.
40. 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”.

Draft principle 6

¹⁶ ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, Art. 1, para. 202 (2020).

¹⁷ 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), <http://opiniojuris.org/2020/07/17/ensuring-respect-for-the-geneva-conventions-a-more-common-approach-to-article-1/> (last visited June 26th, 2021). This debate resulted in Resolution 1 (33IC/19/R1), in 33rd International Conference of the Red Cross and the Red Crescent (2019), <https://rcrcconference.org/about/33rd-international-conference/documents/> (last visited June 26th, 2021).

41. Current text: Draft principle 6 states that: “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”.
42. 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 (SOFAs) that Israel is aware of, there is no distinction between situations pertaining to armed conflicts and situations that occur outside armed conflicts.
43. Suggested change: *Amend* draft principle 6 so that it would be applicable only to SOFAs that explicitly refer to armed conflict situations.

Draft principle 9

44. Current text: Footnote 1084, attached to paragraph (3) of the appended commentary to draft principle 9, refers to “articles 35, paragraph 3, and 55 of Additional Protocol I and their customary counterparts”.
45. Comment: Israel is not a party to Additional Protocol I, and – like other States not party to the Protocol – does not consider articles 35(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.¹⁸ An indication that these provisions do not reflect customary international law may also be found in the ICJ’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”.¹⁹
46. Suggested change: *Delete* the words “and their customary counterparts”.

Draft principles 10 and 11

47. Current text: Draft principle 10 states that: “States should take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories exercise due diligence with respect to the protection of the environment ...”. Draft principle 11 states that: “States should take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories can be held liable for harm caused by them to the environment ...”.
48. 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

¹⁸ See, Israel’s statement in the UN Sixth committee from October 2020 regarding Agenda Item 83: https://www.un.org/en/ga/sixth/75/pdfs/statements/protocols/12mtg_israel.pdf.

¹⁹ *Nuclear Weapons advisory opinion*, *supra* note 7, at para. 31.

State's borders. Israel is concerned, however, that the draft principles might imply that corporate due diligence and liability may include extra-territorial elements.

49. 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.
50. 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.

Draft principle 12

Paragraph (2) of the commentary

51. 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".
52. 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.
53. 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.²⁰ Second, the same problem arises –

²⁰ The ILC'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

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.

54. 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

55. 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”.

56. Comments: Israel refers to its general comment, in Part I of the present document, concerning the applicability of IHRL 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 IHRL. This suggestion is unsubstantiated and contradicts the historical context of this provision and its commonly accepted meaning. It may also be recalled that the ICJ 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” (emphasis added).²¹ 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.

57. Suggested change: *Delete* the passage cited above.

Draft principle 13

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

58. Current text: draft principle (13) states that “[t]he natural environment shall be respected and protected in accordance with applicable international law and, 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).

²¹ *Nuclear Weapons advisory opinion, supra* note 7, at para. 87.

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’”.

59. Comment: The framing of draft principle 13(1), in that it refers generally to the “natural environment”, is inappropriate. It is Israel’s position that under customary international law, the “natural environment” in the abstract is not the subject of protection under LOAC, 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.
60. In Israel’s view, 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 LOAC, while draft principle 13(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.²² 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 LOAC (see also the comments below on draft principle 15).
61. 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”.

²² References to respecting and protecting certain classes of persons or objects can be found, for example, in: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114; 75 UNTS 31, (First Geneva Convention) article 12 and article 19 (military medical establishments and units); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516; 75 UNTS (Fourth Geneva Convention), article 18 (civilian hospitals); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 UNTS 3., article 15 (civilian medical personnel and religious personnel), article 33(4) (search teams), article 62 (civil defence organizations), article 71 (relief personnel). While a similar phrasing is used also in article 48 of AP 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 LOAC), and, in addition, it is recalled that elements of the environment are not necessarily either civilian objects or military objectives (see our general comment on the issue in Part I of the present paper).

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 ICJ advisory opinion from paragraph (3).

