

INTERNATIONAL LAW COMMISSION

Sixty-seventh session

Geneva, 4 May – 5 June and 6 July – 7 August 2015

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Protection of the environment in relation to armed conflicts
Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau
30 July 2015

Mr. Chairman,

It gives me great pleasure to introduce the fifth report of the Drafting Committee for the sixty-seventh session of the Commission, which concerns the topic “Protection of the environment in relation to armed conflicts”.

The Drafting Committee devoted 5 meetings, on 14, 15, 16, 20 and 21 July, to its consideration of the draft principles regarding this topic. It examined the draft principles presented by the Special Rapporteur in her second report (A/CN.4/685) this year, together with reformulations that were presented by the Special Rapporteur to the Drafting Committee in order to respond to suggestions made, or concerns raised, during the Plenary with respect to the draft principles presented.

Before addressing the details of the report, let me pay tribute to the Special Rapporteur, Ms. Marie Jacobsson, whose mastery of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee. I also thank the members of the Drafting Committee for their active participation and valuable contributions to the successful outcome. Furthermore, I also wish to thank the Secretariat for its valuable assistance.

Finally, I would like to thank Mr. McRae for accepting to chair the Drafting Committee in my absence on the 15th of July.

I would like too, Mr. President, to stress that the present statement of the Chairman of the Drafting Committee will be posted on the website of the Commission, both in French and English. In addition, I am pleased that the Drafting Committee worked in these two languages.

Mr. Chairman,

It will be recalled that the Commission at its 3269th meeting on 14 July 2015 decided to refer the five draft principles, together with the preamble, as contained in the second report of the Special Rapporteur to the 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 in the Drafting Committee. The Drafting Committee proceeded to consider the relevant provisions of the draft principles on the basis of texts prepared by the Special Rapporteur, taking into account the plenary debate.

As presented, in document A/CN.4/L.870, the draft text provisionally adopted by the Drafting Committee has an introduction containing provisions on the scope and purpose of the draft principles, as well as 6 draft principles.

I draw your attention first to the “Introduction”, which was previously entitled “Preamble”. It is understood that a preamble, formulated in the usual manner, will be prepared at the appropriate time to accompany the draft principles. Since the two provisions on scope and purpose previously forming part of a “preamble” are not principles as such, it was decided, on the basis of a proposal by the Special Rapporteur, to place them in an Introductory section.

The provision on “Scope”, shortened from “Scope of the principles” in order to be consistent with the more recent practice of the Commission, provides that the present draft principles apply to the protection of the environment before, during or after an armed conflict. As will be recalled, the topic addresses the protection of the environment in the three temporal phases, namely, the pre-, in-, and post-armed conflict. It was therefore viewed important to

signal quite early that the scope of the draft principles relates to these phases. This notion is captured by the phrase “before, during or after” an armed conflict. The disjunctive “or” seeks to underline the recognition within the Drafting Committee that not all draft principles would be applicable during all phases. It bears emphasizing that the Drafting Committee was quite mindful of the existence of a close relationship for purposes of protection to the environment among the three identified phases.

The Drafting Committee decided to presently cast the provisions as “draft principles” as proposed by the Special Rapporteur on the understanding that the final form will be subject of consideration at a later stage. Given the intersection in particular between the law relating to the environment and the law of armed conflict, which is inherent to the topic, the principles are cast normatively at a general level of abstraction.

The second provision in the introduction relates to the purpose of the present draft principles and is appropriately entitled “Purpose”. The aim is to enhance 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. The purposive nature of the provision is found in the word “enhancing”, which in this case is not intended to have a connotation of an effort to progressively develop the law. It does not in any way constitute a statement on the statutory role of the Commission. The current formulation was reached after a detailed discussion on how the provision should be formulated. In the main, it was considered that the provision should state the purpose, which would be subject of further elaboration in the ensuing draft principles. The reference to “including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures” is meant to signal the general kinds of measures that would be required to offer the necessary protection. A suggestion to qualify the text with words like “as appropriate” was considered inopportune at this point in time, particularly for a draft provision dealing with purpose.

Like in the preceding provision, the present provision covers the three temporal phases. In this connection the reference to “preventive measures for minimizing damage” relates

predominantly to the situation before and during armed conflict. The reference to “remedial measures” in turn concerns primarily the post-conflict phase. As has been recognized, however, there is a close relationship among the phases. Indeed, remedial measures might be required during an occupation. The phrase “remedial measures” was preferred to “restorative measures” as it was viewed as clearer and broader in scope, encompassing any measure of remediation that may be taken to restore the environment. This might include loss or damage by impairment to the environment, costs of reasonable measures of reinstatement, as well as reasonable costs of clean-up associated with the costs of reasonable response measures. The Drafting Committee also chose to delete the temporal element denoted by the phrase “taken at the end of active hostilities” on the understanding that the commentary will include the notion that remedial measures could be undertaken even before the conflict ends.

