

Articles 35 and 55 of Protocol I

A. Article 35 of Protocol I

N.B. As per the disclaimer ^[1], neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. Similarly, in some of the texts used in the case studies, the facts may not always be proven; nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source:** Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); available on <http://www.icrc.org/ihl> ^[2]]

**Part III: Methods and means of warfare,
Combatant and prisoner-of-war status**

Section I: Methods and means of warfare

Article 35: Basic rules

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited. [...]
3. 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.

B. Article 55 of Protocol I

[Source: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); available on <http://www.icrc.org/ihl> ^[2]]

Part IV: Civilian population

Section I: General protection against effects of hostilities

[...]

Chapter III: Civilian objects

[...]

Article 55: Protection of the natural environment

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited.

Article I of 1977 United Nations Convention

C. Article I of 1977 United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)

[Source: Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, Adopted by Resolution 31/72 of the United Nations General Assembly, December 10, 1976; available on <http://www.un-documents.net/enmod.htm> ^[31]]

Article I

1. Each Party to this Convention undertakes 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.
2. Each Party to this Convention undertakes not to assist, encourage or induce any State, group of States or international organization to engage in activities contrary to the provisions of paragraph 1 of this article.

Guidelines for Military Manuals and Instructions

D. Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict

[Source: International Committee of the Red Cross, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict,

[**N.B.:** The Guidelines were submitted by the ICRC at the 48th session of the United Nations General Assembly on the Protection of the Environment in Times of Armed Conflict. The General Assembly did not formally approve the Guidelines, but at its 49th session, invited all States to disseminate and incorporate them into military manuals.]

ANNEX:

GUIDELINES FOR MILITARY MANUALS AND INSTRUCTIONS ON THE PROTECTION OF THE ENVIRONMENT IN TIMES OF ARMED CONFLICT

I. PRELIMINARY REMARKS

1. The present Guidelines are drawn from existing international legal obligations and from State practice concerning the protection of the environment against the effects of armed conflict. They have been compiled to promote an active interest in, and concern for, the protection of the environment within the armed forces of all States.
2. Domestic legislation and other measures taken at the national level are essential means of ensuring that international law protecting the environment in times of armed conflict is indeed put into practice.
3. To the extent that the Guidelines are the expression of international customary law or of treaty law binding a particular State, they must be included in military manuals and instructions on the laws of war. Where they reflect national policy, it is suggested that they be included in such documents.

II. GENERAL PRINCIPLES OF INTERNATIONAL LAW

4. In addition to the specific rules set out below, the general principles of international law applicable in armed conflict – such as the principle of distinction and the principle of proportionality – provide protection to the environment. In particular, only military objectives may be attacked and no methods or means of warfare which

cause excessive damage shall be employed. Precautions shall be taken in military operations as required by international law.

G.P.I Arts. 35 ^[5], 48 ^[6], 52 ^[7] and 57 ^[8]

5. International environmental agreements and relevant rules of customary law 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.

Obligations concerning the protection of the environment that are binding on States not party to an armed conflict (e.g. neighbouring States) and that relate to areas beyond the limits of national jurisdiction (e.g. the high seas) are not affected by the existence of the armed conflict to the extent that those obligations are not inconsistent with the applicable law of armed conflict.

6. Parties to a non-international armed conflict are encouraged to apply the same rules that provide protection to the environment in international armed conflict and, accordingly, States are urged to incorporate such rules in their military manuals and instructions on the laws of war in a way that does not discriminate on the basis of how the conflict is characterized.
7. In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience.

H.IV preamble ^[9], G.P.I Art. 1.2 ^[10], G.P.II preamble ^[11]

III. SPECIFIC RULES ON THE PROTECTION OF THE ENVIRONMENT

8. Destruction of the environment not justified by military necessity violates international humanitarian law. Under certain circumstances, such destruction is punishable as a grave breach of international humanitarian law.

H.IV.R Art. 23(g) ^[12], G.C.IV Arts. 53 ^[13] and 147 ^[14], G.P.I Arts. 35.3 ^[5] and 55 ^[15]

9. The general prohibition on destroying civilian objects, unless such destruction is justified by military necessity, also protects the environment.

H. IV.R Art. 23(g) ^[12], G.C.IV Art. 53 ^[13], G.P.I Art. 52 ^[7], G.P.II Art. 14 ^[16]

In particular, States should take all measures required by international law to avoid:

- a. making forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives;

CW.P.III ^[17]

- b. attacks on objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas or drinking water installations, if carried out for the purpose of denying such objects to the civilian population;

G.P.I Art. 54 ^[18], G.P.II Art. 14 ^[16]

- c. attacks on works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, even where they are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population and as long as such works or installations are entitled to special protection under Protocol I additional to the Geneva Conventions;

G.P.I Art. 56 ^[19], G.P.II Art. 15 ^[20]

- d. attacks on historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.

H.CP ^[21], G.P.I Art. 53 ^[22], G.P.II Art. 16 ^[23]

10. The indiscriminate laying of landmines is prohibited. The location of all pre-planned minefields must be recorded. Any unrecorded laying of remotely delivered non-self-neutralizing landmines is prohibited. Special rules limit the emplacement and use of naval mines.

G.P.I Arts. 51.4 ^[24] and 51.5 ^[24], CW.P.II Art. 3 ^[25], H.VII ^[26]

11. Care shall be taken in warfare to protect and preserve the natural environment. 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 and thereby prejudice the health or survival of the population.

G.P.I Arts. 35.3 ^[5] and 55 ^[15]

12. The 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 is prohibited. The term “environmental modification techniques” refers to 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.

ENMOD Arts. I ^[27] and II ^[28]

13. Attacks against the natural environment by way of reprisals are prohibited for States party to Protocol I additional to the Geneva Conventions.

G.P.I Art. 55.2 ^[15]

14. States are urged to enter into further agreements providing additional protection to the natural environment in times of armed conflict.