Paragraph (5) of the commentary

62. 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 25-27 and 30 in the ICJ's *Nuclear Weapons* advisory opinion.
63. Comment: As mentioned in Part I of the present paper, the applicability of IHRL and IEL in relation to armed conflicts is controversial. Furthermore, as already noted, in the cited paragraphs of the *Nuclear Weapons* advisory opinion, the ICJ did not pronounce on the applicability of IEL to armed conflicts. With regard to IHRL, the ICJ referred to a specific convention, rather than to this whole body of law.
64. 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 ICJ's *Nuclear Weapons* advisory opinion.

Draft principle 13(2)

65. Current text: "Care shall be taken to protect the natural environment against widespread, long-term and severe damage".
66. Comments: Israel is committed to the protection of the natural environment in accordance with its obligations under LOAC. The current text of draft principle 13(2) is based on article 55(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(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 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.
67. 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.
68. 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(3)

69. Current text: "No part of the natural environment may be attacked, unless it has become a military objective".
70. Comments: As described in Part I above, Israel considers that under customary LOAC the legal status of elements in the natural environment is to be examined from an

anthropocentric perspective. Regrettably, draft principle 13(3) and its appended commentary are inconsistent with this approach and with customary international law.

71. In addition, it would be more precise to describe the prohibition against attacking civilians and civilian objects under LOAC by referring to making them *the object of attack*. This wording would be more consistent with the language commonly used in LOAC, and would better distinguish between intended and incidental harm to the environment.²³
72. 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 underlies 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(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.

Draft principle 14

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

73. 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.
74. Comments: The words “with a view to its protection” alter the existing balance in LOAC 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.
75. 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

²³ See AP I, articles 51(2) and 52(1).

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

76. 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”.
77. 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(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 LOAC. 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.
78. Suggested change: *Delete* the passage cited above.

Paragraph (8) of the commentary

79. 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”.
80. 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.
81. 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.
82. Suggested Changes: *Delete* the passage in paragraph (8) that is cited above.

Paragraph (9) of the commentary

83. Current text: “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'. 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 actually necessary to accomplish a specific military purpose and is not covered by 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, or other relevant prohibitions, and meets the criteria contained in the principle of proportionality”.

84. Comments: There is a longstanding question regarding the modern role of the principle of military necessity under LOAC. While there is a consensus that the principle of military necessity is a foundational concept that underlies and informs particular rules of LOAC, 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 LOAC rules. This question touches upon the basic nature of LOAC, and the answer thereto may entail far-reaching implications.
85. 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 LOAC 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 IHL; it is not a prohibition which applies over and above the extant rules”.²⁴
86. 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.
87. Suggested changes: *Delete* paragraph (9). Alternatively, *amend* the paragraph so that it addresses article 23(g) of the Hague Regulations – a *specific* LOAC 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”.

Draft principle 15

88. Current text: “Environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity”.
89. 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 ICJ 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

²⁴ See Michael Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VIRGINIA JOURNAL OF INTERNATIONAL LAW 795, 799, 835 (2010).

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 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”.²⁵

90. As is apparent from the reference to the relationship between the right of self-defence and environmental obligations, the ICJ’s passage is concerned with necessity and proportionality under the *jus ad bellum*. This has been acknowledged by the ILC itself, which, in its commentary to article 21 of its Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), 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.²⁶ Draft principle 15 is, however, based on the assumption that the quoted passage concerns environmental obligations and LOAC.
91. Moreover, the term “environmental considerations” in the context of proportionality under LOAC, would be too broad and imprecise.
92. 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 LOAC, *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.

Draft principle 16

93. Current text: “Attacks against the natural environment by way of reprisals are prohibited”.
94. 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 Israel’s view, the same applies to article 55(2) of Additional Protocol I, on which the draft principle is based (and to the other articles in the Protocol addressing reprisals).²⁷ As indicated in the comments above to draft principle 9, the same understanding may be found in the ICJ’s *Nuclear Weapons* advisory opinion, where the Court, while referring to article 55 (and also to article

²⁵ *Nuclear Weapons advisory opinion*, *supra* note 7, at para. 30.

