

**Comments by the Federal Republic of Germany on the International Law
Commission's draft principles on the „Protection of the environment in
relation to armed conflicts“, adopted on first reading**

The general outcome of the project:

1. Germany expresses great appreciation for the Commission's work in adopting at first reading the comprehensive draft principles and comments on the complex and timely issue of “protection of the environment in relation to armed conflict”.
2. The biggest challenge of this project is the identification of norms for the protection of the environment in different legal regimes and their interpretation in order to develop a comprehensive approach for the formulation of general rules and principles. Germany commends the Commission for its preparatory work formulating the draft principles and its commentary.
3. We welcome the fact that the two special rapporteurs have shed light on the subject from many different angles in their reports and that they have included complex issues such as the role of non-state actors, the extraction of raw materials in areas of armed conflict and the environmental impact of camps of displaced people. They have thus addressed the particular challenges and complexities of today's armed conflicts and their impact on and threat to the environment.

We believe, however, that the amalgamation of different legal regimes, including on culture, indigenous people and displaced persons in certain instances carries the risk of overburdening the principles and may lead to potential challenges in

practical implementation. Narrowing the principles more strictly to the matter at hand may therefore help promote future adherence and implementation.

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

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

On the content of the draft principles in detail:

1. We welcome the call to establish protected areas in Draft Principles 4 and 17. These principles provide encouragement to work together on this issue in the future. As pointed out by the Commission, generally a bi- or multilateral treaty on the designation of protected areas would be necessary to have binding effect on all parties under international law and only in specific instances would other forms

of designation, such as unilateral declarations, have legally binding effects for other States, such as in cases of non-defended localities. Germany hence believes the addition “or otherwise” requires qualification by adding “in accordance with international law”.

Furthermore, Germany suggests to revisit the aspect of “cultural importance” in this Principle. First, if read as a cumulative requirement (“and”) it raises questions about zones that fulfill only one of the criteria. Further clarification would be useful. Second, the inclusion of the aspect of “cultural importance” goes beyond the scope of the principle and might entail further challenges at the stage of application. Germany welcomes the clarification in the commentary on Principle 4 that the cultural aspect is subordinate and of derivative meaning and believes that the principle would benefit from also clarifying this relation in the text itself. It could be considered in this regard, to employ the concept of “natural heritage” of the UNESCO World heritage convention in addition to “major environmental importance”, instead of “cultural importance”.

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

3. Contrary to the indication that Principle 7 constituted a rule of customary international law (“shall”), Germany believes this to be a non-legally binding principle, which is reflected in non-binding policy documents adopted by the EU, the UN and NATO, which in this particular instance do not reflect customary international law. Germany therefore suggests to reformulate the principle utilizing the verb “should”. Despite the explanation in para. 6 of the commentary, Germany suggests that further clarification on the definition of “peace operations” could help to avoid undue ambiguity.

4. Germany welcomes Principle 9 on state responsibility based on the assumption that it codifies customary international law and does not alter the rules of state responsibility for internationally wrongful acts. Germany underlines its understanding, that a precondition to liability is an internationally wrongful act that is a) attributable to the State under international law, and b) constitutes a breach of an international obligation of the State, as codified in Art. 2 of the Draft Articles on State Responsibility. It is suggested to clarify the commentary to Principle 9 accordingly to prevent the potential misconception of an attempted modification of the rules on State responsibility. Additionally, Germany holds the rules governing the responsibility of states for internationally wrongful acts as *per se* applicable to breaches of the law of armed conflict. Paragraph 4 of the commentary, stipulating that the rules governing armed conflicts represent *leges speciales*, might be misleading in this context, as the rule cited rather seems an application of the general rule of State responsibility for internationally wrongful acts.