I now turn to the draft principles.

Let me note that the Drafting Committee has structured the draft principles bearing in mind the three phases related to the topic. This has entailed the introduction of Parts. Accordingly, the draft principles provisionally adopted thus far by the Drafting Committee currently cover two Parts. Part One, entitled “Preventive measures”, consists of one draft principle, while Part Two, entitled “Draft principles applicable during armed conflict”, consists of five draft principles. Moreover, the numbering of the draft principles is such that the Roman numeral denotes the phase to which the particular draft principle predominantly relates. The draft principles have been prepared on the general understanding that they would normally apply to both international and non-international armed conflicts.

I now introduce **Draft principle I-x**, entitled “Designation of protected zones”. An appropriate number is yet to be assigned to the draft principle, as there will be additional draft principles to be contained in Part One that the Special Rapporteur intends to propose in the future. Part One, on “**Preventive measures**” deals mostly with the pre-conflict stage when peace is prevailing. It is anticipated that a State may already take the necessary measures to protect the environment generally, but also in particular, as part of preventive measures in the

event that an armed conflict might occur. It is also recognized that there would be certain draft principles that cut across and straddle the various phases.

It will be recalled that initially the Special Rapporteur had proposed this draft principle as draft principle 5. It was then presented in the Drafting Committee reformulated into two draft principles, in view of comments made in Plenary. Suggestions were made to broaden the temporal scope of draft principle 5 to cover the various temporal phases, as well as to address the legal implications of such zones *vis-à-vis* the other parties to a conflict, including obligations not to attack such zones.

The provision now provides that States should designate by agreement or otherwise areas of major environmental and cultural importance as protected zones. It is now placed in Part One as it deals primarily with the pre-conflict phase. This is not to exclude instances in which such areas could be designated during armed conflict or indeed in the post-conflict phase. The Drafting Committee elected to employ the term “protected zones” as opposed to “demilitarized zones”, as the latter term is amenable to different understandings.

Such areas may be designated by agreement or otherwise. The reference to “agreement or otherwise” is intended to introduce some flexibility. This may include an agreement concluded verbally or in writing, as well as reciprocal and concordant declarations. They also include a unilateral declaration by a State of a protected zone or through an international organization. The area declared has to be of “major environmental and cultural importance”. The Drafting Committee is aware that the 1954 Hague Convention on the Protection of Cultural Property in the event of armed conflict, including its additional protocols, is the regime that governs the protection of cultural property whose provisions apply in time of peace, as well as during armed conflict. It is not the intention of the present draft principle to replicate that regime. The idea here is to protect areas of major “environmental importance”. The reference to “cultural” is intended to infer the existence of a close linkage to the environment. It would accordingly include, for example, ancestral lands of indigenous peoples, who depend on the environment for their sustenance and livelihood.

While this draft principle deals predominantly with the pre-conflict phase, it has a corresponding provision in draft principle II-5. And, as pointed out earlier, a designation of a protected zone may occur during an armed conflict or indeed in the post-conflict phase. The commentary would indicate that the reference to “States” does not preclude the possibility of such designation being reached by agreement with non-State actors particularly during armed conflict.

I will now turn to Part Two, which is entitled “Draft principles applicable during armed conflict”.

Draft principle II-1 is entitled “General protection of the [natural] environment during armed conflict”. The reference to [natural] is still in square brackets as the Drafting Committee is yet to decide whether it should for the purposes of the draft principles use “environment” or “natural environment” throughout the text, or whether it should use “natural environment” only in the instance that the principle relates to “natural environment” during armed conflict, as it is that term that the law of armed conflict employs. In that context, the concept of the natural environment is supposed to be understood in the widest sense to cover the biological environment in which a population is living. As provided in the commentary to the Additional Protocol I, it “does not consist merely of the objects indispensable to survival...but also includes forests and other vegetation mentioned in the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, as well as fauna, flora and other biological or climatic elements.”

Draft principle II-1, General protection of the [natural] environment during armed conflict

Draft principle II-1 consists of three paragraphs. Paragraph 1 sets out the general proposition that the [natural] environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.

On the basis, *inter alia*, of language used in the *Legality of the threat or use of nuclear weapons* advisory opinion in which the International Court of Justice notes that the environment

should be respected and protected, the Drafting Committee decided to retain the phrase “respected and protected”, as proposed by the Special Rapporteur. Moreover, the concepts of “respect” and “protect” have a long pedigree in the law of armed conflict as well as in environmental law and human rights law.