²⁶ *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, pp. 74-75.

²⁷ See, for example, Israel’s statement in the Sixth Committee from October 2020 regarding Agenda Item 83: https://www.un.org/en/ga/sixth/75/pdfs/statements/protocols/12mtg_israel.pdf.

35(3) of AP1), noted that “[t]hese are powerful constraints for all the States having subscribed to these provisions”.²⁸

95. 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

96. Current text: “As the environment should be considered as a civilian object unless parts of it becomes a military objective ...”.
97. Comment: As mentioned in Part I of the present paper, 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.
98. Suggested Amendment: *Delete* the passage cited above and replace it with the word “[T]herefore”.

Draft principle 17

99. Current text: “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”.
100. Comments: This wording could be improved by aligning it with the language commonly used in LOAC, which would better distinguish between intended and incidental harm to the environment. Inspiration may be drawn, in this context, from article 2(4) in Protocol III of the CCW, which refers to making elements of the natural environment by making it *the object of attack*.²⁹
101. 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.
102. Suggested changes: *Amend* draft principle 17, in line with the language of article 2(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”.

Draft principle 18

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

103. Current text: The first sentence of paragraph (4) reads: “Pillage is a broad term that applies to any appropriation of property in armed conflict that violates the law of

²⁸ *Nuclear Weapons advisory opinion*, *supra* note 7, at para. 31.

²⁹ Protocol III to the CCW, *supra* note 13.

armed conflict. At the same time, the law of armed conflict provides a number of exceptions under which appropriation or destruction of property is lawful”.

104. 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’.³⁰ Equating between 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.
105. Moreover, the description of LOAC 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.
106. 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”.
 - c. *Delete* the last sentence of paragraph (3) of the appended commentary given that the ICJ’s case did not refer to ‘pillage’ as such; and also paragraph (5) in its entirety and the second sentence of paragraph (6).

Draft principle 19

Paragraph (2) of the commentary

107. Current text: Paragraph (2) of the appended commentary to draft principle 19 notes: “The mention of international obligations in the draft principle refers to the treaty obligations of States parties to the Convention and, to the extent that the prohibition

³⁰ ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment of the Trial Chamber, 16 November 1998, p. 208-209, at para. 590-591; ICTY, *Prosecutor v. Hadžihasanović*, IT-01-47-T, Judgment of the Trial Chamber, 15 March 2006, p. 15 at para. 49.

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. To quote the ICRC study, ‘there is sufficiently widespread, representative and uniform practice to conclude that the destruction of the natural environment may not be used as a weapon’, and this irrespective of whether the provisions of the Convention are themselves customary”.

108. 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 ILC’s own conclusions on the identification of customary international law.³¹ More specifically, the ICRC’s proposition in Rule 45 of its Study lacks adequate substantiation. Additionally, Israel does not consider that the ENMOD Convention reflects customary international law. Israel stresses that manipulation of natural processes or using the destruction of the environment as a weapon, should be distinguished from the effects of the use of a weapon on the environment.
109. It also bears noting that while the draft mentions that according to the ICRC, there is a prohibition on the *use* of the environment as a weapon, the ICRC argues that there is a prohibition on using the *destruction* of the natural environment as a weapon.
110. 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’s proposition in the text, it is suggested to *replace* the words “the use” with the words “using the destruction”, in order to quote the ICRC more accurately.

The Introduction to Part Four of the draft principles

111. Current text: Paragraph (4) of the Introduction to Part Four reads: “It is widely acknowledged that the law of occupation applies to such cases provided that the local surrogate acting on behalf of a State exercises effective control over the occupied territory. The possibility of such an ‘indirect occupation’ has been acknowledged by the International Criminal Tribunal for the Former Yugoslavia, the International Court of Justice, and the European Court of Human Rights”.
112. 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,³² 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 Israel’s knowledge), which is required for a customary rule to emerge.³³ In this regard, paragraph (4) refers

³¹ UN Doc A/73/10 135.

³² Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land art. 42, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539.

³³ UN Doc A/73/10 135.

only to one official State source, but even that source does not unequivocally acknowledge the “indirect occupation” theory as part of existing law.³⁴ As mentioned by the 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”.³⁵

113. Other sources cited in paragraph (4) likewise fail to lend reliable support to the theory. For example, the ICJ’s judgment in the *Armed Activities* case cannot be considered as supporting the “indirect occupation” theory. In that case, the ICJ rejected the position that Uganda occupied certain areas in the DRC 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”.³⁶ It does not necessarily follow that if there were any such control, the ICJ would have found that occupation existed. The passage may be read as if the ICJ simply did not see a need to discuss the DRC’s argument of “indirect occupation”, since there was no sufficient connection between Uganda and the rebels to begin with. Indeed, the ICJ did not substantively address, let alone adopt, the “indirect occupation” theory.
114. Although some ICTY 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.
115. 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]”,³⁷ not with the applicability of the law of belligerent occupation.
116. 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 ICJ and ECtHR cases.

Draft principle 20

Draft principle 20(1)

117. Current text: “An Occupying Power shall respect and protect the environment of the occupied territory in accordance with applicable international law and take environmental considerations into account in the administration of such territory”.

³⁴ United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict* ¶ 11.3.1 (2004).

³⁵ 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*, Art. 2, para. 331 (2016).

³⁶ *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. 173.

³⁷ *Loizidou v. Turkey*, Application No. 15318/89, Judgment of 18 December 1996, para. 52.

118. Comments: Israel refers to the comments it made above regarding draft principle 13(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(1) in its entirety.
119. 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

120. Current text: Paragraph (1) of the commentary, relating to draft principle 20(1), states: “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 security in the occupied territory”.
121. 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*”.³⁸ 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.
122. 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

123. Current text: Paragraph (4) of the commentary to draft principle 20(1) states: “Paragraph 1 is also related to draft principle 15 entitled ‘Environmental Considerations’. The reference to environmental considerations in both provisions is drawn from and inspired by the advisory opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons*. While the statement referred to in the commentary to draft principle 15 is related to the principle of proportionality and rules of military necessity, the Court also held more generally that ‘the existing international law relating to the protection and safeguarding of the environment ...

³⁸ See *Christian Society for the Holy Sites v. Minister of Defence*, HCJ Case No. 337/71, PD XXVI(1), p. 574, 581 (1972).

indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict”.

124. 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.
125. 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 LOAC, or the law of belligerent occupation in particular.
126. As for the reference to the ICJ’s observation on the consideration of environmental factors in implementing LOAC, 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 LOAC 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 LOAC to consider environmental factors beyond the requirements of specific rules.
127. 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

128. Current text: Paragraphs (5)-(8) of the commentary explain the basis for draft principle 20(2), including by reference to requirements and concepts borrowed from article 55 of Additional Protocol I and IHRL.
129. Comments: Israel views draft principle 20(2) as a potential specific application of draft principle 20(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 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,³⁹ 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 Part I of the present paper, Israel is

³⁹ Article 55 is found in Section I of Part IV of the First Additional Protocol. 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).

concerned that such a justification for draft principle 20(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(3)

130. Current text: “An Occupying Power shall respect the law and institutions of the occupied territory concerning the protection of the environment and may only introduce changes within the limits provided by the law of armed conflict”.
131. Comments: Israel believes that the text of draft principle 20(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(3) does not reflect customary international law.⁴⁰
132. Suggested changes:
- a. *Amend* draft principle 20(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

133. Current text: “While some active interference in the law and institutions concerning the environment of the occupied territory may thus be required, the Occupying Power may not introduce permanent changes in fundamental institutions of the country and shall be guided by a limited set of considerations: the concern for public order, civil life, and welfare in the occupied territory”.
134. 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.⁴¹

⁴⁰ Israel’s statement in the Sixth Committee from 26 October 2018: <http://statements.unmeetings.org/media2/20305255/israel-82-cluster-3.pdf>.