G.P.I Art. 56.6 ^[29]

15. Works or installations containing dangerous forces, and cultural property shall be clearly marked and identified, in accordance with applicable international rules. Parties to an armed conflict are encouraged to mark and identify also works or installations where hazardous activities are being carried out, as well as sites which are essential to human health or the environment.

e.g. G.P.I Art. 56.7 ^[29], H.CP. Art. 6 ^[30]

IV. IMPLEMENTATION AND DISSEMINATION

16. States shall respect and ensure respect for the obligations under international law applicable in armed conflict, including the rules providing protection for the environment in times of armed conflict.

G.C.IV Art. 1 ^[31], G.P.I Art. 1.1 ^[10]

17. States shall disseminate these rules, making them known as widely as possible in their respective countries, and include them in their programmes of military and civil instruction.

H.IV.R Art. 1 ^[32], G.IV Art. 144 ^[33], G.P.I Art. 83 ^[34], G.P.II Art. 19 ^[35]

18. In the study, development, acquisition or adoption of a new weapon, means or method of warfare, States are under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by applicable rules of international law, including those providing protection to the environment in times of armed conflict.

G.P.I Art. 36 ^[36]

19. In the event of armed conflict, the parties thereto are encouraged to facilitate and

protect the work of impartial organizations contributing to preventing or repairing damage to the environment, pursuant to special agreements between the parties concerned or, as the case may be, the permission granted by one of them. Such work should be performed with due regard to the security interests of the parties concerned.

e.g. G.C.IV Art. 63.2 ^[37], G.P.I Arts. 61 ^[38]-67 ^[39]

20. In the event of breaches of rules of international humanitarian law protecting the environment, measures shall be taken to stop any such violation and to prevent further breaches. Military commanders are required to prevent and, where necessary, to suppress and to report to competent authorities breaches of these rules. In serious cases, offenders shall be brought to justice.

G.C.IV Arts. 146 ^[40] and 147 ^[14], G.P.I Arts. 86 ^[41] and 87 ^[42]

Protecting the Environment during Armed Conflict

E. United Nations Environment Programme, Protecting the Environment During Armed Conflict

[Source: United Nations Environment Programme, Protecting the Environment During Armed Conflict, An Inventory and Analysis of International Law, November 2009; available at http://postconflict.unep.ch/publications/int_law.pdf ^[43]. Footnotes omitted.]

1. INTRODUCTION

The toll of warfare today reaches far beyond human suffering, displacement and damage to homes and infrastructure. Modern conflicts also cause extensive destruction and degradation of the environment. In turn environmental damage, which often extends beyond the borders of conflict-affected countries, can threaten the lives and livelihoods of

people well after peace agreements are signed.

This report aims to understand how natural resources and the environment can be better protected during armed conflict by examining the status of existing international law and making recommendations on concrete ways to strengthen this legal framework and its enforcement.

Public concern regarding the targeting and use of the environment during wartime first peaked during the Viet Nam War. The use of the toxic herbicide Agent Orange, and the resulting massive deforestation and chemical contamination it caused, sparked an international outcry leading to the creation of two new international legal instruments. The Environmental Modification Convention (ENMOD) was adopted in 1976 to prohibit the use of environmental modification techniques as a means of warfare. Additional Protocol I to the Geneva Conventions, adopted in the following year, included two articles (35 and 55) prohibiting warfare that may cause “widespread, long-term and severe damage to the natural environment.”

The adequacy of these two instruments, however, was called into question during the 1990-1991 Gulf War. The extensive pollution caused by the intentional destruction of over 600 oil wells in Kuwait by the retreating Iraqi army and the subsequent claims for USD 85 billion in environmental damages led to further calls to strengthen legal protection of the environment during armed conflict. While some advocated a “fifth” Geneva Convention focusing on the environment, many scholars, organizations and States also considered whether and to what extent the emerging body of international environmental law might apply.

In 1992, the UN General Assembly held an important debate on the protection of the environment in times of armed conflict. While it did not call for a new convention, the

resulting resolution (RES 47/37) urged Member States to take all measures to ensure compliance with existing international law on the protection of the environment during armed conflict. It also recommended that States take steps to incorporate the relevant provisions of international law into their military manuals and ensure that they are effectively disseminated.

As an outcome of the UN debate, the International Committee of the Red Cross (ICRC) issued a set of guidelines in 1994 that summarized the existing applicable international rules for protecting the environment during armed conflict. [See Part D of this case] These guidelines were meant to be reflected in military manuals and national legislation as a means to raise awareness and help limit damage to the environment in times of war. Despite this important step international momentum to address the issue – particularly through a formal binding instrument – slowed by the end of the 20th century.

Yet armed conflicts have continued to cause significant damage to the environment – directly, indirectly and as a result of a lack of governance and institutional collapse. For instance, dozens of industrial sites were bombed during the Kosovo conflict in 1999, leading to toxic chemical contamination at several hotspots. In another example, an estimated 12,000 to 15,000 tons of fuel oil were released into the Mediterranean Sea following the bombing of the Jiyeh power station during the conflict between Israel and Lebanon in 2006. [See Israel/Lebanon/Hezbollah, Conflict in 2006 ^[44]]

[...]

The fact that the environment continues to be the silent victim of modern warfare raises a number of important legal questions. Which international laws directly and indirectly protect the environment and natural resources during armed conflict? Who is responsible for their implementation and enforcement? Who should pay for the damage and under what

circumstances? Do multilateral environmental agreements apply during armed conflict? Can environmental damage be a violation of basic human rights? When can damage to the environment be a criminal offence? How can “conflict resources” be better monitored and international sanctions against their illegal exploitation and trade be made more systematic and effective?

To answer these questions, the United Nations Environment Programme (UNEP) and the Environmental Law Institute (ELI) undertook a joint assessment of the state of the existing legal framework protecting natural resources and the environment during armed conflict. This legal assessment was informed by the outcomes of an expert meeting held by UNEP and the ICRC in Nairobi, Kenya in March 2009, which brought together twenty senior legal experts from international organizations, non-governmental organizations, governments, the military, courts and academia to explore the status and effectiveness of the current instruments.

[...]

2. INTERNATIONAL HUMANITARIAN LAW

2.1 Introduction

The first body of law to consider in an analysis of the protection of the environment during armed conflict is international humanitarian law (IHL) – the set of laws that seek, for humanitarian reasons, to regulate war and armed conflict. [...]

IHL [...] distinguishes between international armed conflict (IAC) [...] and non-international armed conflict (NIAC) [...].

