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PROTECTION OF THE ENVIRONMENT IN TIMES OF NON-INTERNATIONAL ARMED CONFLICTS – A GAP TO BE FILLED IN

I. Environmental protection in times of armed conflicts is not subject to the sectoral or particular protection categories of environmental law and to date it has not been comprehensively regulated by international law. The principles of this field have not been established, either, except for general phrases, both in the 1992 Rio Declaration, which part of the legal doctrine considers a catalogue of the principles of environmental law, and in the discussions of the doctrine which have taken place for many years regarding the legal standards of such protection.

In fact, only the international law of armed conflict, in particular, the international humanitarian law of armed conflict, contains norms which address the natural environment in times of armed conflicts. Their provisions are limited in subjective and objective terms, they are often phrased in a keyword-like manner and directly or indirectly address the needs of environmental protection in relation to military operations which have a destructive impact on the environment. If one were to attempt to build a system of norms addressing environmental protection in times of military operations and assume that a common feature of such a system should be the imperative to protect the environment one would also have to incorporate into the system the norms of those treaties that directly regulate the environment. Since the issues of environmental protection in times of armed conflicts are not, in general, addressed in political reflections of the international community which lead to legislative activities, the discussion on these issues is primarily held in the context of norms *de lege lata* and the possible proposals *de lege ferenda* in this matter.

From this point of view, the discussions on the legal regulations on the complex set of issues related to environmental protection in times of non-international armed conflicts belong to those that are the least democratic and least susceptible to the acceptance of axiological arguments which provide the basis for environmental protection. The traditional attachment of States to the principle of discretionary decision-making in all the events which take place in their territories, including the issues related to internal armed conflicts, results e.g. in the situation

where environmental protection in times of non-international armed conflicts has a rudimentary character. This is indicated, *inter alia*, by the wording of the common Article 3(2) of the 1949 Geneva Conventions on armed conflict of a non-international character which provides that the application of its provisions will not affect the legal status of the Parties to the conflict.¹

As the practice of international relations demonstrates, due to the discretionary power of the State in respect of environmental protection in relation to the functioning of the military complex both in peacetime and in times of armed conflicts, the discussion on this subject is slow, if not postponed. One of the basic issues of this discussion concerns the values which the international community would be willing to share when environmental protection is in conflict with military operations in the context of the issues related to the classic concept of state sovereignty. It is difficult to convince political decision-makers that the perspective of a possible conflict between values is, indeed, to a large extent dysfunctional, since the international community is aware that the adverse impacts of the armed forces on the environment include not only armed operations conducted during armed conflict but also the activities of the military complex in peacetime.²

Attempts to protect the environment in times of armed conflict can be compared to the already proverbial navigation between Scylla and Charybdis. This comparison seems to be particularly illustrative when considering the need to reconcile the objectives of the preservation and protection of the environment and the military objectives. This comparison is reflected in international law since the existing system of this law shows many gaps in this respect. In particular, this concerns the downright rudimentary systems of regulations on environmental protection in times of non-international conflicts. This system – or rather a set of regulations – contains norms with different objective and subjective ranges, which are dispersed in different treaty norms intended to govern armed operations and the environment. In turn, the question how the environment can be protected most effectively in times of armed conflicts, including armed conflicts with a non-international character, becomes increasingly topical, in light of the growing number of armed conflicts in the world with exactly such a character.

The practice of international relations in the last thirty years has confirmed the opinions of the international law doctrine, in particular, that of international environmental law, that the existing instruments of international law in this

¹ The Geneva Conventions of August 12, 1949 – Geneva (I) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31; Geneva (II) Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85; Geneva (III) Convention Relative to the Prisoners of War, 75 UNTS 135; Geneva Convention (IV) Relative to the Civilian Protection in Time of War, 75 UNTS 287.