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

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

Talking into account these general remarks, it is submitted that para. 3 of the commentary on Draft Principle 10 could be clarified by further elaboration on the analogous application of due diligence considerations stemming from the UN Guiding Principles on Business and Human Rights in the context of the protection of the environment. A clarification on the element of “human health” in Draft

Principle 10, as outlined in para. 10 of the commentary might be helpful in this regard. With respect to draft Principle 11 further elaboration on liability provisions in the international instruments referred to in the commentary on Draft Principle 10 would be helpful. In this regard, it should be noted that the UN Guiding Principles on Business and Human Rights do not contain provisions on liability but rather provide in generic terms that States should ensure through judicial, administrative, legislative or other appropriate means that affected persons have access to effective remedy.

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

7. At the same time, we appreciate that Draft Principles 13 and 16 imply an intrinsic value of the natural environment in and of itself, recognizing that attacks against the natural environment are prohibited unless it has become a military objective, as are reprisals against the natural environment. However, as we understand it, this prohibition is not based on Art. 55 para. 2 of the first Additional

Protocol to the Geneva Conventions, despite the use of the same wording in Draft Principle 16, because Art. 55, which concentrates on the survival of the population and thus follows an anthropocentric approach, provides for the protection of the environment in order to protect the health and survival of the civilian population. It is rather Art. 35 para. 3 of Additional Protocol I on methods of warfare, which reflects an intrinsic approach and supports the view that environmental protection in international humanitarian law has an intrinsic value. Furthermore, this is without prejudice to recognizing an intrinsic value of the natural environment or nature in legal regimes other than IHL.

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

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

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

11. On Principle 18 Germany understands that it relies on the international law definition of pillage without intent of altering said definition. It should therefore

be clarified in para. 3 of the commentary that pillage required the deprivation of a third-party's property. Hence the commentary should read that "pillage only applies to natural resources that are subject to ownership and constitute property [emphasis added]". Should the intention behind Principle 18 have been to progressively develop the law and equally prevent unlawful appropriation of natural resources during armed conflict without regard to ownership, Germany suggests that the Principle should be rephrased to reflect such developmental nature.

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

13. With regard to Principle 20 paragraph 2, Germany submits that further clarification would be needed in terms of scope and standard applied. It is not evident, in our view that the situations of Article 3 of the Draft Articles on Prevention of Transboundary Harm are fully equivalent with the relation of an occupying power towards occupied territory. Para. 2 should address more clearly whether environmental harm must be prevented only from the occupying power's own activities or beyond that, from all activities in the occupied territory. Should the latter be the case, further clarification would be needed as to the envisaged role of the institutions of the occupied territory in such prevention (cf. Art. 56 GC IV: "..with the cooperation of national and local authorities.."). As currently phrased, Germany is doubtful as to the customary international law character attributed to this paragraph and suggests to change "shall" to "should".

Furthermore, Germany would like to note that the second phrase "that is likely to prejudice the health and well-being of the population of the occupied territory" could be omitted. The commentary itself clarifies that this passus is not intended to create a second, cumulative threshold, thus, the current wording of the Draft Principle seems to be redundant and might be misleading. Furthermore, we would

like to note that mentioning „health and the well-being of the population” while omitting other human rights raises selection issues.

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

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

16. On Principle 24, Germany, like others, remains doubtful as to the existence of such customary international law rule to share and grant access to information, yet, based on the reference to “their obligations under international law”, understands the Principle as restatement of (potentially) existing obligations rather than codification of a new obligation.

17. Lastly, we support and welcome the intention conveyed in Draft Principles 27 and 28 to eliminate remnants of war that could have harmful effects on the environment. However, para. 1 of Draft Principle 27 could be read as entailing an

obligation to act in any case where remnants of war are identified, including in the territorial sea and, with respect to warships and other state-owned vessels, even outside territorial waters, which would place an inappropriate burden on many States. It would therefore seem advisable to reword Draft Principle 27 in order to make it clear that an obligation to act only arises after an environmental impact assessment has concluded that action is viable, necessary and appropriate in order to minimize environmental harm.

18. Finally, Germany would like to thank the Commission for its excellent work on a difficult, but timely and very important topic. We will continue following this project with great interest.