This distinction poses a significant challenge to the applicability and enforcement of IHL for environmental protection. Indeed, while IHL was largely developed in an era of

interstate conflicts, the overwhelming majority of conflicts today are internal. Many laws are therefore inapplicable, or much less restrictive when applied to internal conflicts. Yet internal conflicts are the most strongly linked to the environment, with recent research suggesting that at least forty percent of all intrastate conflicts over the last sixty years have a link to natural resources.

Another challenge is that very few provisions of IHL address environmental issues directly, as most major treaties predate the widespread concern about environmental damage generated by the Viet Nam and Gulf wars. Protection is therefore generally inferred from provisions regulating the means and methods of warfare and the impacts of armed conflict on civilian objects and properties, or recommended through non-binding or soft law, including UN resolutions.

[...]

2.2 Treaty law

The relevant provisions of IHL treaty law for the protection of the environment during armed conflict can be divided into three main categories: those that directly address the issue of environmental protection, the general principles of IHL that are applicable to environmental protection, and the provisions that can be considered to provide indirect protection to the environment during times of conflict.

Provisions specifically aimed at protecting the environment during armed conflict

Additional Protocol I to the 1949 Geneva Conventions, Article 35(3) and Article 55(1) (1977)

[...]

Article 35 [...] protects the natural environment *per se* – which had never been done before – and applies not only to intentional damage, but also to expected collateral damage. Importantly, specific intent is not necessary.

Article 55 provides specific protection for the environment within the context of the protection granted to civilian objects. It also explicitly prohibits attacks on the environment by way of reprisals.

The common core of these two Articles is the prohibition of warfare that may cause “widespread, long-term and severe damage to the natural environment.” The scope of these provisions initially appears extensive. However, important questions remain with regard to the threshold at which the damaging activity violates international law. Indeed, this triple standard is a cumulative requirement, meaning that to qualify as prohibited “damage,” the impact must be widespread *and* long-term *and* severe. The Protocol fails to define these terms, resulting in a high, uncertain and imprecise threshold.

One commentary on Article 35(3) has accordingly noted that it would “not impose any significant limitation on combatants waging conventional warfare. It seems primarily directed instead to high-level decision-makers and would affect such unconventional means of warfare as the massive use of herbicides and chemical agents which could produce widespread, long-term and severe damage to the natural environment.”

The relevance of these two provisions and the effectiveness of the protection they provide in practice, therefore, seem limited.

UN Convention on the Prohibition of Military or Any Other Use of Environmental Modification Techniques (ENMOD) (1976)

The ENMOD Convention was established as a reaction to the military tactics employed by the United States during the Viet Nam War. These included plans for large-scale environmental modification techniques that had the ability to turn the environment into a weapon, for instance by provoking earthquakes, tsunamis, or changes in weather patterns – what some commentators have called “geophysical warfare.” The Convention was also a reaction to the use of large quantities of chemical defoliants (known as Agents Orange, White and Blue), which resulted in extensive human suffering (death, cancer and other illnesses, mutations, and birth defects) and long-term environmental contamination, as well as very significant destruction of forests and wildlife.

ENMOD’s objective was to prohibit the use of environmental modification techniques as a means of warfare. Article (1) requires that “each State Party to this Convention undertakes 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.” Hence, while Article 35(3) of Additional Protocol I aims to protect the natural environment per se, ENMOD prohibits the use of techniques that turn the environment into a “weapon.” [...]

Another noticeable difference with the article of Additional Protocol I is that ENMOD requires a much lower threshold of damage, with the triple cumulative standard being replaced by an alternative one: “widespread, long-lasting or severe.” In addition, it appears that the terms were interpreted differently. For instance, under ENMOD the term “long-lasting” is defined as lasting for a period of months or approximately a season, while under Additional Protocol I “long-term” is interpreted as a matter of decades.

[...]

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 (CCW), and its Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons (1980)

See

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons ^[45]

Amendment to Article 1 of the 1980 Convention, in Order to Extend it to Non-International Armed Conflicts ^[46]

Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention) ^[47]

[...] An amendment to Article 1 of the Convention introduced in 2001 extends its application to situations referred to in common Article 3 to the 1949 Geneva Conventions – that is, to non-international armed conflict (NIAC).

Article 2(4) of the CCW Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons also directly addresses environmental protection, as it prohibits “mak[ing] forests or other kinds of plant cover the subject of an attack by incendiary weapons except when such natural elements are used to cover, conceal, or camouflage combatants or other military objectives, or are themselves military objectives.”

The specific situations where ENMOD and the CCW and its Protocol III would apply and the high threshold of the two provisions protecting the environment per se in Additional Protocol I limit the utility of these direct protections in establishing a wide-reaching duty to protect the environment in armed conflict.

General principles of IHL applicable to the protection of the environment during armed conflict

The general principles of IHL are often referred to as a source of law on their own. They complement and underpin the various IHL instruments and apply to all countries. Prior to

an analysis of these principles, it is important to note the importance of the Martens Clause, a general provision that was first adopted at the 1899 Hague Conference and thereafter contained in the Preamble of the 1907 Hague Convention IV.

[...]

In essence, [...] where gaps exist in the international framework governing specific situations (including, for instance, the relationship between armed conflict and the environment), the Martens Clause stipulates that States should respect a minimum standard as established by the standards of “humanity” and the “public conscience.” The Martens Clause is generally considered to constitute a foundational principle of IHL and a core principle protecting the environment in the absence of other provisions in treaty or customary law [...].

The core principles underpinning IHL include the principles of distinction, military necessity, proportionality, and humanity – all of which can be considered to have a bearing on environmental protection during armed conflict, as detailed below.

[...]

The principle of distinction

The principle of distinction is a cornerstone of IHL and the first test to be applied in warfare: it distinguishes between military and civilian persons and objects, and prohibits indiscriminate attacks and direct attacks against civilian objects. Article 52(2) of Additional Protocol I defines military objectives as those that “by nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military

advantage.” It can therefore be argued that given the non-military nature of most environmentally significant sites and protected areas, targeting such areas would be contrary to the principle of distinction and, subsequently, to Article 52(2).

