

THE PROTECTION OF THE ENVIRONMENT DURING WARFARE: AN INTERNATIONAL ENVIRONMENTAL LAW PERSPECTIVE

Foreword

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It is now widely acknowledged that armed conflicts cause multiple 'environmental degradation and destruction, affecting the well-being, health and survival of people across the globe'.¹ Indeed, during hostilities, belligerents usually destroy habitats and kill wildlife on a wide scale, thereby disrupting the harmonious functioning of ecosystems and threatening ecological balance of fragile areas.² When attacking industrial sites, factories, and other infrastructure, they often release toxic substances which contaminate soils and, in turn, groundwater and drinking water supplies.³ They also fabricate, store, and use weapons and munitions which contain similar hazardous products,⁴ such as lead, steel, mercury, tungsten, copper, or depleted uranium. They sometimes employ toxic agents, like herbicides, as weapons of war to destroy crops or to remove trees and dense tropical foliage that provided enemy cover.⁵ When conducting military operations, belligerents also contribute to global warming and climate change by consuming enormous amounts of energy, like fossil fuel, or by destroying large areas of forest or big industrial

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1 See International Committee of the Red Cross (ICRC), *Guidelines on the Protection of the Environment in Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary* (ICRC, 2020), available online at www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating (visited 1 January 2023), at § 1.

2 Geneva Call, 'Armed Conflict and the Environment', 8 October 2011, available online at <https://www.genevacall.org/fr/armed-conflict-and-the-environment/> (visited 1 January 2023).

3 For an in-depth analysis of the various effects of armed conflicts on the exposure to toxic and dangerous products, see Report of the Special Rapporteur, O. Ibeanu, 'Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights', Human Rights Council, UN Doc. A/HRC/5/5, 5 May 2007, §§ 5–17.

4 K. Hulme, *War Torn Environment: Interpreting the Legal Threshold* (Martinus Nijhoff Publishers, 2004), at 118.

5 Human Rights Council, *supra* note 3, at § 20.

facilities.⁶ To sustain war economies, they harmfully exploit natural resources,⁷ and conduct illicit trafficking of substances and ammunitions,⁸ which are ultimately often dumped into oceans, thereby threatening marine life. They abandon explosive and toxic remnants of war on the battlefield, which also causes lasting environmental degradation.⁹ All these harmful effects are aggravated by the fact that most armed conflicts occur in a context where governmental authorities are unable to adequately anticipate and respond to environmental damage due to the collapse of governance and the deterioration of infrastructures and services.¹⁰

Despite increasing ecological challenges, the international humanitarian law (IHL) framework remains overwhelmingly anthropocentric¹¹ and largely incomplete to face the above multifaceted environmental risks. Indeed, the few IHL provisions on the conduct of hostilities that are designed to protect the environment are submitted to restrictive conditions of application¹²; so restrictive that some scholars have considered that they are inapplicable in practice.¹³ Moreover, reflecting the reluctance of states to accept heavy constraints on the way they combat rebel groups, no similar provisions protecting the environment apply in the context of non-international armed conflict. The international criminal law (ICL) regime is not better equipped than IHL to deal with environmental challenges. For instance, the war crime provision contained in the Statute of the International Criminal Court (ICC) triggers individual criminal responsibility under conditions which are even more restrictive than those that apply to the protection of the environment under IHL.¹⁴ Other international crimes — such as crimes against humanity and acts of genocide — focus on the safeguard of human interests, without encompassing environmental criminality as such. Efforts are underway to strengthen ICL in this regard: some scholars and states have recently suggested that a new crime of ecocide be added to the jurisdiction of the ICC.¹⁵ But, so far, this proposition has not been agreed upon by States Parties to the ICC Statute.

6 Conflict and Environment Observatory, 'The military's contribution to climate change', 16 June 2021, available online at <https://ceobs.org/the-militarys-contribution-to-climate-change/> (visited 1 January 2023); ICRC, *supra* note 1, at § 2.

7 ICRC, *supra* note 1, at § 3.

8 Human Rights Council, *supra* note 3, at § 22.

9 D. Weir, 'A New Framework for Assisting Victims of Toxic Remnants of War', International Union for Conservation of Nature (IUCN) blog, 8 January 2021, available online at <https://www.iucn.org/news/world-commission-environmental-law/202101/a-new-framework-assisting-victims-toxic-remnants-war> (visited 1 January 2023).

10 ICRC, *supra* note 1, at § 3.

11 See generally M. Schmitt, 'Green War: An Assessment of the Environmental Law of Armed Conflict', 22 *Yale Law Journal* (1997) 1–108, at 13–14.

12 Arts 35(3) and 55, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (AP I).

13 M. Bothe, C. Bruch, J. Diamond, and D. Jensen, 'International Law Protecting the Environment during Armed Conflict: Gaps and Opportunities', 92 *International Review of the Red Cross (IRRC)* (2010) 569–592, at 576.

