

Comments of the United States on the International Law Commission’s draft principles on the protection of the environment in relation to armed conflicts

October 6, 2021

The United States considers the International Law Commission (ILC)’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 Rapporteur, Marcelo Vásquez-Bermúdez, for his efforts, as well the work of previous Special Rapporteurs Marja Lehto and Marie G. Jacobsson.

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 U.S. 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.¹ The U.S. military also has adopted a number of policies and practices to protect the environment in relation to military operations and activities.² 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 United States provides general comments on the draft principles and commentary in this section as well as additional comments below on many of the draft principles and the accompanying commentary. The absence of specific comments on any particular draft principle or commentary does not necessarily indicate U.S. 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 ILC should be clear about the intended legal status of the specific principles addressed.

¹ U.S. Department of Defense (DoD) Directive 2311.01, *DoD Law of War Program*, (July 2, 2020), available at: <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231101p.pdf?ver=2020-07-02-143157-007>.

² See, e.g., DoD Instruction 4715.22, *Environmental Management Policy for Contingency Locations*, (Feb. 18, 2016; Change 2 Aug. 31, 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.”).

Individual principles should be clear as to whether they are intended to codify existing law, or to reflect the ILC’s recommendations for progressive development of the law.

In our 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, we have recommended a number of changes to the draft principles to more accurately reflect existing legal obligations and more clearly 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 ILC’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 (IHL). The United States and others have expressed concerns with the methodology and certain conclusions of this ICRC study.³ We recommend that the references to the ICRC’s study be reconsidered, as further elaborated below.

Consistent with the concerns that the United States expressed regarding the ICRC’s study on customary IHL, the United States also recommends that the ILC 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 ILC 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.⁴ 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 U.S. Department of Defense Law of War Manual (“DoD Law of War Manual”). These citations are offered only as examples; a

³ See, e.g., DoD Law of War Manual § 19.25 and sources cited therein (June 2015, Updated Dec. 2016), available at: https://ogc.osd.mil/Portals/99/law_war_manual_december_16.pdf.

⁴ See, e.g., [1997] 2 Y.B. Int’l L. Comm’n 1, at 72 ¶ 238, U.N. Doc. A/CN.4/SER.A/1997/Add.1 (indicating that ILC topics “should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification”).

full study of military issuances published by a variety of States would be an important step to establish State practice. We note, 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.

IHL as the lex specialis applicable to armed conflict

The United States appreciates the recognition in the commentary that IHL 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, IHL. Although there are different interpretations of the *lex specialis* principle, and its operation may depend on the specific context and the relevant legal rules,⁵ it would be helpful for the draft principles themselves, in addition to the commentary, to acknowledge expressly that that IHL is the *lex specialis* applicable to armed conflict.

In this regard, IHL, 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 IHL to the environment that deviate from this traditional focus could conflict with existing IHL requirements or diminish existing IHL protections for civilians, detainees, or other persons protected by IHL.

The United States therefore recommends that a principle be added (either as a stand-alone principle or a sub-paragraph 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.

Part One - Introduction

Draft principle 1

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. We recommend that the principle be revised to reflect more accurately the intended scope of the draft principles:

⁵ For further discussion, see DoD Law of War Manual § 1.3.2 and sources cited (June 2015, Updated Dec. 2016).

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.⁶

Draft principle 2

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. We therefore recommend 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.

Part Two – Principles of general application

Draft principle 3

Sub-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 sub-paragraph should be revised to reflect existing legal obligations of States, as the use of “shall” versus “should” in sub-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 IHL obligations given in the commentary (obligations to disseminate IHL or to conduct the legal reviews of weapons) are not actually obligations to take measures to enhance the protection of the nature environment. Sub-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**

⁶ Cf. Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, May 14, 1954, 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.”).

protection of 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.” We have 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 we have not made the suggestion wherever “in relation to armed conflict” appears.

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 the ICRC has offered this interpretation of Common Article 1, a number of States have not accepted it, including the United States.⁷ The ILC should remove this reference in the commentary or at a minimum note that although the ICRC has advocated for this interpretation, it has been rejected by a number of States Parties to the 1949 Geneva Conventions.

Draft principle 4

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.⁸ A State’s designation of the natural environment as protected under its domestic

⁷ 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, April 1, 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.”); DoD Law of War Manual § 18.1.2.1 (June 2015, Updated Dec. 2016) (“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.”) (footnotes omitted).

⁸ See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 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.”).

law would not be effective in providing protection under IHL, unless the adverse party agrees to recognize the zone.⁹

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 IHL 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.¹⁰

Thus, we recommend "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 IHL rules governing the declaration of villages, towns, or cities as undefended.¹¹

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

⁹ See DoD Law of War Manual § 5.14.3.1 (June 2015, Updated Dec. 2016) ("The establishment of a zone only binds an adverse party when it agrees to recognize the zone.").

¹⁰ See DoD Law of War Manual § 5.15 (June 2015, Updated Dec. 2016).

¹¹ See DoD Law of War Manual § 5.15.4 (June 2015, Updated Dec. 2016).

that increases the risk of harm to civilians in armed conflict.¹² We recommend 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.¹³ 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.¹⁴ We therefore suggest 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.

