Volume 21, Issue 2
December 2023

ISSN 1731-8297, e-ISSN 6969-9696
http://czasopisma.uni.opole.pl/index.php/osap

ORIGINAL ARTICLE
received 2023-03-11
accepted 2023-09-30

The Environmental Impact Assessment and military conflicts – an outline of the problem area

Ocena oddziaływania na środowisko a konflikty zbrojne – zarys problematyki

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Citation: Sergiusz, Urban. 2023. The Environmental Impact Assessment and military conflicts – an outline of the problem area. *Opolskie Studia Administracyjno-Prawne* 21(2): 211–222. DOI: 10.25167/osap.5070.

Abstract: The Environmental Impact Assessment (EIA) is a legal, procedural tool that allows identifying, predicting, evaluating and preventing or mitigating the impacts of a planned project on the environment. An inherent element of this process is public participation that shall be assured at all times. An EIA is regulated by domestic environmental laws of a given country, but an imminent influence on these regulations is exerted by EU EIA Directive (Directive 2011/92/EU text codified) and international conventions, especially the ESPOO Convention. EU legislation and international EIA-focused treaties do not determine whether armed conflicts affect the EIA procedures and, if the answer is positive, in what way, especially whether the EIA procedure remains required under these exceptional circumstances or it may be postponed until cessation of the conflict or even omitted.

For this reason, it was of high importance to determine whether the EIA-related obligations set by EU and international statute (conventional) laws are suspended or remain valid and in force during armed conflicts. The research revealed that the above-mentioned acts do not have provisions that explicitly regulate the effect of armed conflicts on the obligations relating to the EIA procedures. Furthermore, current jurisprudence and doctrine do not provide a clear answer as regards the scope of application of international environmental law during an armed conflict. It is often explained by the fact that environmental law is not yet fully formed in that respect and it is still not commonly agreed how it relates to international humanitarian law. Based on findings of the research, some conclusions are

proposed that aim to provide advice on the application of EIA during armed conflicts and suggestions to complement relevant legal regulations. This article will discuss the main results of the study conducted on this important and very up-to-date subject.

Keywords: EIA, armed conflicts, environment

Abstrakt: Ocena oddziaływania na środowisko (OOŚ) jest prawnym proceduralnym narzędziem, które pozwala zidentyfikować, przewidzieć, ocenić i zapobiec lub złagodzić wpływ planowanego przedsięwzięcia na środowisko. Nieodłącznym elementem tego procesu jest udział społeczeństwa, który zawsze powinien być zagwarantowany. OOŚ jest regulowana przez wewnętrzne prawo ochrony środowiska poszczególnych państw członkowskich Unii Europejskiej, ale niebagatelny wpływ na te regulacje wywiera unijna dyrektywa OOŚ (dyrektywa 2011/92/UE tekst ujednolicony) oraz konwencje międzynarodowe, zwłaszcza Konwencja ESPOO. Przepisy unijne oraz traktaty międzynarodowe regulujące kluczowe aspekty OOŚ nie precyzują, czy konflikty zbrojne wpływają na procedury OOŚ, a jeśli tak – to w jaki sposób, w szczególności czy w takich wyjątkowych okolicznościach procedura OOŚ jest nadal wymagana czy też może zostać odroczona do czasu ustania konfliktu lub nawet pominięta. Z tego powodu bardzo ważne było ustalenie, czy obowiązki związane z OOŚ określone w prawie unijnym i międzynarodowym ulegają zawieszeniu, czy też należy je realizować również podczas konfliktów zbrojnych. Przeprowadzone badania wykazały, że w ww. aktach prawnych nie ma przepisów, które wprost regulowałyby wpływ konfliktów zbrojnych na obowiązki związane z procedurami OOŚ. Ponadto, aktualne orzecznictwo i doktryna nie dają jednoznacznej odpowiedzi na temat zakresu stosowania międzynarodowego prawa ochrony środowiska podczas konfliktu zbrojnego. Często tłumaczy się to tym, że prawo ochrony środowiska nie jest jeszcze w pełni ukształtowane w tym zakresie i że brak jest jednolitego, powszechnie podzielanego poglądu na temat tego, w jaki sposób odnosi się ono do międzynarodowego prawa humanitarnego.

Na podstawie wyników badań zaproponowano wnioski, które odnoszą się do zagadnienia stosowania OOŚ podczas konfliktów zbrojnych oraz sugestię uzupełnienia omawianych regulacji prawnych. W niniejszym artykule omówione zostaną najważniejsze wyniki badań przeprowadzonych na ten ważny i bardzo aktualny temat.

