

## Chapter XI

### PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

#### A. Introduction

186. At its sixty-fifth session (2013), the Commission decided to include the topic “Protection of the environment in relation to armed conflicts” in its programme of work and decided to appoint Ms. Marie G. Jacobsson as Special Rapporteur for the topic.<sup>830</sup>

#### B. Consideration of the topic at the present session

187. At the present session, the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/674), which it considered at its 3227th to 3331st meetings, from 18 to 25 July 2014.

##### 1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE PRELIMINARY REPORT

188. The preliminary report provided an introductory overview of phase I of the topic, namely the environmental rules and principles applicable to a potential armed conflict (“peacetime obligations”). It did not directly address measures to be taken during an armed conflict or post-conflict (phases II and III, respectively). In framing the report, the Special Rapporteur took into account the views expressed during the informal consultations held in the Commission in 2013, the views expressed by States in the Sixth Committee of the General Assembly, as well as the written submissions of States in response to the request by the Commission in its 2013 report.

189. The Special Rapporteur indicated that the report examined some aspects relating to scope and methodology, before proceeding to identify existing obligations and principles arising under international environmental law that could guide peacetime measures taken to reduce negative environmental effects in armed conflict. The Special Rapporteur considered that it was premature to attempt to evaluate the extent to which any peacetime obligations continued to apply during or after armed conflict. The report noted that certain obligations, such as the precautionary principle and the obligation to undertake environmental impact assessments, had comparable obligations under international humanitarian law, but such rules were far from identical to peacetime obligations. Detailed examination of phase II obligations would be undertaken in the next report.

190. The report also addressed the use of certain terms, as well as the relevance of international human rights law

to this topic. The Special Rapporteur noted that draft definitions of the terms “armed conflict” and “environment” were proposed to facilitate discussion, though it was not envisioned that they would be referred to the drafting committee at the present session.

191. The Special Rapporteur concluded by describing the proposed future programme of work, noting that the envisaged time frame for the work was three years. The report next year on the law applicable during both international and non-international armed conflicts will contain an analysis of existing rules of armed conflict relevant to the topic, as well as their relationship to peacetime obligations. That report will also contain proposals for guidelines, conclusions or recommendations on, *inter alia*, general principles, preventive measures and examples of rules of international law that are candidates for continued application during armed conflict. The subsequent report, in 2016, will focus on post-conflict measures and will also likely contain a limited number of guidelines, conclusions or recommendations on, *inter alia*, cooperation, sharing of information and best practices, as well as reparative measures. The Special Rapporteur indicated that submissions of States highlighting relevant national legislation, as well as her continued consultations with other international and regional entities, would continue to be of assistance.

##### 2. SUMMARY OF THE DEBATE

###### (a) *General comments*

192. There was broad recognition of the importance of the topic and its overall purpose. The members of the Commission generally agreed that the focus of the work should be to clarify the rules and principles of international environmental law applicable in relation to armed conflicts. Several members agreed with the Special Rapporteur that the Commission should not modify the law of armed conflict. On the other hand, some members were of the view that, in the light of the minimal treatment of the environment in the law of armed conflict, further elaboration of environmental obligations in armed conflict might be warranted. It was suggested that the legal entity to be protected under this topic was the environment itself, and that the work on the topic should attempt to systematize the norms applicable in all three phases. It was also stressed that the Commission should not address basic questions relating to international environmental law or international human rights law as part of the topic.

###### (b) *Scope and methodology*

193. There was general support for the temporal, three-phased approach adopted by the Special Rapporteur, with some members indicating that the approach would

<sup>830</sup> The decision was made at the 3171st meeting of the Commission, on 28 May 2013 (*Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 167). For the syllabus of the topic, see *Yearbook ... 2011*, vol. II (Part Two), annex V.

facilitate the work. It was suggested that the temporal distinction would enable the Commission to focus on preparation and prevention measures in phase I and repair and reconstruction measures in phase III. Some other members, however, raised concerns regarding an overly strict adherence to the temporal approach, noting that the Special Rapporteur herself had made clear in her Report that it is not possible to have a strict differentiation between the phases. To begin with, several members noted that it was unclear how the temporal phases would be reflected in a coherent final outcome. In developing guidelines or conclusions, several members were of the view that it would be difficult and inadvisable to maintain a strict differentiation between the phases, as many relevant rules were applicable during all three phases.