Draft principle 5

We appreciate the use of the word “should” and “appropriate” as well as the goals of this draft principle.

Draft principle 6

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, we recommend clarifying the second sentence of this draft principle.

¹² See DoD Law of War Manual § 5.14 (June 2015, Updated Dec. 2016) (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”).

¹³ See, e.g., Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, May 14, 1954, art. 18(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.”).

¹⁴ See, e.g., Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, May 14, 1954, 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.”).

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.

Draft principle 7

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 ILC mandate does not extend to recommending policy or “best practices.”

Draft principle 8

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. We recommend rephrasing this draft principle in light of the anthropocentric character and humanitarian objectives of IHL:

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 ILC’s work on the topic ‘Protection of persons in the event of disasters.’” We recommend also highlighting that relief activities are contemplated under IHL. For example, the 1949 Geneva Conventions contemplate relief activities for war victims, such as prisoners of war and civilian internees.¹⁵ In addition to the revisions suggested

¹⁵See, 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 DoD Law of War Manual (June 2015, Updated Dec. 2016).

above to draft principle 8, additional explanation along these lines could be added to the commentary.

Draft principle 9

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 ILC’s draft articles on the Responsibility of States for Internationally Wrongful Acts, which address “injury” from an international wrongful act and an “injured State”.

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.”¹⁶ To address these concerns, we recommend 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.

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 ILC 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 IHL. This has the effect of stigmatizing corporations and business enterprises

¹⁶ See, e.g., Chapter II of the DoD Law of War Manual. On the other hand, “precautions in attack” in the DoD Law of War Manual is discussed as a rule implementing the principle of proportionality. See DoD Law of War Manual § 5.11 (June 2015, Updated Dec. 2016).

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. We suggest these principles could be deleted or, alternatively, the ILC should revise them in order to take into account other relevant actors.

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, we recommend 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.

Part Three – principles applicable during armed conflict

Draft principle 12

We 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 our view, 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 IHL and international human rights law. Although IHL 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.

Draft principle 13

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.

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 property¹⁷) that may not be seized or destroyed unless imperatively demanded by the necessities of war.¹⁸ Similarly, in certain cases, features of the natural environment, such as natural resources,¹⁹ 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.²⁰

¹⁷ 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, Jan. 19, 1993, reprinted as Appendix VIII in Patrick J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 202 (1993) (“The United States considers the obligations to protect natural, civilian, and cultural property to be customary international law.”).

¹⁸ 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, Oct. 18, 1907 (“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;”).

¹⁹ 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, Jan. 19, 1993, reprinted as Appendix VIII in Patrick J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 202 (1993) (“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.”).

²⁰ 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, Nov. 3, 2006, reprinted in 46 INTERNATIONAL LEGAL MATERIALS 514, 520 (2007) (“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 (III) on Prohibitions or Restrictions on the Use of Incendiary Weapons, art. 2, 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, Oct. 10, 1980 (“4. It is prohibited to make forests or

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 (AP 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.²¹

In addition, by referring to IHL 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.²²

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

Regarding sub-paragraph 1, although “respect and protect” has been used in IHL treaties to regarding certain categories of individuals, it has not been applied to the natural environment.

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.”).

²¹ 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, Nov. 3, 2006, *reprinted in* 46 INTERNATIONAL LEGAL MATERIALS 514, 520-21 (2007) (“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 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* (Jan. 22, 1987), 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419, 424 (1987) (“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.”).

²² Written Statement of the Government of the United States of America, Jun. 20, 1995, ICJ, Request by the U.N. General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, p.34.

We recommend rephrasing the sentence slightly and including additional clarification in the commentary to sub-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. We recommend reproducing the text of that provision. The phrase “respect and protect” is often used in IHL 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.*, articles 10, 15, 62, 71, 76, and 77). Although the United States is not a party to the 1977 Additional Protocol I, in our 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.

Sub-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. We therefore recommend 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. We recommend 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.

Sub-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, we recommend revising subparagraph 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 U.S. military manuals cited in the ICRC’s study on customary IHL. However, these references were quoted selectively by the ICRC CIHL study, which omitted key aspects of the relevant sections cited. We recommend citing original sources directly instead of as characterized by the ICRC. If the draft text of the commentary is not revised, we request 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’s representation of U.S. sources in the ICRC CIHL study and advising the reader to consult U.S. sources directly for official statements and interpretations.

Draft principle 14

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.

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 our general comments above, we 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 favor increased risks to the civilian population.

Therefore, we recommend 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 9, we recommend citing the military manuals interpreting the principle of military necessity in addition to the ICRC.²³ For example, the U.S. DoD 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.

The way the ICRC interprets the principle of military necessity has been contested by States.²⁴ Citing official State documents may better reflect State practice and the implementation of military necessity in practice.

²³ See, e.g., DoD Law of War Manual § 2.2 (June 2015, Updated Dec. 2016) and footnote 13 collecting examples.