Nevertheless, the application of this principle may be difficult in practice, for instance when considering the targeting of industrial facilities such as power plants or chemical factories, which could have important environmental impacts but would be seen as a direct contribution to ongoing military action. In such circumstances, a relevant question regarding the meaning of Protocol I would be: “Does undermining a country’s morale and political resilience constitute a sufficiently definite military advantage?”

Similar questions arise for example when a protected area is affected by the illegal exploitation of high-value natural resources (whether by rebels, government troops or foreign occupying forces). In this scenario, would the protected area be considered an acceptable target, considering that revenue from this illegal trade was contributing to the war effort?

The difficulties in interpreting the provisions of Article 52(2) highlight the need for a more precise definition of what constitutes a definite (or direct) military advantage, as opposed to a diffuse (or indirect) one.

The principle of military necessity

The principle of military necessity implies that the use of military force is only justified to the extent that it is necessary to achieve a defined military objective. Furthermore, the principle of military necessity seeks to prohibit military actions that do not serve any evident military purpose.

The principle of military necessity is reflected in the 1907 Hague Convention IV, in Article 23(g) on enemy property, which stipulates that it is forbidden “to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.” This provision has significant environmental relevance as “enemy property” may well encompass protected areas, environmental goods and high-value natural resources, all of which could therefore be granted indirect protection.

The principle of proportionality

Based on the principle of proportionality codified in Article 57 of Additional Protocol I, disproportionate attacks are those in which the “collateral damage” would be regarded as excessive in relation to the anticipated direct military advantage gained. Destroying an entire village or burning an entire forest to reach a single minor target, for example, would be considered a disproportionate strategy in relation to the military gain.

Many instances of environmental damage could be seen as a “disproportionate” response to a perceived threat and therefore considered illegal. This was the opinion shared by most experts in the case of the massive pollution resulting from the burning of oil fields and the millions of gallons of oil deliberately spilled into the Gulf Sea during the 1990-1991 Gulf War.

The principle of humanity

The principle of humanity prohibits inflicting unnecessary suffering, injury and destruction. Thus a Party cannot use starvation as a method of warfare, or attack, destroy, remove or render useless such objects indispensable to the survival of the civilian population.

According to this principle, the poisoning of water wells and the destruction of agricultural land and timber resources that contribute to the sustenance of the population, as seen in the

ongoing conflict in Darfur, could be considered “inhumane” means of warfare.

[...]

IHL treaty provisions that indirectly protect the environment during armed conflict

The rules of IHL treaty law that can be considered to indirectly protect the environment during armed conflict can be clustered into the five following categories: rules limiting or prohibiting certain weapons and methods of warfare; clauses protecting civilian objects and property; clauses protecting cultural heritage sites; rules concerning installations containing dangerous forces; and limitations on certain specifically defined areas.

Limitation on means and methods of warfare

Many weapons have the potential to cause serious and lasting damage to the environment. Limiting the development and use of these weapons can therefore indirectly protect the environment during armed conflict.

The following sources, regulating the use of various types of weapons, are relevant in this context:

– **The Hague Convention IV (1907)**

[...]

[T]wo provisions of the Hague Convention IV of 1907 [...] are relevant for the environment. The first, Article 22, provides that “the right of belligerents to adopt means of injuring the enemy is not unlimited.” Some commentators have referred to this Article as

one of the most significant provisions in the regulations in so far as a precautionary imperative can be implied from it in the absence of explicit provisions. This first provision should be read in light of the second – the Martens Clause – which is contained in the Preamble of the 1907 Hague Convention IV.

It should be noted that very little has been achieved so far in terms of enforcement of the Hague Law on means and methods of warfare, and that most judicial cases conducted to date have instead focused on violations of the Geneva Law protecting persons and civilian objects.

– **The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925)**

[See The Geneva Chemical Weapons Protocol ^[48]]

[...]

In so far as the use of chemical and biological weapons may cause harm to the environment, the Protocol can be seen to provide some level of environmental protection during armed conflict.

The Protocol, however, suffers from major limitations. First, only the use of chemical and biological means of warfare is prohibited, excluding the research, development, stockpiling and possession of such weapons from control. Second, the Protocol lacks control mechanisms and provisions for establishing responsibility for violations, thereby limiting its ability to serve as a deterrent.

– **The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC) (1972)**

[See ICRC, *Biotechnology, Weapons and Humanity* ^[49]]

[...]

The actual use of biological weapons is not prohibited by the BWC, as the drafters of the agreement took the stance that this aspect is regulated by the 1925 Protocol. [...]

By banning the use of these weapons, the BWC and the Protocol protect the environment in armed conflict from weapons that are likely to cause significant environmental degradation, particularly to the natural environment and to fauna and flora.

– **Convention on Certain Conventional Weapons (CCW) (1980)**

See :

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons ^[45]

Amendment to Article 1 of the 1980 Convention, in Order to Extend it to Non-International Armed Conflicts ^[46]

Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention) ^[47]

Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention) ^[50]

Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention) ^[51]

As noted above, the Preamble of the 1980 CCW and its Protocol III expressly mention environmental protection. Following a 2001 amendment, the CCW also applies to non-

international armed conflict (NIAC).

In addition, Protocol II to the CCW attempts to limit the harmful effect of landmines by requesting States to take protective measures such as recording the location of targets in order to allow for later collection of the unexploded devices, and thereby facilitate substantial restoration to prior environmental conditions. Finally, Protocol V on Explosive Remnants of War, adopted in 2003, is the first international legal instrument dealing with the problem of unexploded and abandoned ordnance, and offers similar guidelines that can serve to indirectly protect the environment from post-conflict threats.

– **Chemical Weapons Convention (CWC) (1993)**

See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction ^[52]

[...]

It is [...] notable that the CWC specifically prohibits destroying chemical weapons by “dumping in any body of water, land burial and open pit burning,” thereby ensuring that the human and environmental costs of disposal are minimized.

As is the case for the Biological Weapons Convention, the CWC has an immediate bearing on the protection of the natural environment during armed conflict, as chemical substances may have particularly direct and severe impacts on the environment. In addition, the CWC has effective mechanisms in place that may provide a model for monitoring, verification and non-compliance mechanisms in other treaties.