194. Some members suggested that a thematic approach to the work, rather than a strictly temporal approach, could be useful. It was recommended that consideration of the topic could proceed by examining (a) whether there are principles and rules of general international law or of international environmental law applicable to the protection of the environment in the context of armed conflict; (b) which rules or principles, if any, are adaptable to the protection of the environment in relation to armed conflict; and (c) what are the legal consequences of harm caused by grave attacks on the environment in an armed conflict.

195. The weight that should be accorded to phase II, namely obligations relating to the protection of the environment during an armed conflict, was the subject of considerable debate. Several members were of the view that phase II should be the core of the project as consideration of the other two phases was inherently linked to obligations arising during armed conflict. According to those members, the law of armed conflict relevant to the protection of the environment was limited and did not reflect the present-day realities of armed conflict and the risk it poses for the environment. Several other members stressed that, as proposed by the Special Rapporteur, the Commission should not focus its work on phase II, as the law of armed conflict was *lex specialis* and contained rules relating to the protection of the environment.

196. There was also substantial discussion of limitations on the scope. Some members were of the view that the issue of weapons should be excluded from the topic, as proposed by the Special Rapporteur, while some other members argued that a comprehensive treatment of the topic would necessarily include consideration of weapons. Several members were of the view that general classes or types of weapons could be addressed, as necessary. It was suggested that it could be clarified that the work on the topic was without prejudice to existing rules on specific weapons.

197. Several members agreed that issues relating to internally displaced persons and refugees should be approached cautiously. It was stressed that such issues should not be entirely ignored, particularly insofar as the human rights dimension is included in the work. According to another view, it was questionable whether such issues were of direct relevance to the topic. Some members also agreed with the proposal to exclude consideration

of cultural heritage, though several other members were of the view that the issue had important linkages to the environment, and that there were defects and gaps in the existing law that should be addressed.

198. Concerning environmental pressure as a cause of armed conflict, some members agreed that it should be excluded, though according to another view the issue was of major importance and relevance and should not be ignored.

199. Finally, questions were raised about the proposal to consider non-international armed conflicts. While there was widespread agreement with the proposal to address such conflicts, some members indicated that the inclusion would necessitate study of whether non-State actors were bound by the law of armed conflict, or by obligations that were identified as arising under phases I and III.

### (c) Use of terms

200. There was broad support for the proposal to develop working definitions to guide the discussions. In that spirit, there was a general exchange of views on the possible definitions of “armed conflict” and “environment” presented in the report. Whether definitions would ultimately be included in the outcome of the work, however, remained an open question.

201. The main issue discussed relating to the definition of armed conflict was the proposal to include conflicts between “organized armed groups or between such groups within a State”.<sup>831</sup> Several members expressed support for that proposal. Other members were of the view that the definition should require a minimum degree of intensity and organization among the parties to an armed conflict. It was recommended that the definition clarify that “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence”, were not covered.<sup>832</sup> According to some other members, however, it would be too restrictive to require that armed conflicts may only occur between armed groups that show a minimum level of organization. Questions were also raised as to the legal consequences of damage to the environment in a conflict between non-State actors.

202. To develop a working definition on the “environment”, it was proposed that the Commission would first need to determine whether the environment has a legal nature. Some members recalled that definitions of the term included in the report, for example the definition adopted by the Commission in the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities,<sup>833</sup> were not internationally-accepted definitions. Several members were of the

<sup>831</sup> *Prosecutor v. Duško Tadić a/k/a “Dule”*, Case No. IT-94-1-AR72, Decision on the Defence Motion of Interlocutory Appeal on Jurisdiction, Decision of 2 October 1995, Appeals Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 1994–1995*, vol. I, p. 352, at p. 429, para. 70.

<sup>832</sup> Rome Statute of the International Criminal Court, of 17 July 1998, art. 8, para. 2 (f); and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), of 8 June 1977, art. 1, para. 2.

<sup>833</sup> *Yearbook ... 2006*, vol. II (Part Two), paras. 66–67, principle 2 (b).

view that the working definition should thus be tailored to the particular purpose of the work, namely protection of the environment in armed conflict.

203. There was also a request for clarification on the use of the terms “principle” and “concept” in the report. It was suggested that if a “principle” was indeed a legal rule, that should be stated, as the term “concept” does not suggest a legal rule but rather a policy-oriented proposition.

