

# Protection of the Natural Environment in Time of Conflict: Overview of the State of International Humanitarian Law and Position of the International Committee of the Red Cross (ICRC)

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## 1. *Foreword*

Let me thank, first of all, the Inter-American Institute of Human Rights (IIDH), and particularly Professor Cançado Trindade, for having considered the inclusion, within the program of this Seminar on Human Rights and Environmental Law, of the topic of environmental protection in time of armed conflicts, and, more concretely, the contribution of International Humanitarian Law (IHL) to the safeguarding of natural environment in war situations.

In my capacity of representative of the International Committee of the Red Cross (ICRC) for Brazil, I am glad to have the opportunity to present, although in a summarized way, a few points related to the subject. For that purpose, I shall found this exposé on the content of a Memorandum, officially communicated to the 3rd Preparatory Committee of the United Nations Conference on Environment and Development (UNCED) that took place in Geneva in August 1991, document that was aimed at giving an overview of the present state of International Humanitarian Law regarding the protection of environment, as well as presenting the position of the International Committee of the Red Cross on this particular matter.

And for those interested in deepening the subject, I shall gladly hand over a few studies that give a more comprehensive look at this theme.

## 2. *Background*

Ever since its inception, International Humanitarian Law (IHL) has set limits on the right of belligerents to cause suffering and injury to people and to wreak destruction on objects, including the natural environment.

The Declaration of St. Petersburg of 1868 already expressed this idea in the following terms:

"The only legitimate object which States should endeavour to accomplish during the war is to weaken the military forces of the enemy..."

On its side, Article 35 (1) of Protocol I to Geneva Conventions, about which we shall talk ahead, gives expression to this fundamental rule as follows:

"In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited".

The concept of proportionality also sets important limits on warfare: the only acts of war permitted are those that are proportional to the lawful objective of a military operation and actually necessary to achieve that objective.

These fundamental rules are now part of customary international law, which is binding on the whole community of nations. They are also applicable to the protection of the environment against acts of warfare.

The rules of IHL have been drawn up to address the specific problems caused by warfare. As such they are applicable as soon as an armed conflict breaks out.

Let us point out that, in addition to the rules of law pertaining to warfare, general (peacetime) provisions on the protection of the environment may continue to be applicable. This holds true in particular for the relation between a belligerent State and third parties.

The following paragraphs will review the major international legal rules which are relevant to the protection of the environment in time of war.

### 3. *The Hague Convention Respecting the Laws and Customs of War on Land of 18 October 1907, With the Hague Regulation Annexed Thereto, and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of 12 August 1949: the Protection of Property.*

In keeping with international law in general, IHL has been slow in recognizing that the environment requires protection by a set of specific rules of law.

Thus, the word "environment" does not appear in the Hague Regulations nor in the 1949 Geneva Conventions, and these treaties do not address specific environmental issues.

However, Article 23 (g) of the Hague Regulations states that is forbidden "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war".

In the event of belligerent occupation, Article 55 of the Hague Regulations and Article 53 of the Fourth Geneva Convention set limits to the discretion of the "Occupying Power". The latter rule deserves to be quoted:

"Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations".

Thus an Occupying Power that destroys, for example, industrial installations in an occupied territory, and in so doing causes damage to the environment, violates the Fourth Convention, if such destruction is not rendered "absolutely" necessary by military considerations; if such destruction is "extensive", the act becomes a grave breach of that same Convention (Article 147), i.e., a "war crime".

Obviously, the limits discussed in this section do not relate to environmental issues as such, but they do protect the environment by prohibiting the destruction of property.

4. *Protocol (I) Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict: the Protection of Environment as Such.*

Protocol I includes two provisions which deal directly with the danger that modern warfare represents for the environment. They protect the environment as such, although in relation to human beings who are the principal concern of IHL.

The rules are Articles 35 (3) and 55:

Article 35 - Basic rules

"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".

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".

Therefore, we can see that article 35 sets out the general rule applicable to all acts of warfare, whereas article 55 is intended to protect the civilian population from the effects of warfare on the environment.

In both cases the following are prohibited: (a) attacks on the environment as such; and (b) making use of the environment as a instrument of warfare.

Articles 35 (3) and 55 prohibit only such damage to the environment as if "widespread, long-term and severe", thereby making it clear that not all damage to the environment is outlawed. Indeed, in warfare damage to the environment is unavoidable. The point at issue, therefore, is where to set the threshold?

Moreover, the question as to what constitutes "widespread, long-term and severe" damage and what is "acceptable damage" to the environment is open to interpretation. Such discussion has to take the whole context into account, and will vary with changes in expectations with regard to the general need to protect the environment. Of course, the "travaux préparatoires" of the Diplomatic Conference have also to be taken into consideration, where relevant.

Besides Articles 35 (3) and 55, other provisions of Protocol I touch incidentally on the protection of the environment in armed conflict. In particular, Article 56 deals with the danger to the environment resulting from the destruction of dams, dikes or nuclear power stations, under the title "Protection of objects indispensable to the survival of the civilian population". Article 54 prohibits, under certain conditions, the destruction of, among others, agricultural areas or irrigation works.