– **Nuclear weapons**

[See ICJ, Nuclear Weapons Advisory Opinion ^[53]]

Nuclear weapons are indiscriminate by nature and the damage they cause to human populations and the environment they live in is immense.

The use of nuclear weapons must be considered in reference to three treaties. The first is the 1963 Partial Test-Ban Treaty, which does not regulate the conduct of warfare as such, but instead prohibits States from undertaking any nuclear test or explosion “at any place under its jurisdiction or control.” Although this treaty is mainly concerned with nuclear testing and restricted to the atmosphere, outer space and the marine environment, it ensures that nuclear testing does not cause harm to the identified areas and, importantly for this report, to marine ecosystems.

The second treaty of interest is the 1968 Nuclear Non-Proliferation Treaty, which does not explicitly prohibit the use of nuclear weapons in armed conflict per se, but does prohibit signatory States from “manufacturing or otherwise acquiring nuclear weapons or other nuclear explosive devices.” By seeking complete disarmament and non-proliferation, the treaty anticipated that the issue of the use of nuclear weapons would be rendered a moot point.

The third treaty, and the most significant, is the 1996 Comprehensive Nuclear-Test-Ban Treaty, which seeks to secure an end to all nuclear weapons testing and other forms of nuclear explosions. By prohibiting all nuclear explosions, the treaty constitutes a holistic measure of nuclear disarmament and non-proliferation and could, as noted in its Preamble, “contribute to the protection of the environment.” The Comprehensive Nuclear-Test-Ban Treaty has, however, yet to enter into force. Only 35 of the 44 Annex II States that are required to ratify it to ensure that it enters into force have done so, and three of the nine countries yet to ratify it have not even become signatories. Nevertheless, a total of 150 UN

Member States have ratified the treaty to date, emphasizing widespread worldwide support for banning nuclear explosions, which negatively impact human health and the environment.

It is also important in this respect to mention regional nuclear disarmament treaties. The 1967 Tlatelolco Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean is a key regional instrument ratified by all 33 States in Latin America and the Caribbean. The Treaty entered into force in 1969, and forbids the testing, use, possession, fabrication, production or acquisition by any means of all nuclear weapons in this region. Under the treaty, member States have over the years adopted resolutions addressing radioactive pollution and the environment. Other regional instruments include the 1985 Treaty of Roratonga (establishing a nuclear free zone in the South Pacific), the 1995 Treaty of Bangkok for South-East Asia, the 1996 Treaty of Pelindaba for Africa, the 2006 Treaty of Semipalatinsk for Central Asia, and the 1959 Antarctic Treaty.

– **Landmines and cluster bombs**

See

Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention) ^[47]

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction ^[54]

Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention) ^[51]

Convention on Cluster Munitions ^[55]

[...]

In addition, Articles 51(4) and (5) of Additional Protocol I to the Geneva Conventions, which prohibit indiscriminate attacks, can be of particular relevance when encouraging States to refrain from using landmines in warfare, as such weapons are indiscriminate by nature and pose particularly injurious long-term risk to both humans and animals.

[...]

In concluding this analysis of IHL treaty law addressing the means and methods of warfare, attention should be given to the absence of treaties explicitly banning or otherwise addressing the use of depleted uranium munitions and other recently developed weapons. This being said, Article 36 of Additional Protocol I to the Geneva Conventions, which is binding on 168 States, requires them to ensure that any new weapon, or means or method of warfare, does not contravene existing rules of international law. IHL also prohibits weapons and means or methods of warfare that cause superfluous injury or unnecessary suffering, have indiscriminate effects, or cause widespread, long-term and severe damage to the natural environment.

Protection of civilian objects and property

The provisions that govern the protection of civilian objects and property could provide a more effective legal basis for protecting the environment during armed conflict than those protecting the environment per se, at least under existing IHL treaty law. Relevant provisions are as follows:

– The Hague Regulations (1907)

The Hague Regulations attached to the 1907 Hague Convention IV on the Laws and Customs of War on Land stipulate that it is forbidden “to destroy or seize the enemy’s

property, unless such destruction or seizure be imperatively demanded by the necessities of war.” As noted earlier, this “enemy property” could include protected areas, environmental goods and natural resources, which would as such be indirectly protected by the Hague Regulations.

– **The Geneva Convention IV (1949)**

[...] In a reiteration of the Hague Regulations rule on enemy property, Article 147 lists “extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly” among the acts constituting “grave breaches” of the Convention.

Furthermore, in the specific context of occupation, Article 53 states that “any destruction by the Occupying Power of real or personal property belonging individually or collectively to individuals, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”

As natural resources are generally considered civilian property, belonging collectively to private persons, their destruction could be considered to violate Articles 147 and 53 of the Geneva Convention IV, if not justified by imperative military necessity.

– **Additional Protocol I to the 1949 Geneva Conventions (1977)**

The “basic rule” for the protection of civilian objects against the effects of hostilities is enunciated under Article 48 of Additional Protocol I to the Geneva Conventions. Article 48 provides indirect protection for the environment by stating that “in order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict

shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” This basic rule is an explicit affirmation of the general principle of distinction. This principle is re-emphasized within the rule contained in Article 52, which explains what constitutes a military objective as opposed to a civilian object.

Article 54(2) of Additional Protocol I also indirectly protects the environment by prohibiting attacks against “objects indispensable to the survival of the civilian population,” meaning objects that are of basic importance to the population’s livelihood. Natural resources such as agricultural land, cattle, and drinking water could in many instances be seen as such means of survival. This provision is generally considered to reflect customary international law as its violation would constitute a grave breach of IHL if it amounted to any of the acts enumerated within Article 147 of Geneva Convention IV. In addition, Article 54(3)(b) applies even when farmlands and foodstuffs are used in direct support of military action, if their destruction were to cause starvation or forced relocation of the civilian population. The effect of this provision is also to exclude, except in defence of a State’s own territory, recourse to scorched-earth policies that cause severe environmental destruction.

Finally, the precautionary measures contained within Article 57, which also recall the proportionality principle, add protection for the environment by discouraging acts that could possibly impact the environment.

