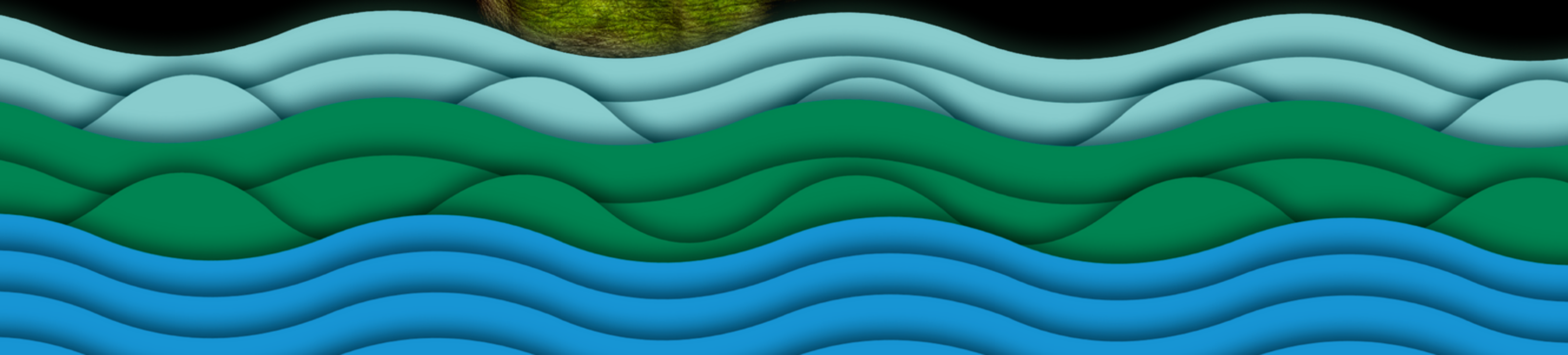
ENVIRONMENT PEOPLE LAW

The rule of law for the protection of the environment

Key provisions of the UNEP report on protecting the environment during armed conflicts

Analitical note



Key provisions of the UNEP report on protecting the environment during armed conflicts

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Lviv - 2023

This material contains an analysis of the 2009 UNEP report on protecting the environment during armed conflict, which is available at the following link: https://bit.ly/3GOWvXt.

This report provides an inventory and analysis of legal provisions contained in four major bodies of international law that can be used to strengthen the legal protection of the environment in wartime. It provides specific recommendations for steps to be taken by various international and national actors to ensure the expansion, implementation and enforcement of a more effective legal framework for environmental protection during international and non-international armed conflicts.

Regarding treaty law. Articles 35 and 55 of Additional Protocol I to the 14 Geneva Conventions do not provide effective protection of the environment during armed conflict due to the stringent and imprecise threshold required to demonstrate damage. While these two articles prohibit "widespread, lng-term and severe" damage to the environment, all three conditions must be proven for a violation to occur. In practice, this triple cumulative standard is nearly impossible to achieve, particularly given the imprecise definitions of the terms "widespread," "long-term," and "severe."

The majority of the international legal provisions protecting the environment during armed conflict were designed for international armed conflicts and do not necessarily apply to internal conflicts. This legal vacuum is a major obstacle for preventing often serious environmental damage inflicted during internal conflicts, full-scale war. There are also no institutionalized mechanisms to prevent the looting of natural resources during full-scale war. Furthermore, there are no systematic mechanisms to prevent states or corporations from aiding and abetting warring parties to harm the environment or looting natural resources.

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 tests or explosions "at any place under its jurisdiction or control." Although this treaty is mainly concerned with nuclear testing and is restricted to the atmosphere, outer space and marine environment, it ensures that nuclear testing does not cause harm to the identified areas and, importantly, 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." The third and most important treaty 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 measure and could, as noted in its Preamble, "contribute to the protection of the environment." However, the Comprehensive Nuclear-Test-Ban Treaty has not yet entered into force. Only 35 of the 44 Annex II States that are required to ratify it to bring it into force have done so, and three of the nine countries that have yet to ratify it have not even become signatories. Nevertheless, to date, a total of 150 UN Member States have ratified the treaty, emphasizing widespread worldwide support for banning nuclear explosions, which negatively impact human health and the environment.