Finally, Article 36 obliges the Parties to Protocol I to determine whether the use of a new weapon about to be developed, tested or acquired would be compatible with International Law; and of course, the rules concerning the protection of the environment are part of that international standard.

In conclusion, the provisions of Protocol I, in particular Articles 35 (3) and 55, do set up, from our point of view, a substantial legal bulwark against destruction of the environment in wartime.

Protocol I has now been accepted by 103 States. Its provisions concerning the protection of the environment are therefore binding international law for the vast majority of States, but not yet for all of them. Let us point out, nevertheless, that the main protagonists of the Gulf War were not bound by the provisions of Protocol I.

## 5. *Other International Instruments*

A number of other international instruments deal with the protection of the environment in time of war. Without going into details, the following treaties are worthy of mention:

- Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, of 17 June 1925.

- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, of April 1972.

- Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modifications Techniques (ENMOD), of 10 December 1976.

- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, of 10 October 1980.

Furthermore, all international rules which limit the development, production, testing or use of weapons of mass destruction make a significant contribution to the same objective. And the ongoing negotiations with a view to strengthening the ban on chemical weapons are also to be mentioned.

## 6. *The Special Case of Non-International Armed Conflicts*

The international law that protects victims of non-international armed conflict is less well-developed than IHL governing international armed conflict.

Article 3 common to the four 1949 Geneva Conventions does not say anything about protecting the environment from attack in civil war since it only addresses humanitarian issues in the strictest sense.

Whereas Protocol II additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, contains no provisions directly concerning the environment. However, article 14, on the "protection of objects indispensable to the survival of the civilian population", has a direct impact on warfare and the environment, with its prohibition of attacks on agricultural areas, irrigation works, etc.

There is consequently no doubt that IHL provisions concerning the protection of environment in internal conflicts deserve to be strengthened.

## 7. *The Question of Monitoring*

As is the case for any other rule of law, compliance with international provisions relating to the protection of the environment in time of war must be assured. In the event of non-compliance, action must be taken to establish the facts, to redress the wrong and to prevent the recurrence of such violations.

Among the various procedures set up by IHL to guarantee the implementation of its rules, three may be mentioned in this context.

### **7.1. *International Fact-Finding Commission*** **(Protocol I, Article 90)**

This Commission has the mandate, in the event of an alleged violation of IHL in the course of an international armed conflict, to ascertain the facts, and to offer its services to the parties concerned with a view to preventing further violations.

Obviously, the Fact-Finding Commission could render invaluable service should there be wartime damage to the environment.

The Commission's jurisdiction, however, depends on a special declaration of acceptance (Article 90.2), and, as of today, no more than 23 countries have accepted this optional procedure.

### **7.2. *Individual penal responsibility***

States Party to the Geneva Conventions and Protocols are bound to take all possible measures to ensure the proper discharge of their obligations in time of war. Among such measures, one of the more important is the adoption of appropriate national rules on penal sanctions.

Although causing widespread, long-term and severe damage to the environment as such is not a "grave breach" of Protocol I, such acts may be part of a "grave breach" of other provisions.

### **7.3. *Duties of all States Party to the Humanitarian Treaties***

Article I common to the Four Geneva Conventions and Protocol I stipulates that States Party are under the obligation "to ensure respect" for the said treaties. This underlines the shared responsibility of all Parties to the Conventions and Protocol I to make sure that humanitarian obligations are implemented by each and every State; and the duty to respect the environment in time of war is, of course, one of those obligations.

## **8. *Concluding Remarks and Future Prospects***

We have seen that modern International Humanitarian Law only addresses threats to the environment that are specific to warfare. In that particular context, the 1977 Protocols additional to the Geneva Conventions have made an important contribution to the strengthening of the international rules intended to protect the environment in time of armed conflict.

For that reason, ICRC urges all States that have not yet done so to ratify (or accede to) the two 1977 Protocols.

Furthermore, the true significance of the new law for the preservation of the natural environment in war has yet to be fully grasped. Thorough studies must be undertaken on the national and international levels, taking into account not only recent experiences with attacks on the environment but also the growing international concern for environmental protection. Practical steps must hence be worked out with a view to ensuring that all parties to an armed conflict comply with the new rules.

The drafting of a summary of the relevant provisions to remind military commanders of their obligations in this respect might be a first step in ensuring full implementation of the rules on the protection of the environment.

The ICRC, for its part, was intending to submit proposals to the 26th International Conference of the Red Cross and Red Crescent, to be held in Budapest/Hungary, in November 1991; with the postponement of the Conference, ICRC has decided to convene a meeting of international experts, scheduled for the 27th - 29th of March 1992 in Geneva, in order to make a comprehensive and updated balance on the whole subject.

The ICRC also trusts that the United Nations Conference on Environment and Development - Rio 92 - will give due consideration to the specific problem of damages to natural environment caused by armed conflicts.