Comments of the Czech Republic on the International Law Commission's draft principles on protection of the environment in relation to armed conflicts, adopted on first reading

The Czech Republic welcomes the opportunity to present written comments on the set of draft principles, together with commentaries thereto, on protection of the environment in relation to armed conflicts, adopted, on first reading, by the International Law Commission at its seventy-first session (2019).

The Czech Republic would like to express its appreciation and gratitude to the Commission and the Special Rapporteur, Ms. Marja Lehto, for their work on this topic, and commend the Special Rapporteur for her scholarly guidance in this undertaking.

The Czech Republic would like to make the following comments concerning the draft conclusions:

General comments

1) As the Czech Republic already stated in its oral interventions in the 6th Committee, the topic chosen by the Commission is very relevant. It is undisputable that today the protection of environment is more pressing issue than ever before and that armed conflicts always have negative impact on the environment not only in the places where they take place, but also in other areas. However, the main problem of today's armed conflicts is to enforce the basic rules of international humanitarian law, especially by non-State actors. In general, the Czech Republic expects that the outcome of this topic will be, in particular, a summary of the rules of international law in relation to the use and the protection of environment and natural resources during an armed conflict, rather than an ambitious and innovative list of recommendations based on very general concepts.

2) We have certain doubts concerning the lack of clarity about the overall orientation and goal of Commission's work on this topic, i.e. whether the "principles" are intended to reflect current state of international law, whether they are intended to provide a guidance without pretending to be firmly founded in positive law, or whether they are a combination of both approaches. In the draft, sometimes there seems to be no clear dividing line between the accepted rules of international law and the efforts of the Commission to contribute to the progressive development of international law. The normative status of some of the rules cited by the Commission as accepted international rules is not beyond doubt (see below for more details).

3) We also wish to point to the fact that legal obligations concerning protection of the environment in relation to armed conflicts cannot be properly interpreted and understood in an abstract manner, in isolation from other provisions applicable in armed conflicts. As regards the draft principles, sometimes it is not clear what is the criterion allowing to draw a line – within the law of armed conflicts – between the rules aiming at protection of the environment and other rules, and whether the rules on

protection of the environment could be taken out of the context of other rules applicable to armed conflicts without a risk of altering their meaning. We are also concerned with the approach consisting in selection of rules from various areas of international law and their discussion in connection with armed conflicts. Some of these rules may be applicable in all situations, including those of armed conflicts, and raising them specifically in the context of the present topic may give an incorrect impression that it is not yet the case. For other rules, however, mere fact that they relate to the protection of the environment does not make them automatically suitable for the purpose of the present topic. In this regard, the risks arising from a selective or incomplete compilation should be also duly considered.

4) The draft aims to formulate principles that would apply to international as well as non-international armed conflicts without any distinction. It is to be noted that existing treaty law relevant to non-international armed conflicts does not address the natural environment in any way. On the other hand, the ICRC Study on Customary International Humanitarian Law (2005) does identify some general principles that should apply to the natural environment in both international and non-international armed conflicts. However, the Commission's draft seems to go beyond this range and brings into play notions that do not otherwise occur in the corpus of international law relevant to non-international armed conflicts.

5) The Czech Republic has doubts about the principles addressed to "other relevant actors" (according to the draft, these include, *i. a.*, "international donors, and international non-governmental organizations"). These actors lack the capacity to assume obligations under international law. It is also not clear how these actors should follow suggested recommendation in practice, including their cooperation with the representatives of States and international organizations.

6) There are no definitions of the basic terms including, most importantly, the natural environment. This is the core notion and the absence of its definition may significantly limit the effectiveness (and use) of the draft. Another problem is the notion of "areas of major cultural importance" in principles 4 and 17. It seems to be conceived too broadly, and therefore likely to become a source of ambiguities, namely with regard to the fact that international humanitarian law already contains detailed rules for the protection of cultural property during armed conflicts.

Specific comments

Principle 4 [I-(x), 5] - Designation of protected zones

The Czech Republic considers this principle questionable for two reasons. The commentary does not rule out agreements with non-State actors; however, the principle itself contains no reference to such actors. Further, the principle says nothing about the status of the zones and the rules governing them during armed conflict (this is only partly addressed in principle 17). The zones are a new notion not yet defined in international humanitarian law.

Principle 5 [6] - Protection of the environment of indigenous peoples

The recommendation in this principle could be addressed, as a contribution to the progressive development of international law, also to non-State actors which exercise control over territory inhabited by indigenous peoples.

Further, the draft principle addresses protection of the environment of indigenous peoples as a category of particularly vulnerable people. The question is, whether indigenous people are the only category of particularly vulnerable people, which have special relationship with their environment.

In terms of practical application, it is to be noted that the principle is placed in the part concerning the pre-conflict stage although its second paragraph deals with post-conflict situations.

Principle 8 - Human displacement

The Czech Republic has doubts about the inclusion of the category of "other relevant actors". It is not clear what these actors should do to comply with this principle in practice and how their cooperation with the representatives of the given State should take place.

Principle 9 - State responsibility

The commentary might give the impression that it leads to certain modification of the rules of responsibility of States for internationally wrongful acts. The elements of responsibility consist in a breach of an international obligation of the State and the fact that the breach is attributable to the State under international law. Therefore, the two conditions mentioned in paragraph 3 of the commentary (violation of relevant substantive rules of international law and the fact that such rules are binding on the State) are rather misleading.

Further, paragraph 4 of the commentary seems to indicate that the law of armed conflict represents *lex specialis* with respect to the rules on the responsibility of States for internationally wrongful acts. However, the rules on the responsibility of States, including the rules on the attribution of conduct, are fully applicable with respect to the breaches of the law of armed conflict.