(d) *Sources and other material to be consulted*

204. The information provided in the report relating to State practice, international organization practice and the previous work of the Commission was welcomed. Several members indicated that further information and submissions from States would be critical to the work on the topic. In particular, it was suggested that the practice of States that had recently been involved or affected by armed conflict would be of particular value. In agreement with the Special Rapporteur, a number of members noted that the practice of the States included in the report, though interesting and useful, may not be generally representative of State practice worldwide. It was posited that, although other States might have a policy to protect the environment where possible, it was doubtful that the military forces of many other States were governed in armed conflict by national environmental laws, among other reasons because there were numerous exemptions available on national security grounds.

205. A general appeal was also made for additional information on the practice of international and regional organizations in this area, particularly with respect to peacekeeping operations and the protection of civilians. In a similar vein, it was considered that the best practices of international entities operating in this area, such as the ICRC, would be useful. The ongoing consultations of the Special Rapporteur with such entities were thus well received.

(e) *Environmental principles and obligations*

206. The information in the report on environmental principles was welcomed, though the general position of members was that further analysis of the particular relationship of such principles with armed conflict was required. Some members stressed that the Commission should not, as part of the topic, endeavour to decide whether “sustainable development” or the “principle of prevention” were general principles or rules of international law. Instead, the widespread view was that the topic should focus squarely on the applicability of such principles in relation to armed conflict.

207. Some members were of the view that further study of international environmental treaties should be undertaken. As most of those treaties were silent with respect to their applicability in relation to armed conflict, and as some treaties indicated expressly that they would not apply in armed conflict, further examination of the operation of environmental principles in the context of armed conflict was required. Some members also recalled in this regard that the articles on the effects of armed conflict on treaties adopted by the Commission at its sixty-third

session<sup>834</sup> did not presume the continued application of environmental treaties, but instead concluded that certain treaties were not *ipso facto* suspended or terminated during armed conflict. It was also recalled that article 10 of those Articles provided that the termination or suspension of a treaty does not affect obligations embodied in the treaty that also apply independently of the treaty.

208. In addition to the general debate on the need to identify those peacetime obligations relevant to armed conflict, there was discussion of the specific environmental principles presented by the report. Some members requested further clarification on the content and operation of the precautionary principle in relation to armed conflict. According to another view, insofar as there was a precautionary principle under general international law, its operation in the context of armed conflict involved the duty of decision-makers to take care to spare civilian objectives and to employ means and methods of warfare with due regard to the protection and preservation of the natural environment. It was the position of some members that the law of armed conflict was *lex specialis* and, as a result, the obligations relating to precaution were those arising under that law.

209. The relevance to armed conflict of certain other principles identified in the report was questioned. Several members were not persuaded that sustainable development was of relevance to the topic. Similar doubts were expressed as to the “polluter-pays” principle and the obligation to conduct environmental impact assessments. Nevertheless, some members were in favour of further consideration of environmental impact assessments. Support was expressed for developing guidelines that would obligate States to prepare environmental impact assessments as part of military planning, and it was noted that the International Court of Justice had found that such assessments were required under general international law for industrial activities in a transboundary context.<sup>835</sup>

(f) *Human rights and indigenous rights*

210. Different views were expressed on the consideration of human rights as part of the topic. Some members were of the view that international human rights law was of limited usefulness to the topic as it was of a sufficiently different character than international environmental law. Several other members recommended that human rights continue to form part of the work. In particular, those members drew attention to regional human rights jurisprudence that had identified human rights applicable in times of armed conflict, as well as jurisprudence on the collective right to a generally satisfactory environment included in the African Charter on Human and Peoples’ Rights, 1981.<sup>836</sup> It was suggested that it would be helpful to engage in a substantive analysis of precisely which human rights are linked to the environment and which of those apply in relation to armed conflict.

<sup>834</sup> *Yearbook ... 2011*, vol. II (Part Two), paras. 100–101. The articles on the effects of armed conflict on treaties adopted by the Commission at its sixty-third session are reproduced in the annex to General Assembly resolution 66/99 of 9 December 2011.

<sup>835</sup> See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, at pp. 82–83, para. 204.

<sup>836</sup> Article 24.