² See e.g. The Military's Impact on the Environment; A Neglected Aspect of the Sustainable Development Debate, International Peace Bureau, Geneva 2002.

respect are far from satisfactory, variable, inconsistent, highly subjective, ineffective etc. This gave rise, *inter alia*, to the proposal of the Greenpeace organisation to prepare the Fifth Geneva Convention on the Protection of the Environment in the Time of Armed Conflict.³

It follows from the debate held in the doctrine that the most urgent problem to be solved is environmental protection in times of non-international armed conflicts. It is exactly during such conflicts that the environment is most vulnerable to degradation and irreversible losses, since it remains beyond any international control. It can be said that attacks on the environment in times of internal conflicts would take place irrespective of whether there are any legal norms in this matter or whether there any means of control. But it is exactly the absence of such norms that is “the grist to the mill” for those who do not care at all about environmental protection. *Inter alia*, in view of this, in quite a concerted manner the doctrine of environmental law makes its proposal to the international community for the introduction of the concept of “environmental crime” or “crime against the environment” into international law.⁴

II. In *de lege lata* terms, attempts to build a legal system for environmental protection in times of non-international armed conflicts can be based on a functional analysis of three basic elements of the existing regulations: 1) the principles of applicability of the treaty norms of international environmental law in times of non-international armed conflicts; 2) the principles of environmental protection in times of non-international armed conflicts as derived from the norms of international law; 3) the principles laid down in soft law.

Ad 1. The principles and norms of public international law, including international environmental law, provide only very general and limited guidance on the applicability of international treaties in time of not only international but also non-international armed conflicts. In the legal doctrine, one of the grounds for inapplicability of treaties in time of armed conflicts is the reference to the *rebus sic stantibus* clause (Article 62 of the Convention on the Law of Treaties of 1969⁵), which provides for inapplicability of the provision of a treaty in view of a fundamental change of circumstances (an armed conflict is a fundamental change of circumstances) and the principle that *lex specialis derogat generalis*.

However, this concept has not been sufficiently well justified in legal terms and has been criticised, *inter alia*, because the possible reference to Article 62 of the cited Convention made by the warring parties would be effective with respect to these parties, whereas in the relations with a party to the agreement

³ See G. Plant (ed.), *Environmental Protection and the Law of War: A Fifth Geneva Convention on the Protection of the Environment in the Time of Armed Conflict*, London–New York 1992, *passim*.

⁴ For more on this issue see K. Mollard-Bannelier, *La Protection de l'environnement en temps de conflit arme*, Paris 2001, p. 504 et seq.

⁵ Convention on the Law of Treaties, 8 ILM 679.

which is not a party to the conflict the reference to a change of circumstances would not affect the applicability of a given agreement between these parties; similarly, if a conflict is not international in character the provisions of treaties apply to all its parties. Moreover, in the opinion of certain representatives of the doctrine of international law, States' practice demonstrates that the provisions of certain types of treaties always apply between belligerent states.⁶ Furthermore, since this kind of treaties has been concluded primarily to be applied in peacetime, therefore, they do not distinguish between international and non-international armed conflicts.⁷ This kind of treaties includes, *inter alia*, the norms of the treaties on the protection of human rights and the norms with the nature of *ius cogens* and *erga omnes*. However, a serious doubt arises with respect to the treaties on the protection of human rights which protect the environment indirectly by correctly applying their standards to protect the environment in times of armed conflicts with a non-international character, in view of the general principle providing that the application of some of their provisions is suspended in situations of military necessity, which is certainly applicable in times of non-international armed conflicts. Self-evidently, this limits the possibilities for applying the norms of the protection of human rights to protect the environment in times of non-international armed conflicts.

As far as the norms with the character of *ius cogens* are concerned, in the doctrine of international environmental law there were attempts to establish a catalogue of norms with such a character, which were undoubtedly inspired by the ruling of the International Court of Justice in the case of Gabcikovo-Nagymaros.⁸ Among the norms with the character of *ius cogens* in the field of environmental law, the doctrine of international environmental law mentions the prohibition of "eco-slaughter", with arguments based on an analysis of legal acts and evidence of States' practice of prohibiting the infliction of deliberate serious damage to the environment in times of international armed conflicts. The acts of international law which are cited on this occasion include, in particular, the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I, Articles 35(3) and 55), 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, Article 15) and the Convention on the Prohibition of Military or any Other Hostile

⁶ For more on these types of treaties see S. Voneky, *Peacetime Environmental Law as a Basis for State Responsibility*, Environmental Consequences of War. Legal, Economic and Scientific Perspective, Cambridge University Press 2000, pp. 190–225; see also S. Voneky, *A New Shield for the Environment. Peacetime treaties as legal restraints of wartime damage*, Review of European, Comparative and International Environmental Law, 2003.