– **Additional Protocol II to the 1949 Geneva Conventions (1977)**

Additional Protocol II specifically addresses issues of protection during non-international armed conflict (NIAC). [...] The provisions that indirectly address environmental protection are Article 14 on civilian objects, Article 15 on installations containing

dangerous forces and Article 16 on cultural objects and places of worship. Article 14 prohibits attacks on objects indispensable to civilian populations, including foodstuffs, agricultural land, crops, livestock, drinking water installations and irrigation works. It thus replicates for internal conflicts the protection provided by Article 54 of Protocol I applicable to international armed conflict (IAC). [...]

Protection of cultural objects

- **The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols (1954 and 1999)**

See Conventions on the Protection of Cultural Property ^[56]

[...]

- **Additional Protocols I and II to the 1949 Geneva Conventions (1977)**

The protection of cultural property is reinforced by provisions contained in the two 1977 Additional Protocols to the 1949 Geneva Conventions, namely Articles 38, 53 and 85 of Additional Protocol I and Article 16 of Additional Protocol II. Though they do not mention the environment per se, these provisions could be useful in providing legal protection for the natural environment during armed conflict.

Protection of industrial installations containing dangerous forces

- **Additional Protocol I to the 1949 Geneva Conventions, Article 56**

[...] Oil fields and petrochemical plants are not explicitly addressed here (and may even

have been intentionally excluded). As a result, the provision does not cover the attacks on oil fields and petrochemical facilities that occurred, for instance, during the 1990-1991 Gulf War, the 1999 Kosovo conflict, or the 2006 Israel-Lebanon conflict. It should be noted, however, that oil fields and petrochemical plants can be protected by the general principle of distinction comprised within the chapeau rule under Article 52.

As is the case under Article 54(2), the prohibition set forth in Article 56 applies even when the target (dams, dykes and nuclear electrical generating stations) constitutes a military objective, except in the restricted cases referred to under Paragraph 2.

– **Additional Protocol II to the 1949 Geneva Conventions,**

Article 15 of Additional Protocol II extends the protections contained in Article 56 of Protocol I to non-international armed conflicts [...].

Limitations based on targeted areas

– **Territories under occupation**

[...]

Article 55 of the 1907 Hague Convention IV sets forth the rules of usufruct for the occupying power. It clarifies that the occupying power has the right to “use” the occupied property, but not the right to damage or destroy it, except in the circumstances of military necessity. Similarly, Article 53 of the 1949 Geneva Convention IV prohibits destruction by the occupying power of property individually or collectively owned by inhabitants of the occupied territories, except in the circumstances of absolute military necessity.

The special status of occupation and the regulations attached to it, such as those provisions qualifying the occupants as “usufructuary,” may offer some guiding principles for dealing with similar situations in the context of non-international armed conflict (NIAC). The over-extraction and depletion of valuable natural resources has become an all too common feature of NIACs, with revenue generated from this often illegal exploitation serving to finance armed forces and their weaponry. Recent research shows that over the last twenty years, at least eighteen civil wars have been fuelled by natural resources such as diamonds, timber, minerals and cocoa, which have been exploited by armed groups in Liberia, Angola and the Democratic Republic of Congo, for example.

– **Neutral territories**

[...]

With respect to the environment, this customary principle is articulated in the ICRC *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict* [See Part A of this case], where it is stipulated that “obligations relating to the protection of the environment towards States not party to an armed conflict are not affected by the existence of the armed conflict to the extent that they are not inconsistent with the applicable law of armed conflict.”

– **Demilitarized zones**

Formally identified “neutralized” or “demilitarized” zones between belligerents are also subject to dedicated protection under Article 15 of the Geneva Convention IV and Article 60 of Additional Protocol I. Violation of this obligation constitutes a grave breach of IHL if it is carried out under the circumstances set forth in the chapeau requirements under Article 85 of Protocol I.

A few other areas are specifically protected from warfare and its impacts, including Antarctica – by the 1959 Antarctic Treaty – and outer space – by the 1967 Outer Space Treaty.

It thus follows that one option to enhance the protection of particularly valuable protected areas or dangerous environmental hotspots would be to formally classify them as “demilitarized zones.” [...]

2.3 Customary international humanitarian law

[...]

[See ICRC, Customary International Humanitarian Law ^[57]]

The ICRC 2005 multi-volume explanation of customary IHL discusses 161 “rules” that the authors consider to represent customary international humanitarian law. Three of these rules relate particularly to natural resources, and specify the implications of the general principles of IHL for environmental protection during armed conflicts. These are:

Rule 43. The general principles on the conduct of hostilities apply to the natural environment:

1. A. No part of the natural environment may be attacked, unless it is a military objective.
2. B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.
3. C. Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited (applicable in IAC and NIAC).

Rule 44. Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions (applicable in IAC and arguably in NIAC).

Rule 45. The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon (applicable in IAC and arguably in NIAC).

The ICRC rules offer an articulation of the principles of distinction, proportionality and military necessity in relation to the natural environment, and emphasize the importance of taking a precautionary approach in the absence of scientific certainty about the likely effects of a particular weapon on the environment. In addition, the rules expressly prohibit the use of means of warfare that are intended or can be expected to cause significant damage to the environment, requiring Member States to consider the likely environmental repercussions of their military methods.

The difference in applicability of these rules in IAC versus NIAC remains to a large extent open to interpretation. Due to the differences of scholarly opinion, some experts have noted that codifying the existing customary law on this topic could clarify some of the outstanding questions and, in the process, create more definite measures to protect the environment in armed conflict.

2.4 Soft law related to the corpus of international humanitarian law

[...]

UNGA Resolution 47/37 (9 February 1993)

[...]

UNGA Resolution 49/50 (17 February 1995)

In 1994, the ICRC submitted a proposal to the UN General Assembly in the form of *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict* [See Part A of this case]. At its 49th Session, the General Assembly, without formally approving them, invited all States to disseminate the guidelines widely and to “give due consideration to the possibility of incorporating them” into their national military manuals. These guidelines have also been published as an annex to the Secretary-General Report A/49/323 United Nations decade of international law (1994).

UNGA resolutions considering nuclear disarmament

[...]