⁴¹ See e.g. the Israeli High Court of Justice judgement in *Jam'ait Iscan v. IDF Commander in the Judea and Samaria Area*, HCJ Case No. 393/82, PD XXXVII(4), p. 785, 801 (1983).

135. 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 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).
136. 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”.

Draft principle 21

Draft principle 21 and paragraph (9) of the commentary

137. Current text: “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 a way that ensures their sustainable use and minimizes environmental harm”.
138. 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.
139. 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

140. 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’”.

141. 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”.⁴² 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.
142. 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 of the issue of profits and thereby clarify it.
143. 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 deriving 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

⁴² *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.

occupation, and ‘these should not be greater than the economy of the country can reasonably be expected to bear’.

Paragraph (4) of the commentary

144. Current text: “A further limitation that provides protection to the natural resources and certain other components of the environment of the occupied territory is contained in the 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). The prohibition of pillage of natural resources is furthermore applicable in situations of occupation. An “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” is also defined as a grave breach in article 147 of Geneva Convention IV (see also article 53) and as a war crime of “pillage” in the Rome Statute of the International Criminal Court”.
145. Comments: The current description of LOAC 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 the Fourth Geneva Convention 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.
146. 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(2)(b)(xvi) and 8(2)(e)(v).
147. 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

148. 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”.
149. Comments: This passage, too, conflates different legal frameworks – in this case, the law of belligerent occupation and IHRL. It also relies on non-binding sources such as UN General Assembly resolutions. Israel maintains that such sources do not affect the interpretation of article 55 of the Hague Regulations.
150. Even within the framework of IHRL, the basis for some determinations in the paragraph concerned is flawed, since it appears to misrepresent the ICJ’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.⁴³ Second, the ICJ 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.⁴⁴
151. The comment concerning the principle of self-determination made in the last sentence of paragraph (5), which is supposedly based upon the ICJ’s advisory opinion in the *Wall* case, is an inference that does not exist in the opinion itself.⁴⁵ 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.
152. Suggested Changes: *Delete* the passage cited above.

Paragraph (7) of the commentary

153. 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, 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

⁴³ *Armed Activities* case, *supra* note 36, at para. 244.

⁴⁴ *Ibid.*

⁴⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Advisory Opinion, I.C.J. Reports 2004, p. 136.

even when interpreting treaties concluded before the development of that body of law”.

154. 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.
155. 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 LOAC treaties in light of new environmental norms from other branches of international law.
156. Suggested change: *Delete* the passage cited above.

Paragraph (8) of the commentary

157. Current text: “This entails that the Occupying Power should exercise caution in the exploitation of non-renewable resources, not exceeding pre-occupation levels of production, and exploit renewable resources in a way that ensures their long-term use, and capacity for regeneration”.
158. 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 Israel's view 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.⁴⁶ The current text of paragraph (8) is indeed much too sweeping and lacks sufficient legal basis.
159. Suggested Change: *Delete* the words “not exceeding pre-occupation levels of production”.

Draft principle 27

Draft principle 27(1)

160. Current text: “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

⁴⁶ HCJ 2164/09 *Yesh Din v. Commander of the IDF Forces in the West Bank* (26 December 2011).

control that are causing or risk causing damage to the environment. Such measures shall be taken subject to the applicable rules of international law”.

161. Comments: Israel agrees with the Commission’s statement that “different States thus have varying obligations relating to remnants of war”,⁴⁷ as these obligations appear in treaties that are not universally ratified. This should be made clearer in the language of draft principle 27(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(1) as emanating from any binding source of international law, and notes its conflation between LOAC and IEL.
162. 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”.

⁴⁷ Draft principle 27, paragraph (7) of the commentary.