International law applicable to the environment remains relevant during armed conflict, where the law of armed conflict is applicable as *lex specialis*. It is also understood that insofar as the respect for the law of armed conflict is applicable before, during and after armed conflict, paragraph 1 is relevant during all the three phases. The Drafting Committee decided to use the term “law of armed conflict” rather than “international humanitarian law”, in light of the broader connotation of the former, even though the terms are increasingly understood synonymously in contemporary times. This would also ensure consistency with the terminology employed in the draft articles on the effects of armed conflicts on treaties adopted by the Commission in 2011, to which the present topic is related. The Drafting Committee also decided to use “in accordance with” rather than the more nuanced “consistent with”.

Paragraph 2 is new and is inspired by article 55 of Additional Protocol I. It provides that care shall be taken to protect the [natural] environment against widespread, long term and severe damage. The discussion in the Drafting Committee centered on whether it was necessary to balance the paragraph with a provision on means and methods of warfare as contained in article 35 of the Protocol. Moreover, it was further noted that the paragraph was incomplete as it covered only the first sentence of article 55, leaving unmentioned the second sentence which specifically states that the protection envisaged 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. It was mentioned during the discussions that leaving out the rest of second sentence of article 55 may weaken the proposed text.

It was recognized that the whole of draft principle II-1 has a general character and is cast in general terms. Accordingly, paragraph 2 has to be read together with draft principle II-2, which addresses the application of principles and rules of the law of armed conflict to the natural

environment with a view to its protection. It was suggested that the more specific issue on means and methods of warfare would be better dealt with separately, possibly in a separate draft principle or in the commentaries.

Paragraph 3 seeks to treat, during armed conflict, the natural environment in the same way as a civilian object. It will be recalled that the assertion that the natural environment is “civilian in nature” as contained in the proposal by the Special Rapporteur in her second report was subject of comment in Plenary and the Special Rapporteur chose not to use it in order not to introduce unnecessary ambiguity. Accordingly, the Drafting Committee worked on the basis of a reformulated proposal by the Special Rapporteur that stated that no part of the natural environment may be an object of attack, unless it becomes a military objective. The use of the word “has become” points to a temporal qualifier and is intended to stress that the environment is not, as such, a military objective, although it may become one in certain circumstances. Following further debate in the Drafting Committee, paragraph 3, as appears presently, is based on paragraph A of rule 43 of the ICRC study on Customary international humanitarian law. Given the specificity of the current formulation, as well as its reliance in its formulation on rule 43, the issue then arose whether paragraph 3 needed to be balanced with the other paragraphs of rule 43.

It was recognized that the draft principles are general in nature and there was no wish to reformulate rules and principles already recognized by the law of armed conflict. It is understood that paragraph 3, like paragraph 2, has to be read together with draft principle II-2, which in particular makes reference, *inter alia*, to the application of the principle of distinction.

Draft principle II-2, Application of the law of armed conflict to the environment

Draft principle II-2 is entitled “Application of the law of armed conflict to the environment”. Its structure and wording have been modified slightly to take into account the comments made in plenary, as well as the adoption of the title of Part Two, “Draft principles applicable during armed conflict”, indicating the relevant temporal phase in which the draft principle was situated. In light of this, the words “during an armed conflict” were deleted. The

term “fundamental” was also deleted since it was considered superfluous and may give rise to confusion. For the same reasons as explained in relation to draft principle II-1, it was decided to refer to the “law of armed conflict” instead of “international humanitarian law”.

The phrase “strongest possible” in the initial proposal by the Special Rapporteur had generated much comment in Plenary. In order to avoid any misconception that the draft principle intended to introduce a hierarchy between the protection of environment and other civilian objects in the law of armed conflict, it was decided to delete this reference.

As adopted the draft principle highlights two specific elements. First, as indicated by its title, draft principle II-2 deals solely with the law of armed conflict and aims to highlight the most relevant principles and rules in this context. The principles and rules on distinction, proportionality, military necessity and precautions in attack are therefore explicitly referred to as way of example and should not be perceived as representing an exhaustive list. Second, the draft principle specifies that these should be applied to the environment *with a view to its protection*, thus introducing an objective rather than simply confirming their application to the environment. In order to maintain the general nature of the draft principle, it was decided against elaborating the meaning of the said principles and rules in the provision, which may result in developing or interpreting already established rules.

Draft principle II-3, Environmental considerations

Let me now turn to draft principle II-3, which is entitled “Environmental considerations”. The value of including draft principle II-3 as a separate provision rather than merging it with draft principle II-2 or deleting it altogether was discussed. It was recognized that the draft principle has an added value of specificity, in that it related to the application of the proportionality principle and the rules of military necessity, which have operational importance. The Drafting Committee decided to retain draft principle II-3 and to have it reformulated.

The draft principle provides that environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity. The

text is drawn from and inspired by the advisory opinion of the International Court of Justice on *Legality of the threat or use of nuclear weapons*. The draft principle is aimed at addressing military conduct rather than the process of determining what constituted a military objective as such. Accordingly, the draft principle has been modified in the Drafting Committee to clarify this point. The phrase “in pursuit of lawful military objectives” was deleted and the term “assessing” was replaced with “applying”. Also for purposes of clarity and in order to emphasize the link between draft principles II-2 and II-3, it was decided to refer explicitly to the principle of proportionality and rules on military necessity.

