

ILC

The Environment in Armed Conflicts – Draft Principles –

by Stavros-Evdokimos Pantazopoulos*

The International Law Commission (ILC) originally decided to include the topic “Protection of the Environment in Relation to Armed Conflicts” in its long-term programme of work in 2011.¹ It has been included in the current programme of work since the ILC’s 65th session in 2013,² at which time, Marie G. Jacobsson was appointed as Special Rapporteur for the topic.³ During the 66th session of the ILC, Jacobsson presented her first report on the topic (the “preliminary report”).⁴ The Commission’s 67th session addressed her second report.⁵

Overview of the Work at the 67th Session

The second report aimed at identifying existing rules of armed conflict directly relevant to the protection of the environment in relation to armed conflict and included an analysis of those rules. The core of the second report related to the law applicable during armed conflict. The report also addressed some aspects of methodology and sources, and provided a brief synopsis of the discussions within the Commission during the previous session, as well as information on the views and practices of States and of selected relevant case law. The Special Rapporteur stressed that since it was not the duty of the Commission to revise the law of armed conflict, the report avoided analysing the operational interpretations of such provisions.

The report contained proposals for a preamble and five draft principles, which were referred to a Drafting Committee, with the understanding that the provision of the preamble on the “Use of terms” would be for the purpose of facilitating discussions and would, at this stage, be left pending.

The Drafting Committee’s report on “Protection of the environment in relation to armed conflicts” was presented by the Committee’s Chairman, and contained the draft introductory provisions and draft principles I-(x) to II-5 that had been provisionally adopted by the Drafting Committee.⁶ The Commission took note of the draft introductory provisions and draft principles as presented by the Drafting Committee.⁷

Summary of the Debate Before the Plenary

Use of Terms

The proposed formulations on “armed conflict” and “environment” had already been submitted in the preliminary report. Notwithstanding the fact that the provision on “Use of Terms” was left pending, several members questioned the lack of consistency, in particular with regard to terms such as “environment” and “natural environment”. Accordingly, in the text of the provisionally adopted draft principles, the reference to “natural” is still in square brackets as the Drafting Committee is yet to decide among three possibilities: (i) use only the term “environment”, (ii) use only “natural environment” or (iii) use “natural environment” where the principle relates to “natural environment” during armed conflict because the law of armed conflict employs that term. The issue will be re-examined and decided in future sessions. This

*Research Assistant to Special Rapporteur Marie G. Jacobsson, Ph.D. Candidate in Law at the European University Institute, and scholar of the Foundation for Education and European Culture.

paper takes no position on that issue, using the phrase “[natural] environment” with brackets, wherever appropriate.

Outcome

With regard to the form of instrument that would be used as the final outcome of these discussions, some members of the Commission expressed a preference for draft articles, while others favoured the Special Rapporteur’s proposal to develop draft principles. The latter group indicated that principles bear legal significance, but one that is more general and abstract than rules. In the same vein, the Special Rapporteur referred to “principles” as the most appropriate outcome of the work, in light of the fact that they offer sufficient flexibility to cover all phases of the topic.

Scope

The wealth of information relating to State practice, as provided in the second report, highlighted the fact that the majority of regulations on peacetime military obligations are of recent date, so that multilateral operations are increasingly undertaken within a relatively new framework of environmental regulations. The Commission would need to know how to use such information in its work, that is, whether these newly adopted practices represent customary international law, emerging rules or new trends. Several members of the Commission also underlined the need for further research on the practice of non-State actors in the context of non-international armed conflicts.

From a methodological perspective, some members noted a need for caution, and to avoid viewing this task as one of simple transposition of the provisions of the law of armed conflict as currently applied to the protection of civilians or civilian objects, in order to apply them to the protection of the environment. Members also stressed the need to methodically consider the continued applicability of other rules and principles of international environmental law during armed conflict and the relationship of these legal regimes. The underlying rationale was that it is possible that legal gaps can be avoided so long as the principles do not preclude the co-applicability of international environmental law.

Regarding the use of nuclear weapons, it was suggested that further clarification on the scope of the topic might be needed. The issue of human rights violations caused by actions affecting natural resources was also brought up in the plenary, while a provision on indigenous peoples in light of their special relationship with the environment was also proposed. A separate draft principle that would reflect a duty upon States to protect the environment in relation to armed conflict through legislative measures consistent with applicable international law was also suggested.

Drafts Provisionally Adopted by the Drafting Committee⁸

The provisionally adopted draft text consists of an introduction discussing the scope and purpose of the draft principles, and six draft principles, of which one is included under the heading “preventive measures” and the other five under “Draft principles applicable during armed conflict”. In general, the draft principles have been drafted on the understanding that they would normally be applicable to both international and non-international armed conflicts.

Draft Introductory Provisions

As provisionally adopted by the Drafting Committee, the introduction does not contain a preamble; however, one will be drafted at the appropriate time to accompany the draft principles.

Scope

As set out in the draft introductory provision on scope, the document will individually address the protection of the environment in the three temporal phases, namely: before (indicated by a Roman numeral I in the numbering of a clause), during (II) and after (III) armed conflict.⁹ As noted by the Chairman of the Drafting Committee a close relationship nonetheless exists between these three phases for the purpose of protecting the environment.

