

Comments by Germany on the OEWG Zero Draft Report

In addition to the oral statement made during the informal virtual OEWG meeting on 18-22 February 2021, Germany aligns itself with the EU Written Contribution to the OEWG Zero Draft Report and would like to add the following comments and suggestions.

The Zero Draft faithfully reflects previous discussions in a balanced way and shows that we have made progress. It is a good and the only basis to arrive at a consensus report.

Germany supports the current structure of the Zero Draft including its “Discussions Sections” which could help to find compromises on the “Conclusions and Recommendations Sections” and serves as a repository of topics for future discussions. However, if consensus emerges on focusing the Zero Draft on its “Conclusions and Recommendations Sections”, Germany will be open to such an approach as well. In such a case, it will be particularly important to carefully review which elements of the “Discussions Sections” could be moved to the “Conclusions and Recommendations Sections” to ensure a strong Report.

I. Introduction

- In introduction and also other parts of the text, the term “digital” is used frequently. It would be better to replace it with a clearly-defined and established term, such as ICTs.

II. Existing and Potential Threats

- Para 15: “In their discussions at the OEWG, States raised a wide variety of existing and potential threats, which underscored that States may perceive threats emanating from the digital domain in different ways.”: Suggestion to delete “which underscored that States may perceive threat emanating from the digital domain in different ways”. States may vary in their appreciation of the seriousness of different threats, but generally the OEWG discussions were not so much characterized by different views of the same threats, but different foci. Also, a similar statement is already contained in para 23, in a more fitting context.
- Para 16: “Some voiced concern that the characteristics of the ICT environment may encourage unilateral measures rather than the settlement of disputes by peaceful means.”: Suggestion to specify characteristics as this is certainly not true for all of the characteristics. There is also a risk of contradicting para 17: “many States underlined the point that technologies are neutral”.
- Para 17: “States recognized that even as technological advances and new applications may offer development opportunities, they may also expand attack surfaces, amplify vulnerabilities in the ICT environment or be leveraged for novel malicious activities”: Suggestion to shorten list of similar examples.
- Para 18: “States agreed that they are increasingly concerned about the implications of the malicious use of ICTs for the maintenance of international peace and security, and subsequently for human rights and development”. Consider deletion of “subsequently”, as it could imply a subordinate relationship of human rights and development.
- Para 20: “States also agreed that any use of ICTs by States in a manner inconsistent with their Charter commitment to live together in peace with one another as good neighbours”: Change “their Charter commitment to live together in peace with one another as good neighbours” to “their commitments under the Charter of the United Nations”.

- Para 20: Include reference to 2010, 2013 and 2015 GGE reports as further guidance, after: “as well as with their other obligations under international law”.
- Para 24: Replace “Vulnerable populations” with “vulnerable groups”.
- Suggestion to include a reference to threats to the public core of the internet, as also mentioned in para 50 of the Zero Draft, in the Section on Existing and Potential Threats.

III. International Law

- Germany supports the position of the International Law Section within the overall structure of the report, which underlines that existing international law provides a binding framework for responsible behavior in cyberspace which is complemented by norms, rules and principles for responsible State behavior as well as CBMs and capacity building.
- Para 26: Consider streamlining the order of the referenced sources of international law with art. 38 ICJ Statute (which could also be explicitly cited): (1) international treaties, (2) customary law and (3) general principles of law.
- Para 28: We suggest the following editorial modifications: instead of “sovereign equality” consider writing “sovereign equality of States”; instead of “refraining in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations” consider “prohibition of the threat or use of force as laid down in art. 2 para. 4 UN Charter”.
- In the interest of a more concise Report, delete para 27, as its content is already contained in para 34.
- Para 31: We would like to reiterate that there is no general obligation under international law to publicize a decision on attribution and to provide or to submit for public scrutiny detailed evidence on which an attribution is based. However, substantiating accusations of wrongful acts are desirable and helpful for de-escalation, if circumstances so permit, and we support the current wording of para 31 taken from the 2015 GGE report for these reasons.
- Para 30 first sentence: Suggestion to clarify sentence, it should be stated that States may incur responsibility in accordance with the customary law rules of State responsibility if their use of ICT amounts to a wrongful act under international law.
- Para 30 second sentence: Why do we need the limitation of the due diligence principle to “non-State actors acting on the instruction or under the control of a State to commit a wrongful act”? Instruction/direction or control is a separate criterion for attribution and should be distinguished from the principle of due diligence which seems to be referred to here. Perhaps it would be better to revert to previous version: “States should seek to ensure that their territory is not used by non-State actors to commit such acts”. Before, separately or in combination with the sentence on “proxies” and the last sentence (which already mentions the control aspect), a reference could be made to the attribution criterion of “instructions, direction or control” as detailed in Art. 8 ILC Draft Articles on State Responsibility. Generally, the para should be streamlined on basis of the ILC draft articles on State responsibility, also with regard to the criterion of ownership in the last sentence.
- On paras 32, 33: They should emphasize more clearly that existing international law is applicable to cyberspace and that no lacunae exist in this regard. In particular, para 33 (“It was highlighted that while existing bodies of international law do not include specific reference to the use of ICTs in the context of international security, international law can develop progressively, including

through *opinio juris* and State practice.”) could be understood to weaken existing binding international law.