Słowa kluczowe: OOŚ, konflikty zbrojne, ochrona środowiska

1. Introduction

This article is intended to explore the unobvious and sometimes confusing relation between the international law regulating Environmental Impact Assessment and the time of armed conflicts between belligerent states. As it is provided by Principle 24 of the 1992 Rio Declaration: "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflicts and cooperate in its further development, as necessary" (Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992). Annex I. Rio Declaration on Environment and Development). Un-

fortunately, the exact scope of this obligation is still debated and opposed views are expressed in this regard, as it will be demonstrated later in the deliberations below. The present paper is focused mainly on European perspective hence the choice of legal texts analyzed.

2. Definition of an armed conflict

In the first instance, it shall be explained what the meaning of the term an *armed conflict* is as used in this article. While this notion has several definitions, probably the most imminent one originates from the Geneva Conventions, the bodies of international law forming "the core of the international humanitarian law, which regulates the conduct of an armed conflict and seeks to limit its effects" (The Geneva Conventions and their Commentaries 2023): "declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" (Article 2 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, concluded in Geneva, 12 August 1949).

A similar definition is proposed by the International Law Commission, a legal studies body of the United Nations that was established in order to "initiate studies and make recommendations for the purpose of (…) encouraging the progressive development of international law and its codification" (Article 13 paragraph 1 (a) of *The Charter of the United Nations*, signed in San Francisco on 26 June 1945). In the document exploring the issue of the effects of armed conflicts on treaties (Draft articles on the effect of armed conflict on treaties, 2011: 110-111), the armed conflicts are defined as: "a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups" (Article 2 (b)).

It can be noted that, in general, the definitions refer to the actions of armed forces, often with states as actors (in such a case it is often called an "inter-state armed conflict", see: How is the Term "Armed Conflict" Defined in International Humanitarian Law?, International Committee of the Red Cross (ICRC) Opinion Paper 2008), as opposed to "non-State armed conflict" or "non-international armed conflict" (The Practical Guide to Humanitarian Law 2023), using armed force as a tool to resolve their conflict.

3. Importance and topicality of the analysis undertaken

The issue of the effects of armed conflicts on international environmental treaties and European Union law, regulating the Environmental Impact Assess-

ment and Strategic Environmental Assessment, certainly has a high scientific value, but it is also very vital and is relevant to practice. There are a multitude of examples of actions taken in relation to armed conflicts/war that adversely influence the environment and which undoubtedly do not comply with the international environmental laws (also abbreviated to IELs) or are in breach of them. The very recent case of real impact of armed conflict on (the willingness to implement) environmental regulation, originating in the international laws and European Union laws, comes from Ukraine, which – at the beginning of 2022 – declared suspension of certain legal provisions relating to the Environmental Impact Assessment, notably disabling or at least hindering the access to information and public participation in the EIA procedures: "During the war, public access to the Unified Register of EIA was closed for security reasons. In accordance with the requirements of the Law, all stages of the procedure are covered by informing the public both through the register and through the print media. Without access to the register, the element of publicity was not observed" (Gembarska, 2022).

This approach was justified by the state of the armed conflict which was initiated with the invasion of Russia on Ukraine on 24 February 2022. In consequence, Ukraine declared the necessity to protect certain information as classified for security reasons. Consequently, it was heavily criticized by non-governmental organizations: "In Ukraine, environmentalists criticized the initiative of the Ministry of Statistics to draft of Cabinet resolution on closing access to environmental information during martial law" (Belousowa, 2022). Nevertheless, it provides a clear example of challenges discussed in this article.

4. Does the international armed conflict suspend the European Union's Directives on EIA & SEA as well the international treaties such as the Espoo & Aarhus Conventions?

A thorough analysis of legal texts and commentaries thereto reveals that there is no unequivocal and coherent answer to the question whether the (1) European Union's Directives on Environmental Impact Assessment (Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, further referred to also as EIA Directive) and (2) on the Strategic Environmental Assessment (Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programs on the environment, further referred to also as SEA Directive) as well as the international treaties applicable to these

procedures: (3) the Espoo Convention (Convention on Environmental Impact Assessment in a Transboundary Context, adopted on 25 February 1991 in Espoo, Finland) and Aarhus Convention (Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted on 25th June 1998 in Aarhus, Denmark), remain applicable during armed conflicts or shall be deemed suspended or non-binding.

This lack of certainty is highlighted in many legal documents and commentaries. As it was rightfully indicated in the document prepared by the International Law Commission, "There is no general agreement on the proposition that all environmental treaties apply both in peace and in time of armed conflicts" (Draft articles on the effect of an armed conflict on treaties, 2011: 127). While these observations come from a document that is not legally binding, it remains, however, an authoritative view on the effects of armed conflicts on international environmental treaties.