²⁴ See, e.g., DoD Law of War Manual § 2.2.3.1 (June 2015, Updated Dec. 2016).

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.” DoD Law of War Manual § 5.6.3 (June 2015, Dec. 2016).

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.²⁵

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, we recommend 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.

²⁵ See DoD Law of War Manual § 5.12 (June 2015, Updated Dec. 2016) (“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.”).

Draft principle 15

This draft principle appears to recall the ICJ’s Nuclear Weapons advisory opinion. As an initial matter, it is unclear from that opinion whether the ICJ intended its statement as one of *jus in bello* or *jus ad bellum*.²⁶ This draft principle deviates from the ICJ’s formulation and, assuming it is intended to refer to the *jus in bello* concepts of military necessity and proportionality, we do 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 ICJ’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 ICJ 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 ICJ 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 November 25, 1992 on the “Protection of the Environment in Times of Armed Conflict.” The ICJ’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 our revisions 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 our 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 ICJ’s advisory opinion.

²⁶ 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*, Feb. 28, 1997, *International Review of the Red Cross* 35, 52 (“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.”).

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, we recommend merging it with draft principle 14.

Draft principle 16

In our view, this draft principle does not reflect customary international law. The United States has previously expressed the view that AP 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-U.S. 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.²⁷

At the same event, then-U.S. Department of State Deputy Legal Adviser Michael Matheson noted that this objection was also applicable to AP I's provisions on reprisals against the natural environment.²⁸ 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."²⁹

Paragraph 3 of the commentary asserts that:

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

²⁷ *Position of the United States on Current Law of War Agreements: Remarks of Judge Abraham D. Sofaer, Legal Adviser, United States Department of State, Jan. 22, 1987*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 460, 469 (1987).

²⁸ 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* (Jan. 22, 1987), 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419, 426 and footnote 33 (1987) ("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).").

²⁹ Written Statement of the Government of the United States of America, Jun. 20, 1995, ICJ, Request by the U.N. General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, p. 31; *see also id.* 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.)").

“attacks against the civilian population or civilians by way of reprisals are prohibited.”

However, the ILC does not conduct a survey of State practice and *opinio juris*, instead citing the ICRC’s 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 AP 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.³⁰

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, we recommend 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.

We appreciate the references in the commentary to the statement of the United Kingdom, in connection with the deposit of its instrument of ratification of AP I. However, we suggest citing a more official version of the UK statement, rather than the ICRC’s reproduction of the statement because we have found misquotations or other inaccuracies in the ICRC’s representations of State practice. The UN Treaty Series version of the UK statement (2020 UNTS 75, 77-78) differs slightly from the cited versions printed by the ICRC and is available at:
<https://treaties.un.org/doc/Publication/UNTS/Volume%202020/v2020.pdf#page=109>.

Draft principle 17

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. We therefore recommend 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

³⁰ ICRC Commentary.

shall not be made the object of attack as long as it does not ~~contain~~ **constitute** a military objective.

We recommend 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.

Draft principle 18

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 U.S. 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.³¹

We recommend 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.

Draft principle 19

We recommend 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.

We also recommend 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.³²

³¹ DoD Law of War Manual § 5.17.4.1 (June 2015, Updated Dec. 2016).

³² See DoD Law of War Manual § 6.10.2 (June 2015, Dec. 2016).

Part Four – Principles applicable in situations of occupation

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 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 IHL 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 IHL. 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, we recommend 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 4 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 4 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.

Draft principle 20

In line with our above comments, we suggest changing “shall” to “should” in each of the sub-paragraphs of this draft principle. Although there are legal rules relevant to each of these subparagraphs, the language in each of these sub-paragraphs does not reflect existing international law. Alternatively, we suggest revisions to this draft principle to bring it in line with existing international law:

1. ~~An Occupying Power shall respect and protect~~ The 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.

Draft principle 21

We recommend using “should” instead of “shall” because this principle does not reflect an existing obligation under international law.

In 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 the Fourth Geneva Convention, we recommend 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.**

Draft principle 22

It is not clear that this draft principle accurately reflects the obligations of an Occupying Power. We recommend 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.”³³ Similarly, the ICJ 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.’”³⁴ 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. 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.”³⁵

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.³⁶ 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 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.³⁷ Moreover,

³³ 35 Am. J. Int'l L. 684,716 (1941).

³⁴ Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), 2010 International Court of Justice Reports and Judgments, Advisory Opinions and Orders 18, 56 (internal citations omitted).

³⁵ Stephen C. McCaffrey, *The Law of International Watercourses* (3d ed.) at 489 (internal citations omitted).

³⁶ See Article 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. The Hague, 18 October 1907.

³⁷ Cf. Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, May 14, 1954, art. 5(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.”).

we do 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, we do 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 IHL affecting the environment of occupied and non-occupied territories).

Part Five – Principles applicable after armed conflict

Draft principle 24

The United States is concerned that subparagraph 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 defense or security. Subparagraph 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 IHL obligations, subparagraphs 1 and 2 of draft principle 24 should be stated in terms of “should” rather than “shall.”

Draft principle 27

Subparagraphs 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 subparagraph 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.