- Also, para 33 is unclear and vague with regard to the differentiation between voluntary norms and international law and it is not clear what is meant by “binding measures”. We would therefore propose to delete the whole para 33.
- Para 34 second sentence: Consider changing “...activity that might be interpreted by other States as a threat or use of force” to “activity that may amount to”.
- Para 34 last sentence: With a view to the clarification in para 29: “States underscored that international humanitarian law neither encourages militarization nor legitimizes resort to conflict in any domain” we doubt whether we need the addition in para 34 that “Some States noted that discussions on the applicability of international humanitarian law to the use of ICTs by States needed to be approached with prudence.” In our view, it would be desirable to delete this addition.
- Para 34, generally: It could be considered to include in para 34 or 35 a reference to the **ongoing** dialogue between States as regards the clarification of the modalities of application of international law and a general reference to the effect that such efforts of clarification must follow the established rules of interpretation of international law.
- Except for this last addition, paras 34 and 35 contain important statements on which views converged during the OEWG discussions and should therefore be moved to the Conclusions Section of the Zero Draft.
- Para 37: “States affirmed that international law, and in particular the Charter of the United Nations”, add: “in its entirety” to harmonize with para 27.
- Para 37 second sentence: “further common understanding needs to be developed” could be changed to “further clarification needs to be reached” - otherwise could possibly be misinterpreted as call for further (interpretative) agreements or weakening of the (direct) applicability of existing international law to cyberspace.
- Para 40: “own understanding” of international law, suggestion to delete “own”.
- Include reference to the consensus reached by the 2010, 2013 and 2015 GGE reports on international law in the Conclusions Section of the Zero Draft.

IV. Rules, Norms and Principles for Responsible State Behaviour

- Germany supports the approach taken in the section on rules, norms and principles for responsible state behavior focusing on the implementation of existing norms. The strong set of 11 norms in the 2015 GGE report can only take full effect if they are understood and implemented by all States.
- Para 51: Generally, it is a good solution to compile proposed norms which could not garner sufficient support in a non-paper to ensure that new ideas will not get lost and can be revisited in the future. However, the referenced non-paper in para 51 also contains proposals, such as the one for a survey of national implementation, which were generally welcomed. Such proposals should therefore be expressly referenced in the Discussions, if not Conclusions Section of the report.
- Para 52: Shift proposal to non-paper, reflecting that it has received only little support, and to ensure equal treatment with other norms proposals.

- Para 54 regarding relationship of norms and international law: We would like to see the integration of language on this topic from the GGE Draft Report, which is slightly more extensive, to make sure that the Reports correspond.
- The Conclusions Section should reiterate that States agreed to be guided in their use of ICTs by the 11 norms under resolution 70/237.
- Also, it should be stated more clearly, in particular in para 60, that States agreed by consensus to be guided in their use of ICTs by the 11 norms under resolution 70/237 in contrast to the 13 norms under resolution 73/27.

V. Confidence-building Measures

- Para 66: The role of non-state actors should also be acknowledged in the Conclusions Section.
- Suggestion to add acknowledgement in the Conclusions on CBMs, e.g. in para 69, that valuable lessons can be learned from the experience of regional organizations with CBMs.

VI. Capacity Building

- Germany supports the strong Capacity Building Section and in particular its principles in para 86 which have a real added value.
- Suggestion to add reference to the importance of capacity building to enable all States to fully participate in current and future discussions on how international law applies to cyberspace.
- Para 82: Suggestion to include examples of “existing platforms within the United Nations” and “its specialized agencies”.
- Para 82: “States suggested that existing platforms within the United Nations, its specialized agencies and in the wider international community could be used to strengthen already established coordination.” Change “could” to “should”.
- The importance of a multi-stakeholder approach to capacity building, as stated in para 83, should also be acknowledged under the Conclusions Section.
- Para 85: While the statements in para 85 are correct, suggestion to use more positive language speaking of challenges to capacity building rather than obstacles.
- Para 85: Use “digital divide” in the plural, as there are many and intersecting divides, including women, children, disabled persons and the elderly.
- Para 86: Second principle: Add “free” to list of attributes of ICT environment and streamline within all paras of Zero Draft.

VII. Regular Institutional Dialogue

- Germany appreciates that the Zero Draft contains an explicit reference to and recommends the establishment of a Programme of Action for advancing responsible State behavior in cyberspace which reflects the broad support this proposal has gained.
- In our view, it constitutes the best proposal to return to one, inclusive, flexible and consensus based process. It would have the ability to evolve over time and include discussions on how international law applies in cyberspace, implementation and development of new norms of responsible State behaviour, CBMs as well as capacity building.
- Suggestion to move statement in para 100: “States also expressed the desire for the international community to ultimately return to a single process anchored in consensus and

global support from the outset so as to ensure collective ownership of the process.” to Conclusions Section to better reflect overwhelming consensus on this issue.

- Suggestion to add the non-paper presented by the Co-Sponsors of the Programme of Action proposal as an Annex to the Zero Draft in order to provide further clarity on the content of the proposal.