Purpose

As with the draft introductory provision, the provision on purpose covers all three temporal phases. The phrase “including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures” is intended to indicate the general kind of measures that would be called for to accord the required protection.¹⁰ With respect to the temporal phase in which the relevant measures should be undertaken, the phrase “preventive measures for minimizing damage” refers predominantly to the situation before and during armed conflict, whereas “remedial measures” relates primarily to the post-conflict phase, even though the latter could be adopted before the end of the conflict.¹¹

Part One: Preventive Measures

Part One, which is entitled “Preventive measures”, contains one draft principle and deals mostly with the pre-conflict stage.

Draft Principle I-(x): Designation of Protected Zones

The Drafting Committee decided to split the draft principle initially proposed by the Special Rapporteur¹² into two corresponding provisions – one covering the pre-conflict phase and the other covering the armed-conflict phase.

This draft principle, addressing the pre-conflict phase, provides that States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones. The Drafting Committee chose to use the term “protected zones” as opposed to “demilitarised zones”, since the latter term is subject to multiple different understandings. The term “agreement” may cover an agreement concluded verbally or in writing, as well as reciprocal and concordant declarations. It also includes a unilateral declaration by a State of a protected zone, including one made through an international organisation.

The rationale behind this provision is to protect areas of major “environmental importance”, including ancestral lands of indigenous peoples who depend on the environment for their sustenance and livelihood. Given that the draft principles purport to apply in non-international armed conflicts as well, the reference to “States” does not rule out the possibility that non-State actors may agree on the designation of such areas.

Part Two: Draft Principles Applicable During Armed Conflict

Part Two is entitled “Draft principles applicable during armed conflict” and consists of five draft principles, all obviously applicable primarily to the armed-conflict phase (Roman numeral II).

Draft Principle II-1: General Protection of the [Natural] Environment During Armed Conflict

Draft principle II-1 addresses the general protection of the [natural] environment during an armed conflict and is divided into three paragraphs, of which paragraph 1 is relevant during all three phases. The text, as provisionally adopted, reads:

1. The [natural] environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict. 2. Care shall be taken to protect the [natural] environment against widespread, long-term and severe damage. 3. No part of the [natural] environment may be attacked, unless it has become a military objective.

The wording of this paragraph is based inter alia on the language used in the Advisory Opinion of the International Court of Justice (ICJ) on the *Legality of the Threat or Use of Nuclear Weapons*.¹³ Its notions of “respect” and “protect” are also found in existing law of armed conflict,¹⁴ as well as in environmental law and human rights law. In drafting, the term “law of armed conflict” was preferred over other options such as “international humanitarian law”, taking into account the broader connotation of the former as well as that the draft principles would be consistent with the terminology used in the Draft Articles on the Effects of Armed Conflicts on Treaties, adopted by the Commission in 2011, notwithstanding the fact that the two terms are increasingly used interchangeably.¹⁵

Paragraph 2 of this principle was added to the text following a suggestion by several members during the plenary debate. It follows the wording of Article 55(1) of Additional Protocol I¹⁶ and has to be read together with draft principle II-2. Given the nearly identical wording of this provision and the relevant clause of Additional Protocol I, it was stated in the plenary that the inclusion of the second sentence of article 55(1)¹⁷ may reinforce the proposed text. Connected to this discussion, it was proposed in the Plenary that this paragraph should be limited to the current coverage, and that the more specific issue on means and methods of warfare, which is dealt with in Articles 35(3) and 55(1) of Additional Protocol I, should be addressed separately – possibly in a separate draft principle or in the commentaries.

Paragraph 3 of draft principle II-1 is based on paragraph A of rule 43 of an International Committee of the Red Cross study entitled *Customary International Humanitarian Law* (ICRC Study)¹⁸ and attempts to accord to the environment the same treatment that is accorded to a civilian object during armed conflict. The only difference between the adopted draft text and the rule set out in the study is that paragraph 2 of draft principle II-1 employs the phrase “unless it has become a military objective”, instead of the wording “unless it is a military objective” of paragraph A, rule 43 of the ICRC Study. The reason behind this change is to highlight that the environment is not a military objective *per se*, although it may become one. Like paragraph 2, paragraph 3 of draft principle II-1 has to be read together with draft principle II-2, discussed below.

Draft Principle II-2: Application of the Law of Armed Conflict to the Environment

Draft principle II-2 deals with the application of the law of armed conflict to the environment, “including the principles and rules on distinction, proportionality, military necessity and precautions in attack”. The word “including” makes it clear, however, that the above list is not exhaustive. This draft principle provides that the law of armed conflict “shall be applied to the [natural] environment *with a view to its protection*”. It therefore seems to be an

objective rather than merely an endorsement of the provision's application to the [natural] environment.¹⁹

Draft Principle II-3: Environmental Considerations

The text of draft principle II-3, which provides that “Environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity” is drawn from, and inspired by, the ICJ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.²⁰ It signals the intent to address military conduct by replacing the ICJ's term “assessing” (in reference to the principle of proportionality) with the word “applying”. In discussions, the options of merging draft principle II-3 with draft principle II-2 or of deleting it altogether were discussed. The added value of maintaining draft principle II-3, however, is that it specifies how the principle of proportionality and the rules on military necessity apply to the environment. As such, it was retained.