Below are some representative examples of these concerns and divergent voices:

- "Some MEAs directly or indirectly provide for their continued application during hostilities, while others specifically state that they are automatically suspended, terminated, or inapplicable during an armed conflict. Other MEAs remain silent on the issue. Most MEAs fall into this category, including the Aarhus Convention. The effect of their silence, and whether it varies by type of convention, is uncertain" (Bothe, Bruch, Diamond and Jensen, 2010: 569-592);
- "The precise meaning of Principle 24 is not clear. It may be interpreted as referring to the continued application of IEL during warfare. Alternatively, it may be interpreted as simply restating the requirement that States must adhere to the provisions of IHL that specifically address environmental protection during armed conflict" (Maruma Mrema, Bruch, Diamond, 2009: 42);
- "The law of armed conflict, where applicable, is *lex specialis*" ("but that other rules of international law, to the extent that they do not enter into conflict with it, also remain applicable") (Report of the International Law Commission, 2022: 97);
- "In most cases, whether the provisions apply depends largely on the methodology adopted to determine when IEL [International Environmental Law] remains in force during armed conflict" (Maruma Mrema, Bruch and Diamond, 2009: 35).

There are also some views expressed on the doctrine of international law and the commentaries to the international environmental law, indeed, that articulate the need to apply IELs during the times of armed conflicts. However, the actual extent of this protection, the detailed circumstances of related application and

the binding force of the international treaties serving the purpose of its protection, remain highly unclear and a subject to ongoing disputes:

- "States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development" (Principle 24 of the 1992 Rio Declaration);
- "International environmental agreements (…) may continue to be applicable in times of armed conflict to the extent that they are not inconsistent with the applicable law of armed conflict" (Gasser, 1994: 233).

A very accurate summary of the current state of this debate is provided for in a position paper of United Nations Environmental Program where it is stated that: "The question of the potential application of IEL during armed conflict is complicated by the fact that environmental law is still maturing at both the domestic and international levels, and States are still in the process of determining how it relates to IH" (Maruma Mrema, Bruch and Diamond, 2009: 34).

The above-mentioned opinions could be rightfully applied to the Espoo Convention and the Aarhus Convention, since neither of them provides for the rules on their application during times of armed conflicts. Hence, their status at the time of war remains a question of interpretation rather than simple derivation from explicit wording. It is worth noting, though, that the Implementation Committee of the Espoo Convention was debating over the implementation of respective obligations under this act in relation to the Parties remaining in conflict. The Parties involved were Azerbaijan and Armenia debating over the construction of a nuclear power station in Metsamor, Armenia. The submission brought by Azerbaijan to the Committee in 2011 was contesting irregularities of the transboundary EIA for this project. The Republic of Armenia was obliged to respect the duties stemming from the Convention, irrespective of its on-going conflict with Azerbaijan (Comments of the Republic of Armenia related to Draft Findings and Recommendations of Implementation Committee of the Convention on Environmental Impact Assessment in a Transboundary Context, 2012: 15; Decision VI/2 2014: 6-8; Covino-Kerpelman, 2012: 175-176). Eventually, the case was closed due to the abandonment of planned construction of this nuclear power plant by Armenia, which led the Committee to the conclusion that there was no longer a ground to continue infringement proceedings.

A reference to the use of nuclear power was also made by the International Court of Justice, which issued its advisory opinion on the legality of the threat or use of nuclear weapons. Considering the question whether it is under any circumstances permitted under international law, it found that the answer shall be based prevalently on the laws relating to the use of force and

those regulating armed conflicts. Taking as a starting point their principles, especially the principle of proportionality and Martens Clause, it came to the conclusion that such use (or a threat thereof) might be possible but only under extremely restrictive conditions – the opinion was, however, unequivocal: "There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons." Furthermore, "In view of the current state of international law (…) cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake" (Legality of the threat or use of nuclear weapons, 1996: 44).

Referring to the recent document adopted by the International Law Commission, it could be observed that while "environmental factors are to be taken into account in the context of the implementation of the principles and rules of the law applicable in an armed conflict" and that there is the "need to enhance the protection of the environment in relation to both international and non-international armed conflicts", the topical question was not answered therein (Draft principles on protection of the environment in relation to armed conflicts, 2022). While "States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflicts" (Principle 3(1)), it provides that "the environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflicts" (Principle 13(1)). There are two general remarks that could be formulated on the basis of these provisions: first, the International Law Commission refrains from providing a clear explanation which international laws are applicable in armed conflicts and under which conditions, leaving this issue somehow open to further debate and second, that the environment shall be protected in such circumstances "in particular" by the law of armed conflicts. This explicitly suggests that the role of environmental regulations is at the most complementary here. Overall, it seems quite evident that the Draft principles refer this role prevalently to the law of armed conflicts – hence the focus on the latter and reference to the use of environmental regulations "when applicable" only, without explaining the circumstances of this applicability.