⁷ I. Lechtiemiakyte, I., *Preservation of Environment in Times of Non-International Armed Conflict. Legal Framework, Its Sufficiency and Suggestions*, available on: <https://mr.uni.eu/upload/iblock/fb3/JUR-13-20-2-11.pdf> (accessed: 12.12.2018).

⁸ ICJ Rep.1997, p. 54.

Use of Environmental Modification Techniques of 10 December 1977 (Article 1). In this context, it is also important to mention the Preamble to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980, which recalls the prohibition on the use of methods and means of warfare which cause damage to the natural environment.

As evidence of practice, the literature on international law cites the attitude of the international community to the events which took place during the war in the Persian Gulf when Germany called the Iraqi act “a new form of war crimes”, while Russia used the term “a war crime against the environment”. It is also important to emphasise that on 3 April 1991 the UN Security Council adopted its Resolution 687 confirming the responsibility of Iraq under international law, *inter alia*, for damage to the environment and the depletion of natural resources as a result of its illegal invasion and occupation of Kuwait.⁹ In this context, the position of the International Court of Justice (ICJ) expressed in its advisory opinion of 8 July 1996 on the legality of the use of nuclear weapons is also cited. In its position, the ICJ stated that States must take into account environmental issues when they assess what is necessary and proportional to achieve legitimate military goals.¹⁰ However, in light of the above considerations, it should be borne in mind that the proposed catalogue only applies to international armed conflicts, while its application to non-international conflicts seems problematic.

Certain international treaties explicitly regulate the principles of their application in times of armed conflicts. As far as international environmental law is concerned, only few treaties include provisions on their applicability in times of armed conflicts and provide e.g. for their derogation and suspension for the duration of armed conflicts. This is the case e.g. with the International Convention for the Prevention of Pollution of the Sea by Oil of 12 May 1954, which provides for the possibility of suspending the application of the Convention in whole or in part in case of armed conflicts,¹¹ or with the Convention on the Preservation of Marine Pollution by Dumping of Wastes and Other Matter of 29 December 1972, which provides that it does not apply to military activities, even in the case of peacemaking operations.¹²

It can be concluded from a review of practice and views of the doctrine that a general principle of international law is that provisions of environment-related treaties are not suspended in times of armed conflicts with an international character. However, this does not exclude the possibility that these issues may be

⁹ UN Doc. S/RES/687 (1991).

¹⁰ ICJ Rep. 1996, p. 258.

¹¹ For the text of the Convention see 327 UNTS 3.

¹² For the text of the Convention see 1046 UNTS 120.

regulated in an agreement.¹³ In contrast, it would be difficult to draw a similar conclusion with regard to armed conflicts with a non-international character. In this context, it is important to note that international agreements which apply to legal transactions under international law provide for environmental protection under any conditions and circumstances, as is the case e.g. with the Antarctic Treaty of 1 December 1959. Its Article I(1) provides that Antarctica is to be used for peaceful purposes only. *Inter alia*, it prohibits any measures of a military nature as well as the testing of any types of weapons.¹⁴ A slightly different approach – although it seems to be an effective one from the point of view of environmental protection “par ricochet” – is provided for in the Convention on the Law of Non-navigational Uses of International Watercourses of 21 May 1997, which makes reference in its Article 29 to the protection accorded by the norms and principles of the law applicable in international and non-international armed conflicts.¹⁵

Ad 2. Universal international law – in particular, its branch which is the international humanitarian law of armed conflict – imposes restrictions on the method and means of warfare for environmental reasons, too. Initially, these norms were developed primarily for the purpose of humanitarian protection and, therefore, the environmental dimension had a distinctly secondary character when their contents and protection standards were decided. In this context, in relation to environmental protection, the doctrine of international law usually recalls the so-called Martens Clause contained in the preamble to the International Convention with Respect to the Laws and Customs of War on Land (Hague II)¹⁶ of 29 July 1899 and the Convention respecting the Laws and Customs of War on Land (Hague IV) of 18 October 1907.¹⁷ From the perspective of the contemporary approach to the norms of international environmental law, in particular from the perspective of the anthropocentric approach to the environment, the Martens Clause could effectively cover environmental protection, too, thus justifying the expansion of the scope of the norms of humanitarian law to include the protection of the environment by recognising the environment as a civilian target in armed conflict.