Referring to the provisions of customary international humanitarian law, the following should be indicated. As elements of customary international humanitarian law, the four principles of distiction, military necessity, proportionality and humanity complement and underpin the various international humanitarian instruments and apply to all states, except to those that consistently object to them. Thus, the legality of actions resulting from environmental destruction, especially if they do not serve a clear and compelling military objective, the use of "inhumane" weapons (such as landmines or cluster bombs) could be considered questionable, even without reference to the specific rules of war addressing envirnmenta issues in detail.

Given the differences in scholarly opinion, some experts noted that the codification of existing customary law on the subject could clarify some of the outstanding issues and, in the process, create clearer measures to protect the environment during armed conflict.

With regard to soft law, which also applies to international humanitarian law, it is worth emphasizing the following. In its **Resolution 47/37 of 9 February 1993,** the UN General Assembly stated in the Preamble that "destruction of the environment, not justified by military necessity and carried out wantonly is clearly contrary to existing international law." The resolution then expressed concern that the relevant provisions of international law on the matter "may not be widely disseminated and applied." Accordingly, the resolution "urges States to take all measures to ensure compliance with the existing international law" on this issue, including by "becoming Parties to the relevant international conventions." However, the resolution did not identify specific gaps in the existing international legal framework and, therefore, did not recommend developing or strengthening particular measures.

Resolution 63/211 of the UN General Assembly regarding the oil slick on Lebanese shores caused by the bombing of the El-Jiyeh power plant during the 2006 war, emphasizes "the need to protect and preserve the marine environment in accordance with international law."

UNSC Resolution 1856 strongy and explicitly recognized "the link between the illegal exploitation of natural resources, the illicit trade in such resources and the proliferation and trafficking of arms as one of the major factors fueling and exacerbating conflicts in the Great Lakes region of Africa, in particular in the Democratic Republic of

Congo." Consequently, the Council decided that MONUC should have the mandate "to use its monitoring and inspection capacities to curtail the provision of support to illegal armed groups derived from illicit trade in natural resources." It also urged the States in the region to "establish a plan for an effective and transparent control over the exploitation of natural resources."

There is a lack of case law on the protection of the environment during armed conflict due to the limited number of cases heard by the courts: provisions on the protection of the environment during war have not yet been seriously applied in international or national jurisdictions. To date, only a very limited number of cases have been submitted to national, regional and international courts and tribunals in this context. Moreover, in cases where decisions were made, procedural issues prevailed, rather than arguments based on what had actually been done.

Besides the International Criminal Court and special criminal tribunals, there are few effective mechanisms for enforcing the provisions of IHL, particularly with regard to environmental damage.

In the Tadic case, the International Criminal Tribunal for the former Yugoslavia (ICCY) ruled that international humanitarian law regarding the means and methods of warfare is part of customary law and therefore applies to non-international armed conflicts (NIAC). In particular, the ICTY focused on the rules governing the use of chemical weapons and argued that violations of these norms of customary law in the Tadic case entail individual criminal responsibility. This decision created an important precedent that can confirm the application of contract law to NIAC.

In the ICJ judgment on armed activities in the territory of Congo, the International Criminal Court found that the Republic of Uganda had failed to comply with its obligations as the occupying power in the 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, which resulted in a duty of reparation. Thus, this case recognized that acts of looting, plundering and exploitation by occupying powers are illegal, that there exists a stae duty of vigilance and preventing such acts from occurring, and that reparations are due for damage to natural resources in the context of an armed conflict.

Environmental damage caused by war crimes, crimes against humanity and genocide is a criminal offense under international law. Destruction of the environment and depletion of natural resources may be a material element or basis of other crimes under the Rome Statute. Therefore, it is subject to criminal liability and prosecution by the International Criminal Court and the national criminal jurisdictions of the ICC Parties. This applies to both internal armed conflicts in participating states and international conflicts between participating states. Plunder as a war crime is of particular interest and can be used to prosecute the plunder of natural resources during conflicts.

Although the Rome Statute does not provide significant direct protection for the environment, it provides other avenues for remedying environmental damage. In particular, damage to the environment can be part of other crimes. For example, setting fire to a forest can be a component of such a crime as destruction of property. In addition, the consequences of damage to the environment can also be considered as

material elements of the crime. For example, the scorched earth practice resulting in forced dispacement. This causal linkage has been used successfully in the past, particularly for prosecuring rapes as underlying acts of the crime of genocide (e.g. *the Akayesu case* of the International Criminal Tribunal for Rwanda) or torture (in various cases of the International Criminal Tribunal for the former Yugoslavia).