UNGA resolutions addressing depleted uranium-related issues

Guided by the purposes and principles enshrined in the Charter of the United Nations and the rules of IHL, the General Assembly has started addressing the issue of depleted uranium. Since 2007, it has adopted two resolutions aimed at assessing both the human and environmental impacts of depleted uranium armaments. UNGA Resolutions 62/30 of December 2007 and 63/54 of January 2009 request the Secretary-General to produce reports on the issue.

UNGA Resolution 63/54 clearly acknowledges the importance of protecting the

environment and reads, in part, that because “humankind is more aware of the need to take immediate measures to protect the environment, any event that could jeopardize such efforts requires urgent attention to implement the required measures.” The resolution also recognizes “the potential harmful effects of the use of armaments and ammunitions containing depleted uranium on human health and the environment.”

These two resolutions could eventually lead to the codification in treaty law of norms protecting both human health and the environment from depleted uranium armaments, thus addressing the current major gap in treaty law regarding the use of such weapons.

UNGA Resolution 63/211 (19 December 2008)

[...]

The San Remo Manual (1994) and UNGA Resolution 2749

[See San Remo Manual on International Law Applicable to Armed Conflicts at Sea ^[58]]

[...]

2.5 Case law

Generally speaking, cases addressing the responsibility and liability of States for violations of international humanitarian law (IHL) have been extremely rare. Similarly, there have been very few interpretations by authoritative judicial bodies of international humanitarian law and international criminal law norms relating to environmental protection.

However, several international cases provide relevant guidance and clarification in relation to the protection of the environment during armed conflict. Indeed, judicial decisions are

helpful for treaty interpretation and as evidence of customary law. In addition, case law reveals a number of practical gaps in the existing international legal framework governing environmental protection during armed conflict.

Case law of the International Court of Justice (ICJ)

[...]

ICJ Advisory Opinion on Nuclear Weapons (1996)

[See ICJ, Nuclear Weapons Advisory Opinion ^[53]]

[...]

ICJ Decision on Armed Activities on the Territory of the Congo (DRC v. Uganda) (2005)

[See ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo ^[59]]

In this case, the ICJ found that the Republic of Uganda had failed to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, and therefore had violated its obligations of vigilance under international law (particularly stated in Article 43 of the Hague Regulations of 1907), which resulted in a duty of reparation. This case therefore recognized that acts of looting, plundering and exploitation by occupying powers are illegal, that there exists a State duty of vigilance for preventing such acts from occurring, and that reparations are due for damage to natural resources in the context of an armed conflict.

Decisions of international tribunals and the United Nations Compensation Commission (UNCC)

[...]

ICTY Decision on Yugoslavia v. NATO (1999)

[See Federal Republic of Yugoslavia, NATO Intervention ^[60]]

[...] Although the prosecutor ultimately found no basis for opening a criminal investigation into any aspects of the NATO air campaign, the ICTY did examine the question of responsibility for environmental damage and use of depleted uranium from an environmental perspective, thereby establishing a precedent that merits attention.

The report of the Special Committee established to study the case stated that “the NATO bombing campaign did cause some damage to the environment,” mentioning the bombings of chemical plants and oil installations. Second, it observed that Article 55 of Additional Protocol I “may reflect current customary law” and, therefore, may be applicable to non-Parties to the Protocol (such as France and the United States). With regard to the substance of the legal provisions contained in this Protocol, the committee held that: “Articles 35(3) and 55 have a very high threshold of application. Their conditions for application are extremely stringent and their scope and contents imprecise. Consequently, it would appear extremely difficult to develop a prima facie case upon the basis of these provisions, even assuming they were applicable.” The Special Committee report maintained that the NATO air campaign did not reach the threshold of Additional Protocol I.

The report then analysed the question of environmental damage in light of the customary principles of military necessity and proportionality, stating that: “[E]ven when targeting admittedly legitimate military objectives, there is a need to avoid excessive long-term damage to the economic infrastructure and natural environment with a consequential adverse effect on the civilian population. Indeed, military objectives should not be targeted

if the attack is likely to cause collateral environmental damage which would be excessive in relation to the direct military advantage which the attack is expected to produce.”

With respect to the principle of proportionality, the report stressed that the importance of the target must be assessed and weighed against the incidental damage expected; the more important the target, the greater the degree of risk to the environment that may be justified. After analysing Article 8(2)(b)(iv) of the ICC Rome Statute, the report stated that: “In order to satisfy the requirement of proportionality, attacks against military targets which are known or can reasonably be assumed to cause grave environmental harm may need to confer a very substantial military advantage in order to be considered legitimate. At a minimum, actions resulting in massive environmental destruction, especially when they do not serve a clear and important military purpose, would be questionable. The targeting by NATO of Serbian petrochemical industries may well have served a clear and important military purpose.”

After dwelling upon the imprecise nature of the notion of “excessive” environmental destruction and the fact that the present and long-term environmental impact of NATO actions was “unknown and difficult to measure,” the report set forth a detailed list of points that it considered necessary to clarify in order to evaluate claims of intentional excessive environmental damage: “It would be necessary to know the extent of the knowledge possessed by NATO as to the nature of Serbian military-industrial targets (and thus the likelihood of environmental damage flowing from their destruction), the extent to which NATO could reasonably have anticipated such environmental damage (for instance, could NATO have reasonably expected that toxic chemicals of the sort allegedly released into the environment by the bombing campaign would be stored alongside that military target?), and whether NATO could reasonably have resorted to other (and less environmentally damaging) methods for achieving its military objective of disabling the Serbian military-industrial infrastructure.”

On the basis of these considerations, the report concluded that an investigation into the collateral environmental damage caused by the NATO bombing campaign should not be initiated. Concerning the use of depleted uranium projectiles by NATO aircraft, the report observed that there is currently no specific treaty banning the use of such projectiles, but that principles such as proportionality are also applicable in this context. Referring to the information available regarding environmental damage from depleted uranium, the report recommended that the Office of the prosecutor should not commence investigations into the use of depleted uranium projectiles by NATO.

[...]

The United Nations Compensation Commission (UNCC)

[See UN Compensation Commission, Recommendations ^[61]]

[...]