In addition, draft principle 9 deals with the rules on the responsibility of States for internationally wrongful acts; yet, the commentary refers also to the rules on the international liability for transboundary harm caused by activities not prohibited by international law. Thus, it would be useful to clarify the scope of the draft principle.

Principle 10 - Corporate due diligence

It is not clear why the principle of due diligence, one of the fundamental principles of international environmental law, is mentioned only in connection with corporations (and occupation - principle 22).

Principle 11 - Corporate liability

This is the only principle addressing the liability of non-State actors, which makes it seem somewhat disconnected from rest of the draft. Moreover, as in the case of principle 10, it is not clear why it deals exclusively with business corporations.

Part Three [Two] Principles applicable during armed conflict

Principle 12 - Martens Clause with respect to the protection of the environment in relation to armed conflict

The Martens Clause normally applies to combatants and civilians. Here the Commission seeks to expand its scope of application to include the natural environment, which seems to represent an element of progressive development of international law. This aspect should be explained in more detail in the commentary.

Principle 13 [II-1, 9] - General protection of the natural environment during armed conflict

Principle 13, in conjunction with principle 14, provides core rules for environmental protection during armed conflict. The principle is cast in very general terms. In paragraph 1 it recalls the general obligation to comply with the existing rules of international humanitarian law and other areas of international law concerning protection of the natural environment in armed conflict. Then, however, it goes on to confirm some of these existing rules on a selective basis. This raises the question of the criteria for the selection: was it the importance of these rules or the fact that they are already well established, or was it something else? Are the omitted rules (e.g. the limited choice of the methods and means of warfare causing damage to the natural environment) seen as less important? Moreover, why does principle 14 confirm that general rules of international humanitarian law are to be applied to the natural environment with a view to its protection, when the specific rules that translate these general ones into practice appear already in principle 13?

The commentary states that "draft principle 13 strikes a balance: creating guiding principles for the protection of the environment in relation to armed conflict without reformulating rules and principles already recognized by the law of armed conflict". However, this goal does not seem to be achieved. The principle appears inconsistent and sketchy, and may weaken, rather than improve, the standards of environmental protection in armed conflict. In addition, the first paragraph does not mention armed conflict at all; it would be appropriate to include such reference.

The second and third paragraphs are based on Additional Protocol I (Article 55 (1)) and on the ICRC Study on Customary International Humanitarian Law (Rule 43 (A)). In both cases, the source texts contain some additional rules that, however, are not included in the principle. This again raises the question of the selection criteria. Further, the second paragraph might be difficult to apply in practice, since the above provision of Additional Protocol I (Article 55 (1)) belongs among criticized IHL provisions with unclear scope of interpretation.

Principle 14 [II-2, 10] - Application of the law of armed conflict to the natural environment

The formulation of the draft principle seems to be too general (and, in principle, only repeats what is already included in draft principle 13). Further, in our opinion, the principle of military necessity could be omitted from this list. This principle (together with the principle of humanity - which, however, is not mentioned here) normally belongs to a higher, more general level than the rest of the principles listed here. By contrast, the list does not include the principle of limited choice of methods and means of warfare.

Principle 15 [II-3, 11] - Environmental considerations

This rule should be incorporated into principle 14, as it only elaborates on what is said in principle 14 in relation to the two general principles of international humanitarian law mentioned in this draft principle.

Principle 17 [II-5, 13] - Protected zones

The notion of protected zones does not appear in the corpus of international humanitarian law. There is a question of the status of such zones in international humanitarian law, and the relationship between them and the demilitarized zones: the IHL rules for demilitarized zones are much stricter than those proposed in this principle. According to the principle, the zone is to be protected against any attack only as long as it does not contain a military objective. On the other hand, a demilitarized zone must not be used for military purposes, which means that no part of its natural environment can become a military objective.

Principle 18 - Prohibition of pillage

In international humanitarian law, protection from pillage is, traditionally, limited to protection of property. This means that in this instance the draft seems to abandon general protection of the natural environment (primarily as a public good) to address protection of natural resources (primarily as private property). This draft principle illustrates the problems stemming from the absence of general definition of natural environment in the draft.

Principle 20 [19] - General obligations of an Occupying Power

The law of occupation contains no explicit reference to environment; international humanitarian law contains only general obligations on the basis of which the Commission builds more specific rules concerning the environment. As a result, the legal status of these new rules is unclear. This again shows that the draft promotes progressive development of international law, and this fact should be reflected in the draft as well as in the commentary.

Principle 21 [20] - Sustainable use of natural resources

This principle relates to principle 20, see commentary on principle 20.

Principle 22 [21] - Due diligence

See commentary on principle 10.

Principle 24 [18] - Sharing and granting access to information

In the opinion of the Czech Republic, the existence of a generally binding (on States) rule on the sharing of and access to information cannot be unambiguously inferred from international law. This principle should rather be rewritten into a recommendation.

As in the case of principle 23 and as an effort to promote progressive development of international law, the target group could include also non-State actors (armed groups), which may also have information relevant for the reparation of environmental damage.

Principle 26 - Relief and assistance

The shortcoming of this principle is that although it explicitly targets States, it is obviously closely related to the principles 24 and 25 that address a broader target group (*i.e.* also international organisations, parties to the conflict). In addition, the use of the term "encourage" (in comparison to the use of the term "should" in other recommendatory provisions) could be explained.

Principle 27 [16] - Remnants of war

The provision is based on the 2003 Protocol on Explosive Remnants of War (Protocol V to the 1980 CCW Convention). However, it is questionable whether Protocol's rules are of a customary nature: rules concerning remnants of war were not included in the ICRC Study on Customary International Humanitarian Law (2005). As a result, it is not clear on what basis the Commission has concluded that they are generally binding.

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