The recognition by the UN Security Council that rape is an international crime increases the seriousness of the crime, strengthens the expectation that national and international jurisdictions will prosecute it, and enhances the legitimacy of such prosecution. A similar procedural path for recognition of seriousness applies to violations of environmental protection during armed conflict, especially those that may be considered serious violations. Such a way will strengthen the protection of the environment during an armed conflict.

Sanctions against states may be "recommended" by the UN Security Council under Chapter VI (Article 36) of the UN Charter. However, the binding nature of such resolutions is uncertain.

The UN Security Council can refer a situation where, for example, large-scale and serious environmental impacts from conflicts threatened international peace and security - to the ICC, as per Article 13 of the Rome Statute.

Regarding multilateral environmental agreements and principles of international environmental law. Unless otherwise stated, international environmental law continues to apply during armed conflicts and may be used as a basis for protection. The provisions of multilateral environmental agreements (MEAs) should be considered as continuing to apply both during international and non-international armed conflicts, unless they specifically provide otherwise. The view that international humanitarian law supersedes international environmental law is no longer dominant among legal experts, including the International Law Commission. In addition, international environmental law could be used in the interpretation of incomplete or insufficiently clear norms of international humanitarian law.

A much larger percentage of the principles and instruments of "soft" environmental law clearly speak of armed conflict, in contrast to treaties in this area. Indeed, most contain principles that directly relate to state action during armed conflict or the protection of the environment during armed conflict in general. However, these frameworks are not legally binding, including in peacetime, if they do not rise to the level of customary international law. While scholars continue to debate the scope of customary soft environmental law, many argue that the precautionary principle, pollution prevention principles, and the right to a healthy environment either already exist or are emerging as principles of customary international law.

Regarding the applicability of international environmental law during armed conflict. First, it is important to note the difference between the norms of international environmental law that apply to international conflicts and those that apply to internal conflicts. Indeed, a state experiencing an internal armed conflict remains bound by the norms of international environmental law. If it does not comply with such obligations, the question arises whether this failure is justified by the state of necessity. In addition, the obligations of non-state parties are problematic. They are bound by the relevant norms of IHL, but in general the norms of international environmental law do not apply

to them.

Second, there may be a difference in the application of international law during an armed conflict between two belligerents, as opposed to between a belligerent and a neutral party. Bothe explored this distinction in the early 1990s, suggesting that the effectiveness of international environmental law norms is significantly influenced by whether the environmental damage caused by a belligerent was inflicted on another belligerent or a neutral party. Bothe argued that relations between a belligerent state and a neutral state regarding the neutral state's environment are governed by standard peacetime rules, while international environmental law does not apply to relations between belligerents.

Human rights laws, commissions and tribunals can be used to investigate and sanctin environmental damage caused during international and non-international armed conflicts. For example, linking environmental damage to the violation of fundamenta human rights offers a new way to investigate and sanction environmental damages, particularly in the context of non-international armed conflicts. A variety of human rights fact-finding missions, including the one led by Judge Goldstone in the Gaza Strip in 2009, have investigated the environmental damages that have contributed to human rights violations. This approach could provide an interim solution to address environmental damages until international humanitarian law and associated enforcement institutions are strengthened.

Based on the results of the analysis of this report, the following recommendations can be formulated. The terms "widespread", "long-term" and "severe" in Articles 35 and 55 of Additional Protocol 1 to the 1949 Geneva Conventions should be clearly defined.

Guiding principles of the International Committee of the Red Cross for the Protection of the Environment during Armed Conflicts is required to be updated and further considered by the UN General Assembly. The International Law Commission should study existing international law on the protection of the environment during armed conflict and recommend how it might be clarified, codified and expanded. Countries wishing to protect the environment during armed conflicts should consider reflecting the relevant provisions of international law in national legislation and promote the possibility of creating a permanent body at the UN to monitor violations and resolve issues of compensation for damage caused to the environment. The international community should consider strengthening the role of the Permanent Court of Arbitration to consider disputes related to environmental damage during armed conflict.

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