The doctrine of the international humanitarian law of armed conflict holds the position that the proportionality principle should apply to restrain the method and means of warfare. From the point of view of the protection of the environment,

¹³ For more on this issue see M. M. Kenig-Witkowska, *Międzynarodowe prawo środowiska. Wybrane zagadnienia systemowe (International Environmental Law. Selected Systemic Issues – in Polish)*, Chapter X – *Military activities and protection of the environment*, Warsaw 2011.

¹⁴ For the text of the Convention see 402 UNTS 71.

¹⁵ For the text of the Convention see 36 ILM 700.

¹⁶ The text of the Convention is on: <https://ihl-databases.icrc.org/ihl/INTRO/150?OpenDocument> (accessed: 12.12.2018).

¹⁷ The text of the Convention is available on: <https://ihl-databases.icrc.org/ihl/INTRO/195?OpenDocument> (accessed: 12.12.2018).

these norms contribute only to quite a limited extent to its protection, particularly in times of non-international armed conflicts. In this category of international norms, those considered to ensure the most effective protection of the environment include the provisions of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I, Articles 35(3) and 55) 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, Article 15).¹⁸ From the point of view of the practice of application of Protocol I, it should be borne in mind that its provisions only apply in the case of international armed conflicts. As regards armed conflicts of a non-international character, Protocol Additional II which regulates these issues does not include provisions which would explicitly address the environment as such. In fact, Article 14 of this Protocol applies to elements which could be regarded as some elements of the environment as it provides that it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas, crops, livestock, drinking water installations and supplies and irrigation works. Similarly, Article provides 15 that it is prohibited to attack works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations. With their contents the provisions of Articles 14 and 15 of Protocol II resemble the scope of the provisions cited above as laid down in Articles 52, 54 and 56 of Protocol I which apply to international armed conflicts. However, it should be borne in mind that in the circumstances of armed conflicts with a non-international character the environmental regulations in effect in the territory of the State in which hostilities take place should apply unless they are repealed or suspended e.g. by enacting the regulations of state of emergency. As demonstrated by examples of armed conflicts in the Balkans or in Syria in recent years, the practice is quite far from the law.

In this context, it is important to recall that in 1992 the United Nations General Assembly adopted a resolution stating that destruction of the environment not justified by military necessity and carried out wantonly was clearly contrary to international law.¹⁹ The UN General Assembly called on the States to take all measures to ensure that the operations comply with the existing international law applicable to the protection of the environment in times of armed conflicts. The content of the resolution directly refers to Principle 24 of the Rio Declaration which, in the opinion of the doctrine of environmental law, is a norm of customary law.²⁰

¹⁸ For the text of Protocol I see 16 ILM. 1391; for the text of Protocol II see 1125 UNTS 609.

¹⁹ See UNGA Res. 47/591 of 1992.

²⁰ For the text of the Rio Declaration see the 1992 Rio Declaration on Environment and Development of 13 June 1992, 11 ILM 881.

From the point of view of the protection of the environment, Protocol II does not meet the expectations related to its protection in times of internal armed conflicts, also in light of the so-called common Article 3 of the four Geneva Conventions of 12 August 1949 concerning conflicts with a non-international character. Indeed, Article 1 of Protocol II raises the threshold of the grounds for its application, treating these grounds cumulatively (the grounds apply to conflicts which take place in the territory of a Party to the Protocol between its armed forces and dissident armed forces or other organized armed groups which remain under responsible command and exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement Protocol II). Therefore, it seems that it would be difficult to find situations of armed conflict which would meet all these grounds at the same time.