Draft principle II-4, Prohibition of reprisals

Draft principle II-4 is entitled “Prohibition of reprisals”. The draft principle is a mirror image of paragraph 2 of article 55 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 expressed support for its inclusion, perceiving a prohibition of reprisals as entirely appropriate, given that the present topic is devoted to the protection of the environment in relation to armed conflict. These members linked this proposed text to article 51 of Additional Protocol I, which is one of the most important articles in the Protocol as it confirms the customary rule that innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities. In their view, if the environment, or part thereof, became an object of reprisals it was tantamount to an attack against the civilian population or civilians or civilian objects. It was noted that the fact that the prohibition only existed as a treaty obligation and not as a customary rule was a matter of nuance that could be explained in the commentary. Some members were of the view that the prohibition forms part of customary international law. It was considered that any other formulation could be perceived as weakening an existing rule.

For some other members, paragraph 2 of article 55, on which the draft principle was based, represented no more than a conventional rule. It was not necessary to replicate it in draft principles that were intended to apply generally. It was considered important to factor in the

consideration that the prohibition of reprisals against the environment was not generally accepted as a rule of customary international law and they sought that it should be reflected as such in the draft principle. They also drew attention to the reservations and declarations made in respect of paragraph 2 of article 55 made by States. They also stressed that as presently formulated the draft principle seemingly applied to both international and non-international armed conflicts, yet neither common article 3 to the Geneva Conventions nor Additional Protocol II, contained a specific prohibition of belligerent reprisals. They therefore sought a redrafting with appropriate caveats or its complete exclusion of the text of the draft principles.

There was, for instance, a suggestion to use less obligatory language to the effect that attacks should not be made against the [natural] environment. Several suggestions were also made to seek to limit the draft principle to situations of international armed conflict. In this connection there was a submission to have one paragraph that would limit the proposition to international armed conflict and then another paragraph, which would use hortatory language to encourage parties in a non-international armed conflict not to resort to reprisals.

However, no compromise on the text was found feasible. The draft text remains the same as proposed by the Special Rapporteur. It provides that attacks on the [natural] environment by way of reprisals are prohibited. The commentary will reflect the extent of the divisions regarding the text, noting in particular that some members were opposed to the inclusion of the draft principle. It is understood that the text has particular significance for those States that are parties to Additional Protocol I because of the obligations arising from that treaty; the commentary will also take factual cognizance of the kinds of reservations and declarations that have been made by some States parties. In this context, the Special Rapporteur noted that none of these declarations/reservations refers back explicitly to paragraph 2 of article 55 or to the natural environment. The commentary will also recognize that some States are not party to Additional Protocol I.

Principle II-5, Protected zones

I shall now turn to draft principle II-5, entitled “Protected zones”. This draft principle is a corresponding provision to the one draft principle contained in Part One. It provides that 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. Unlike the earlier draft principle, it only covers areas that are designated by agreement. There has to be an express agreement on the designation. Such agreement may have been concluded in time of peace as well as in time of armed conflict. It was understood that reference to “agreement” should be taken in its broadest sense and include mutual and unilateral declarations accepted by the other party, treaties and other types of agreements, as well as agreements potentially with non-state actors.” Such zones are protected from attack during armed conflict. The reference to “contain” in the phrase “as long as it does not contain a military objective” is intended to denote that it may be the entire zone or parts thereof. Moreover, the protection afforded to a zone ceases if one of the parties commits a material breach of the agreement establishing the zone.

Mr. Chairman,

This concludes my introduction of the fifth report of the Drafting Committee for the sixty-seventh session. Let me note that the Commission is not, at this stage, being requested to act on the draft principles as they have been presented for information purposes only. It is the wish of the Drafting Committee to have the draft principles provisionally adopted by the Commission next year.

Thank you very much.

Protection of the environment in relation to armed conflict

Text of the draft introductory provisions and draft principles provisionally adopted so far by the Drafting Committee

Introduction

Scope

The present draft principles apply to the protection of the environment before, during or after an armed conflict.

Purpose

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.

Part One

Preventive measures

Draft principle I-(x) Designation of protected zones

States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.

Part Two

Draft principles applicable during armed conflict

Draft principle II-1 General protection of the [natural] environment during armed conflict

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.

Draft principle II-2 Application of the law of armed conflict to the environment

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.

Draft principle II-3
Environmental considerations

Environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity.

Draft principle II-4
Prohibition of reprisals

Attacks against the [natural] environment by way of reprisals are prohibited.

Principle II-5
Protected zones

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.