211. There were also divergent views on the advisability of according indigenous rights separate treatment as part of the topic. While some members had reservations, several members supported the idea, indicating that indigenous peoples enjoyed a special relationship with the environment.

(g) *Future programme of work*

212. There was broad support for the proposal by the Special Rapporteur that her second report would further examine aspects of phase I, as well as address phase II, including analysis of the extent to which particular environmental principles are applicable in relation to armed conflict.

213. As far as the outcome of the work, several members expressed support for the development of practical, non-binding guidelines, though completion of the work by 2016 might prove difficult. Other members were of the view that further discussion was required on what the outcome of the work should be.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

214. The Special Rapporteur recalled that the purpose of her preliminary report was to seek views on peacetime obligations, particularly environmental and human rights law obligations, before proceeding to the second report and the development of guidelines, conclusions or recommendations on both phases I and II.

215. With regard to scope and methodology, members had expressed a certain level of flexibility concerning the scope of the work, though there had also been considerable discussion of the proposed limitations on the scope. As several members did not want to exclude general issues concerning weapons, the Special Rapporteur reiterated that the effect of specific weapons should not be addressed as a separate issue since the law of armed conflict deals with all weapons on the same legal basis. She welcomed the possibility of a without prejudice clause.

216. The divergence of views on the treatment of cultural heritage was also noted. The Special Rapporteur recalled that there existed an intricate relationship between the environment and cultural heritage, in particular in relation to aesthetic or characteristic aspects of the landscape. She also recalled that there was a gap in the protection of cultural property and cultural heritage in relation to armed conflict that may need to be addressed. Because of the complexity of such issues, a more detailed analysis of the relevant issues would be presented in the second report.

217. A clear majority of members had expressed their support for the temporal, three-phase approach. Though some members had suggested a thematic approach, the Special Rapporteur recalled that the United Nations Environmental Programme (UNEP), whose 2009 report dealt specifically with this topic,<sup>837</sup> had used a thematic

<sup>837</sup> UNEP, *Protecting the Environment during Armed Conflict: an Inventory and Analysis*, November 2009, available from [https://ceobs.org/wp-content/uploads/2018/03/int\\_law.pdf](https://ceobs.org/wp-content/uploads/2018/03/int_law.pdf).

approach. It turned out to be a complicated working method for the purpose of the present topic and would make drafting operative guidelines particularly difficult.

218. The Special Rapporteur clarified that her insistence that the Commission not revise existing law of armed conflict treaties should not be interpreted as an intention to neglect phase II. She recalled that the second report will address protection of the environment during armed conflict, including those law of armed conflict rules that may serve the purpose of protecting the environment during armed conflict, as well as those rules that may create obligations before an armed conflict.

219. There was a useful debate on the terms “armed conflict” and “environment”, but there seemed to be a general understanding that there was no urgent need to address questions relating to the use of terms.

220. On the availability of evidence of State practice, the Special Rapporteur reaffirmed the need to ascertain whether States have legislation and regulations in force aimed at protecting the environment in relation to armed conflict. In that regard, the Special Rapporteur reiterated that it would be useful if the Commission could ask, once again, States to provide examples of when international environmental law, including regional and bilateral treaties, had continued to apply in times of international or non-international armed conflict.

221. The Special Rapporteur was in full agreement with those members who expressed that further examination of the linkages between environmental principles, human rights law and armed conflict was necessary. She also agreed with the view that sustainable development was of little relevance to the topic, though she recounted that, last year, some Members had urged that sustainable development be included. She also noted that there has long been a political connection between warfare and sustainable development, as reflected in Principle 24 of the Rio Declaration on Environment and Development.<sup>838</sup> She also drew the Commission’s attention to the extensive work by the United Nations Independent Expert on human rights and the environment.<sup>839</sup>

222. Concerning the outcome of the work, a concern had been raised about which actors would be covered by the guidelines, conclusions or recommendations. As had been stated in the debate, it was premature to address this issue in depth. The Special Rapporteur acknowledged, however, that the scope of protection and the actors to whom the work would be addressed would likely differ for each of the phases.

<sup>838</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigendum), vol. I: *Resolutions adopted by the Conference*, resolution I, annex I.

<sup>839</sup> Available from [www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/IEEnvironmentIndex.aspx](http://www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/IEEnvironmentIndex.aspx).