Draft Principle II-4: Prohibition of Reprisals

The text of draft principle II-4 (“Attacks against the [natural] environment by way of reprisals are prohibited”) repeats *verbatim* the wording of Article 55(2) of Additional Protocol I. The consideration of this draft principle in the Drafting Committee revealed the same divisions as in the Plenary debate. Some members of the Commission expressed the view that the prohibition on reprisals against the environment forms part of customary international law. They therefore sought a redrafting with appropriate caveats or its complete exclusion of the text of the draft principles.

Other members felt that the prohibition has been crystallised in customary international law. On this point, the Special Rapporteur observed that the purpose of the ILC's work on this topic was not to enumerate the customary rules, but to set a standard.

It was suggested that the existence of the prohibition only as a treaty obligation was a matter of nuance that could be clarified in the commentary. Following this thread, less obligatory language was proposed, to the effect that attacks should not be made against the [natural] environment. It was agreed to maintain the wording of Article 55(2) of Additional Protocol I and refer to the diverging views in the commentaries.

In connection with this two reflections can be made. First, the prohibition on reprisals apparently applies to both international and non-international armed conflicts, given that, as mentioned above, the draft principles are purported to cover both. Moreover, there is no specific prohibition of belligerent reprisals in either common article 3 to the Geneva Conventions nor Additional Protocol II.²¹

Draft Principle II-5: Protected Zones

As mentioned above, this draft principle corresponds to the draft principle contained in Part One on Preventive measures: “An area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective”. In contrast to the Principle I-(x), however, draft principle II-5 covers only areas that are designated by agreement, so that an express agreement on the designation during either peacetime or an armed conflict is required. The term “agreement” should be understood broadly to include mutual and unilateral declarations accepted by the other party, treaties and other types of agreements, as well as potential agreements with non-State

actors. The protection furnished to a protected zone ceases if one of the parties to the armed conflict commits a material breach of the agreement within that established zone.

Future Programme of Work

During the ILC's 68th session in 2016, the Special Rapporteur will present her third report on the topic, which will include proposals on post-conflict measures, including cooperation, sharing of information and best practices, and reparative measures. That report will close the circle of all three temporal phases and will consist of three parts. The first will focus on the law applicable after an armed conflict. The second will examine issues that have not yet been discussed, such as occupation. The third part will contain a summary analysis of all three phases.

¹ *Official Records of the General Assembly, Sixty-sixth Session Supplement No. 10*. UN Doc. A/66/10 and Add.1. ILC Report 2011, para. 365.

² Decision of the 3171st meeting of the Commission, on 28 May 2013. Reported to the UN at *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10*. UN Doc. A/68/10. ILC Report 2013, para. 167.

³ *Ibid.*

⁴ *Official Records of the General Assembly, Sixty-ninth Session Supplement No. 10*. UN Doc. A/69/10. ILC Report 2014, para. 187. See also Kron, A. 2014. "Environment in Relation to Armed Conflicts". EPL 44(6): 490–492.

⁵ UN Doc. A/CN.4/L.870. See also Laina, E. and Tsioumani, E. 2015. "Ongoing Work on Atmosphere and Armed Conflict". EPL 45(3-4): 113–116.

⁶ See "Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau". Online at http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2015_dc_chairman_statement_peac.pdf&lang=EF.

⁷ *Official Records of the General Assembly, Seventieth Session Supplement No. 10*. UN Doc. A/70/10. ILC Report 2015, para. 134.

⁸ The following outline is based on the report of the Chairman of the Drafting Committee. *Supra*, note 6.

⁹ The text as provisionally adopted by the Drafting Committee reads: "The present draft principles apply to the protection of the environment before, during or after an armed conflict".

¹⁰ *Supra*, note 6, at 3.

¹¹ The text as provisionally adopted by the Drafting Committee reads: "The present draft principles are aimed at enhancing the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures".

¹² The text as provisionally adopted by the Drafting Committee reads: "States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones".

¹³ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, at 243, para. 32.

¹⁴ See Article 48, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, United Nations, Treaty Series, vol. 1125, No. 17512 (entered into force 7 December 1978).

¹⁵ *Supra*, note 6, at 7. See also "Annex to the Draft Articles on the Effects of Armed Conflicts on Treaties", *supra*, note 1, at 178.

¹⁶ *Supra*, note 14.

¹⁷ "This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population".

¹⁸ Henckaerts, J.-M. and Doswald-Beck, L. 2005. *Customary International Humanitarian Law, Volume I: Rules*, at 143. International Committee of the Red Cross, Cambridge University Press.

¹⁹ The text as provisionally adopted by the Drafting Committee reads: "The law of armed conflict, including the principles and rules on distinction, proportionality, military necessity and precautions in attack, shall be applied to the [natural] environment, with a view to its protection".

²⁰ *Supra*, note 13, at 242, para. 30.

²¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.