It follows from a review of international law that certain international treaties prohibiting the use of certain types of conventional weapons may also apply to environmental protection in times of armed conflicts. E.g. in its Preamble the Convention on Prohibitions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980 recalls that it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.²¹ In its Article 2, Protocol III to this Convention provides that it is prohibited to attack forests or other vegetation with incendiary weapons with the exception of the circumstances described in paragraph 4 of that Article.²² In principle, the provisions of the Convention and the three Protocols adopted thereto apply to international armed conflicts but as a result of the adoption of an amendment to Article I(2) the scope of application of the Convention and the Protocols thereto was expanded to include non-international armed conflicts.²³

International law also includes norms which, albeit implicitly rather than explicitly, apply to the matters relating to the state of the environment and the military complex. Thus, in the system of international law it is prohibited to develop, produce and stockpile bacteriological (biological), toxic and chemical weapons and their destruction is required. These issues are regulated by the UN Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction of 10 April 1972²⁴ (the so-called Biological Convention) and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons

²¹ For the text of the Convention see 1342 UNTS 163.

²² For the text of the Convention see 1342 UNTS 171.

²³ The text of the amendment is available on the website: http://disarmament.un.org/treaties/t/ccwc_al/text (accessed: 12.12.2018).

²⁴ For the text of the Convention see 1015 UNTS 163.

of 13 January September 1993 (the so-called Chemical Convention).²⁵ The implementation of the provisions of both Conventions involves the need to solve many environmental problems. The provisions of the Conventions lay down specific obligations related to the environmental impacts of the processes used to destroy these weapons which they cover. The provisions of the Conventions provide for the need to take all necessary safety precautions to protect the population and the environment (Article II of the Biological Convention). In other words, States are obliged to take measures to ensure the safety of people and to protect the environment (Article VII of the Chemical Convention). Most importantly from the point of view of the protection of the environment in times of internal conflicts, both Conventions use the phrase “never under any circumstances”, thus enabling them to be included in a possible catalogue of international treaties which protect the environment in times of non-international armed conflicts.²⁶ Moreover, it can be concluded from the content of Article II(9) of the Chemical Convention that its provisions apply in peacetime, in times of international conflicts and in times of internal conflicts. In addition to human safety, in its Articles IV(10), V(11) and VI(3) the Convention also mentions environmental protection.

A special legal regime is envisioned in times of armed conflicts to protect cultural property²⁷ and to protect cultural and natural heritage. This is done e.g. by the Convention for the Protection of the World Cultural and Natural Heritage of 16 November 1972.²⁸ Although the Convention does not cover armed activities it can potentially apply to the operations of the military both in peacetime and in times of armed conflicts, since its provisions concern, *inter alia*, the stopping of direct attacks on the sites which have been recognised to represent human heritage and have been inscribed onto its list.

The first treaty the norms of which constructed special principles concerning environmental protection in times of armed conflicts was the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 18 May 1977 (hereinafter referred to as the ENMOD Convention).²⁹ The provision of Article I of the Convention prohibits military or any other hostile use of environmental modification techniques with widespread, long-lasting or severe effects. Thus, its content does not distinguish between the types of armed conflicts. Therefore, the provisions of the Convention apply to both international and non-international armed conflicts. Moreover, Article I refers to military or any other hostile use. Assuming that the provisions of the ENMOD Convention apply to environmental protection in times of non-international armed conflicts,

²⁵ For the text of the Convention see 1974 UNTS 317.

²⁶ For the text of the Convention see above.

²⁷ See the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, 249 UNTS 215.

²⁸ For the text of the Convention see 11 ILM 1358.

²⁹ For the text of the Convention see 1108 UNTS 151.

it should be noted that whereas all the conditions under Article 55(1) of Protocol I must be met at the same time (the protection of the natural environment against widespread, long-term and severe damage) the ENMOD Convention uses the construction of conjunction (or), which means that only one of the conditions must be met to enable the application of the provisions of the Convention.