During the war, the extensive environmental damage caused by Iraq was widely condemned by the international community. In addition, the damage caused outside the territory of Iraq was declared to have violated Article 23(g) of the Hague Regulations regarding the destruction of enemy property. As a result, UNSC Resolution 687 stated in Paragraph 16 that “Iraq is liable under international law for any [...] damage, including environmental damage and the depletion of natural resources [...] as a result of Iraq’s unlawful invasion and occupation of Kuwait.” Paragraph 18 of the Resolution created a fund to provide compensation for claims that came under Paragraph 16, and established the UNCC to administer it.

[...]

One way to strengthen the international legal framework governing environmental protection during armed conflict would be to broaden the principles and approach taken by UNSC Resolution 687 creating the UNCC, by establishing a permanent body in charge of evaluating and possibly compensating for wartime environmental damage. Such an approach would be more effective and legally sound if it were grounded in the clear legal basis that environmental damages are illegal per se, and directly breed State or criminal liability.

2.6 Conclusions on international humanitarian law

The provisions of IHL governing environmental protection during armed conflicts constitute a disparate body of treaty law, customary law, soft law and general principles that have developed over decades to respond to a wide range of practical problems and moral concerns. A number of significant gaps and difficulties remain to be reconciled if the protection of the environment is to be enhanced within the IHL framework.

First, while most recent and ongoing conflicts are internal, the body of IHL treaty and customary law governing non-international armed conflict (NIAC) is relatively limited. There is no treaty norm that explicitly addresses the issue of environmental damage during NIAC, and obligations applicable in this context are generally far less restrictive than for international armed conflicts (IAC). The principle treaty law regulations for NIAC are contained within Common Article 3 to the four Geneva Conventions and Additional Protocol II. Common Article 3 merely restates basic protections for persons hors de combat, and is of little direct relevance to environmental protection, while Protocol II does not provide detailed limitations regarding methods and means of warfare. In addition, as noted by one expert, “instances of Protocol II’s application have been rare,” mainly due to the fact that few States ratified it before the late 1980s or 1990s. Protocol II could not, therefore, be applied as a source of treaty law in the many internal conflicts that occurred during that period, including in Angola, Haiti, Somalia and Sri Lanka. General principles of

IHL and customary law may be of assistance in filling this gap of applicable law to internal conflicts.

[...]

Second, many rules contained within treaties are not universally applicable to all States (particularly to those States that are not a Party to them) unless they have entered the corpus of customary international law. This is a major limitation for the practical relevance and effectiveness of the treaties highlighted above, particularly in light of the fact that many have not been ratified by some of the major military powers, resulting in disagreement regarding their implementation and enforcement. It is therefore essential that all States be encouraged to become signatories to the major treaties and to ratify them with haste to ensure that IHL protection for the environment is real and effective.

Third, few norms of IHL explicitly address the issue of environmental protection, and in most cases the environment is better protected indirectly by other norms regulating the means and methods of warfare or protecting civilian persons and objects. The analysis has shown that the indirect means provide significantly more comprehensive protection than the norms of IHL that protect the environment per se.

Fourth, a significant criticism of the entire IHL framework centres on the lack of State adherence to IHL norms even where they are signatories to the relevant treaties. It has all too often been observed that even where applicable environmental provisions do exist, States decide not to enforce them for political or military reasons. The ICRC *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict* (1994) provide guidance for implementation of these norms of IHL in military education.

Finally, aside from the International Criminal Court [...], and ad hoc criminal tribunals, there are few effective mechanisms for enforcing provisions of IHL, particularly relating to damage to the environment.

A key solution to these issues involves the codification of environmental protection into a coherent and practical instrument that considers both IAC and NIAC. Such an instrument could be developed on the basis of updated ICRC guidelines on protecting the environment during armed conflict, and with the expertise of the International Law Commission (ILC). In the absence of such a practical instrument, the protection of the environment remains governed by a disparate body of law that requires elaboration and consolidation.

Discussion

1.
 - a. Which approach to the environment has traditionally been adopted by IHL?
 - b. Is every object that composes the environment necessarily a civilian object, which may therefore not be attacked, independently of any specific rule on the environment? Why is this not sufficient protection for the environment?
 - c. Traditionally the protection of the environment has been linked to the protection of the civilian population and civilian objects. Would you say that this approach has changed?
2. Would you qualify the provisions on the environment in the Hague Conventions, the Geneva Conventions and the latter's Protocols as being insufficient?
3. Can the environment or parts of it become a military objective as defined in Protocol I? Under which conditions? May those parts be attacked? (P I, Arts 35(3) ^[5], 52(2) ^[7] and 55 ^[15])
4.
 - a. What is the purpose of the ENMOD Convention? Which element does its Art. I add to the protection of the environment provided by IHL?
 - b. Does the ENMOD Convention also cover attacks against military objectives? Do the provisions protecting the environment in Protocol I also cover attacks on military objectives?
 - c. In light of the recent State practice would you say that the ENMOD Convention

is necessary? Has the environment as such been used as a weapon since the adoption of that Convention in 1977? If not, does your answer prove that the Convention is not necessary?

5. Since Art. 35(3) of Protocol I focuses on the environment, do you consider Art. I of the ENMOD Convention necessary? Do you think that the thresholds of applicability for Art. 35(3) of Protocol I and for Art. I of ENMOD are the same? Would you differentiate between the two articles in terms of applicability?
6. Does the terminology used in Art. I of the ENMOD Convention and Art. 35(3) of Protocol I, namely that effects (or, respectively, damage) must be “widespread, long lasting or [respectively, long-term and] severe”, have the same meaning?
7. To what extent may the articles protecting the environment be bypassed by invoking military necessity? Is there a difference between the provisions of Protocol I and Art. I of the ENMOD Convention in that regard?
8. Would you consider the articles concerning the environment as being customary or emerging customary international law? How could they become customary international law? Only through practice in armed conflicts? Or also through general State practice concerning the protection of the environment?
9. Do you agree that the protection of the environment is less codified in non-international armed conflict? Are States allowed to damage the environment inside their own territory? Should the rules applying in international armed conflict be applied by analogy in non-international armed conflict? Or are the existing rules sufficiently protective in non-international armed conflict?
10. Do you think there is a need for new international rules directly protecting the environment? Or do you think that the existing rules are sufficient, but need to be better implemented? To what extent could it be counter-productive to start a new process of codification of new rules?

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