At this point it is worthwhile considering also the European Union environmental laws. While there is a clear distinction between IELs and EU legal sources and by no means should they be perceived as homogeneous sources of law (please note that the concept of EU autonomy is widely discussed and approved, referred to as "an autonomous legal order" or "a disguised claim to

sovereignty" (van Rossem, 2013: 13, 22-27, 41), it is insightful to verify how this issue is regulated in the EU provisions regulating the analysis of impact of projects and plans or programs on the environment and compare them to the IELs in this respect. Is it more unequivocal when it comes to determining its application at the times of armed conflict or is it similarly vague?

While it is true that the European Union's SEA and EIA directives refer to the premises of national security and defense, they evoke it in the context of separate, concrete projects or plans under consideration only. Consequently, any derogations from some or all obligations defined by EIA Directive and SEA Directive are not formulated as a general suspension of the Directives as such, but merely as a concession made in favor of a project or plan, hence the Directives in general still remain applicable.

In the case of the EIA Directive, it is regulated by its Article 1.3: "Member States may decide, on a case-by-case basis and if so provided under national law, not to apply this Directive to projects, or parts of projects, having defense as their sole purpose, or to projects having the response to civil emergencies as their sole purpose, if they deem that such application would have an adverse effect on those purposes."

As it was articulated in the explanatory note issued by the European Commission, "In the Bolzano case C-435/97 the Court made the following statement on Article 1(4) (national defense) of Directive 85/337/EC: "Such exclusion introduces an exception to the general rule laid down by the Directive that environmental effects are to be assessed in advance and it must accordingly be interpreted restrictively", therefore "The Member State applying this exclusion must demonstrate that applying the Environmental Impact Assessment Directive would be counter-productive in terms of achieving the purpose in question" (Guidance document regarding application of exemptions under the Environmental Impact Assessment Directive, 2019: 13).

In the case of the SEA Directive, it is regulated by its Article 3.8: "The following plans and programs are not subject to this Directive: plans and programs the sole purpose of which is to serve national defense or civil emergency (…)."

Similarly, the guidance provided by the European Commission underlines the case-specific nature of the derogation mentioned in this provision: "The exemption of plans and programs 'the sole purpose of which' is to serve national defense (…) This means that, for example, a regional land use plan which made provision for a national defense project in some part of the area it covered would require environmental assessment (provided the other criteria in the Directive were met) because to serve national defense was not its sole purpose. In applying this exemption, it is the purpose of the plan or program which must be considered, not its effects" (Implementation of the Directive

2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment, 2004: 19).

It stems from the close scrutiny of the wording of the legal text cited above that the mere reference to the projects serving the purpose of "national defense" or "civil emergencies" does not necessarily imply their application in times of armed conflicts. To the contrary, projects of this nature are often developed with reference to these derogations nowadays, when no war is taking place in the Member States of the European Union, hence the conclusion that these derogations share the same purpose and circumstances of use as the rest of the provisions of EIA and SEA directives. Furthermore, the exceptions under EIA and SEA directives were designed in a similar way, without any reference to exceptional situations that would literally imply their use (or lack thereof) during armed conflicts, therefore related interpretation doubts cannot be easily solved.

5. Conclusions

The examination of the subject of this study revealed that the International Environmental Laws and the directives of the European Union Directives referring to the assessment of the environmental impact of projects and plans are generally designed for peace conditions and do not contain provisions that would regulate their application during the time of war (time of armed conflicts). For this reason, and bearing in mind that the general debate on the effectiveness of the International Environmental Laws during the time of armed conflicts remains unsolved, there is no clear and unquestionable answer to the application of international treaties and EU directives on the Impact Assessment during armed conflicts.

Consequently, in order to remove ambiguities and contradictory interpretations mentioned in this article, the International Environmental Laws and respective European Union Directives should be supplemented with provisions that would clearly regulate this issue. As an alternative, it could be proposed to adopt a general and overarching provision of law which would relate to all International Environmental Laws and, possibly, also European Union directives. Such a legislative intervention could make part of a new international treaty. Similar suggestions were formulated by the International Committee of the Red Cross: "The International Law Commission (ILC) should examine the **existing international law for protecting the environment during armed conflict** and recommend how it **can be** clarified, **codified and expanded**" (Maruma Mrema, Bruch and Diamond, 2009: 52-54).

Abbreviations

Aarhus Convention – the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

CJEU – Court of Justice of the European Union

EIA – Environmental Impact Assessment

EIA Directive – Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment

Espoo Convention – the Convention on Environmental Impact Assessment in a Transboundary Context

EU – the European Union

IEL(s) – the International Environmental Law(s)

IHL – the International Humanitarian Law

SEA Directive – Strategic Environmental Assessment Directive – Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programs on the environment

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