It should be noted, however, that as regards the aspect of the application of the provisions of the ENMOD Convention its provisions were not created to protect the environment. This is evidenced by an exegesis of the content of Article I which obliges the State Parties not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party to the Convention. The Convention defines the term “environmental modification techniques” as any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space (Article II). No definitions have been provided of the terms “widespread”, “long-lasting” and “severe”. These terms were clarified in the proceedings of the Conference of the UN Committee on Disarmament which prepared the Convention. Thus, “widespread effects” means those encompassing an area of several hundred square kilometres; “long-lasting effects” means those lasting for a period of months, or approximately a season; while “severe effects” means those involving serious or significant disruption or harm to human life, natural or economic resources or other assets. Thus, these clarifications do not entail a comprehensive understanding of the concept of the environment and the need for its continuous protection.³⁰

It does not follow from an analysis of the provisions of the ENMOD Convention that they were intended to completely prohibit the use of environmental modification techniques. Indeed, the provisions of the Convention allow its Parties to use environmental modification techniques for peaceful purposes and apply without prejudice to the generally recognised principles and applicable norms of international law concerning such use (Article III).

Ad 3. The modest soft law on military activities and the environment includes primarily the 1992 Rio Declaration on Environment and Development, which makes a general reference to armed conflicts in its Principle 24 without distinguishing between international and non-international conflicts. This Principle provides that warfare has an inherently destructive impact on sustainable development and that states should, therefore, respect international law ensuring the protection of the environment in times of armed conflict and co-operate on the development of the international law. It should be noted that the provision of Principle 24 is not unambiguous since a literal analysis of the provision does

³⁰ See: GAOR Supp. No. 27 (A/31/27), Annex I.

not exactly indicate whether this principle calls on States to respect the norms of international law ensuring the protection of the environment in times of armed conflicts or whether it calls on States to respect international law by protecting the environment in times of armed conflicts. It is important to note that part of the doctrine considers Principle 24 of the Rio Declaration to be a customary norm; anyway, just as the other principles laid down in the Declaration, since they were adopted by consensus by more than 190 heads of state and heads of governments who participated in the Rio Summit.

The content of Resolution 47/37 (1992) of the UN General Assembly can be interpreted in a similar vein. It stated that destruction of the environment not justified by military necessity was contrary to international law.³¹ In this context, too, the advisory opinion of the International Court of Justice of 1996 on the on the legality of the use of nuclear weapons should be recalled. In the opinion, addressing both the international custom and treaty norms, the ICJ expressed its position that States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.³²

Although it does not provide the basis for legally binding obligations but may play a role by providing explanatory and interpretative guidance with respect to legally binding norms, the relatively modest soft law on the protection of the environment in times of armed conflicts also includes the Study on Customary International Humanitarian Law by the International Committee of the Red Cross. The Study has not a form typical of soft law, which is usually that of a recommendation, declaration, guidance etc. As a deep analysis of the norms of the international law of armed conflict, performed from the perspective appropriate for an assessment of customary norms, the Study is a document which has brought some explanation also into the issue of non-international armed conflict.³³ Thus e.g. the major principles of the international humanitarian law of armed conflict as laid down in the Geneva Conventions to which Principles 7–14 of the Study refer apply to both international and non-international conflicts. Therefore, too, even if the norms of the customary law of armed conflict do not apply directly to armed conflicts with a non-international character, environmental protection falls within the category of protection under the principles of international humanitarian law, such as distinction, unnecessary suffering, proportionality, military necessity.³⁴ However, it should be stressed that in terms of the legally binding status, the Study on Customary International Law by Committee of the Red Cross does not impose any obligations based on customary law.

³¹ UNGA A/RES/47/37 of 25 Nov. 1992.

³² ICJ Rep. 1996, 266, paras. 30–32.

³³ The text is available on: <https://www.icrc.org/en/document/customary-international-humar>.

³⁴ I. Lechimiakyte, *Preservation of Environment...*

III. SOME REMARKS ON *DE LEGE LATA* AND *DE LEGE FERENDA*

More than twenty years ago, commenting on the results of an international conference on the protection of the environment in times of armed conflicts and pointing out that instruments protecting the environment during non-international armed conflicts were considerably weaker than those applicable to international wars, Judge Theodor Meron said that effective protection of the environment must be continuous and ongoing. He also said that it could be contingent upon whether there was a state of peace, international war or non-international armed conflict.³⁵ The main thesis of Judge Meron's statement regarding the need for the protection of the environment to be continuous and ongoing is affirmed by the principles of environmental law. In turn, Judge Meron's other thesis still remains on the margin of the considerations of the international community and this community must respond as fast as possible in light of the growing number of armed conflicts with a non-international character in the world.

On the basis of a review of legal acts addressing the issues of environmental protection in times of non-international conflicts, the following conclusions *de lege lata* can be drawn as part of an attempt to answer the question whether international law ensures sufficient environmental protection in such circumstances:

1) in international law, there is a gap relating to the protection of the environment in times of non-international armed conflicts; the existing legal regulations which could be applied in these matters have rudimentary character; the environment is not the subject of these regulations, while essentially environmental protection is not the object of these regulations, either;

2) the available instruments of environmental protection during non-international armed conflicts are dispersed in different treaties, conventions and protocols; they are characterised by inconsistency and there is no doubt that this causes the low level of the protection standards which ensue from them;

3) treaties on environmental law largely do not regulate their application in times of armed conflicts and perhaps relevant clauses should be added to such treaties regarding their application in times of armed conflicts;

4) Principle 24 of the Rio Declaration, which part of the doctrine regards as the expression of a customary norm for environmental protection in times of armed conflicts, does not express unambiguously the principle of environmental protection in times of both international and non-international conflicts; as a principle expressed in an act of soft law it does not impose any obligations under international law;

³⁵ T. Meron, *Comment: Protection of the Environment During Non-international Armed Conflicts*, (in:) R. J. Grunawald, J. E. King, R. S. Mclain (eds.), *Protection of the Environment During Armed Conflict*, "International Law Studies" 1996, Vol. 69, p. 253.

5) environmental protection in armed conflicts in general and especially in non-international conflicts is based on the principles of the customary humanitarian law of armed conflict; certain acts of the humanitarian law of armed conflict, such as e.g. Protocol II to the Geneva Conventions, set too high thresholds for their application;

6) the status of the few principles applicable to the environment in times of non-international armed conflicts, laid down in the norms of the humanitarian law of armed conflict, hardly reaches the minimum level of international acceptance and recognition as a law in terms appropriate for customary norms.

Conclusions *de lege ferenda* are related to the postulates resulting from conclusions *de lege lata* and could, in effect, concern all the provisions addressing the environment in the legal acts analysed above. Academic publications are full of useful strategies for more effective protection of the environment in times of non-international armed conflicts. Now is the time to come up with a proposal to transform the principle expressed in Principle 24 of the Rio Declaration into a legally binding principle of general international law rather than only international environmental law. Appropriate actions should also follow-up on a review of the law of armed conflict from this point of view, given the clear and fast changes taking place in the attitude of the international community to the protection of the environment as a common good and a common concern of the international community.

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PROTECTION OF THE ENVIRONMENT IN TIMES OF NON-INTERNATIONAL ARMED CONFLICTS – A GAP TO BE FILLED IN

Summary

Environmental protection in times of non-international armed conflicts is not subject to the sectoral or particular protection categories of environmental law and to date it has not been comprehensively regulated by international law. Except for generalities, it was also ignored in the 1992 Rio Declaration Principle 24 of which is not unambiguous in its expression. In fact, only the international humanitarian law of armed conflict contains

norms which address the natural environment in times of armed conflicts. On the basis of a review of legal acts addressing the issues of environmental protection in times of non-international conflicts, negative conclusions *de lege lata* can be drawn as part of an attempt to answer the question whether international law ensures sufficient environmental protection in such circumstances. In the Author's opinion, in international law there is a gap relating to the protection of the environment in times of non-international armed conflicts; the existing legal regulations which could be applied in these matters have a rudimentary characters.

KEYWORDS

non-international armed conflicts, international armed conflicts, environmental protection, international environmental law, international humanitarian law, customary law, soft law

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konflikt zbrojny o charakterze niemiędzynarodowym, międzynarodowe konflikty zbrojne, ochrona środowiska, międzynarodowe prawo środowiska, międzynarodowe prawo humanitarne, prawo zwyczajowe, miękkie prawo