14 Art 8(2)(b)(iv) ICCSt.

15 See Stop Ecocide Foundation, *Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text*, June 2021, available online at <https://www.stopecocide.earth/legal-definition> (visited 1 January 2023).

That being said, over the last four decades, a considerable body of international conventions, customary principles, and soft law instruments has progressively emerged, in parallel to IHL, in order to prevent and redress environmental harm during peacetime. This international environmental law (IEL) regime offers significant protection to the environment against the general deterioration of natural habitats and ecosystems caused by mankind. Hundreds of environmental treaties are currently in force. Some propose a sectorial approach which aims at protecting particular species or natural areas. Other treaties are, instead, holistic in nature: they focus not only on environmental protection and conservation but, more broadly, also on issues of common interest for humanity, such as sustainable development and the impact of climate change on ecosystems and biological diversity.

Yet, quite surprisingly, it remains unclear whether — and, if so, how — such an IEL regime could contribute to the protection of the environment during warfare. Numerous articles¹⁶ and reports¹⁷ have been devoted to the protection of the environment by IHL. They usually make references to norms

16 See e.g. G. Herczegh, 'La protection de l'environnement naturel et le droit humanitaire', in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Martinus Nijhoff Publishers, 1984); Schmitt, *supra* note 11; Bothe *et al.*, *supra* note 13; D. Montaz, 'Les règles relatives à la protection de l'environnement au cours des conflits armés à l'épreuve du conflit entre l'Irak et le Koweït', XXXVII *Annuaire français de droit international* (1991) 203–219; M. Bothe, 'The Protection of the Environment in Times of Armed Conflict', 34 *German Yearbook of International Law (GYIL)* (1991) 54–62; A. Roberts, 'Environmental destruction in the 1991 Gulf War', 32 *IRRC* (1992) 538–553; L. Lijnzaad and G.J. Tanja, 'Protection of the Environment in Times of Armed Conflict: The Iraq-Kuwait War', 40 *Netherlands International Law Review* (1993) 169–199; W. Heintschel von Heinegg and M. Donner, 'New Developments in the Protection of the Natural Environment in Naval Armed Conflicts', 37 *GYIL* (1994) 281–314; W.D. Verwey, 'Protection of the Environment in Armed Conflict: in Search of a New Legal Perspective', 8 *Leiden Journal of International Law (LJIL)* (1995) 7–40; R. Desgagné, 'The prevention of environmental damage in time of armed conflict: Proportionality and precautionary measures', 13 *Yearbook of International Humanitarian Law* (2000) 109–129; Y. Dinstein, 'Protection of the Environment in International Armed Conflict', 5 *Max Planck Yearbook of United Nations Law* (2001) 523–549; C. Droegge and M.-L. Tougas, 'The Protection of the Natural Environment in Armed Conflict – Existing Rules and Need for Further Legal Protection', 82 *Nordic Journal of International Law (NJIL)* (2013) 21–52; T. Carson, 'Advancing the legal protection of the environment in relation to armed conflict: Protocol I's threshold of impermissible environmental damage and alternatives', 82 *NJIL* (2013) 83–101; J.M. Henckaerts and D. Constantin, 'Protection of the Natural Environment', in A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, 2014) 469–491; D. Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (Cambridge University Press, 2015); D. Fleck, 'Legal protection of the environment: The double challenge of non-international armed conflict and postconflict Peacebuilding', in C. Stahn, J. Iverson and J.S. Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (Oxford University Press, 2017) 203–219; T. Smith, 'Critical Perspectives on Environmental Protection in Non-International Armed Conflict: Developing the Principles of Distinction, Proportionality and Necessity', 32 *LJIL* (2019) 759–779; C.R. Payne, 'Protection of the natural environment', in B. Saul and D. Akande (eds), *The Oxford Guide to International Humanitarian Law* (OUP, 2020) 205–234.

17 See e.g. United Nations Environment Programme (UNEP), *Protecting the Environment During Armed Conflicts: An Inventory Analysis of International Law* 20 (2009); ICRC, *supra* note 1.

and principles stemming from IEL. But few studies¹⁸ have been fully dedicated, so far, to the many problems raised by the applicability of IEL to armed conflicts. The current state of research in this field is in sharp contrast to the growing body of scholarship devoted to the protection and conservation of the environment in peacetime. The lack of study on the relationship between IHL and IEL is striking in comparison to the high number of books and articles dedicated to the interplay between IHL and international human rights law (IHRL).

It is true that IHL and IHRL share a common goal: they both strive to protect the lives, health, and dignity of individuals, albeit from a different angle. In contrast, the protection of the environment — which is, by definition, the main purpose of IEL — has never been a priority for IHL. Moreover, these two branches of international law operate under different rationale. IHL aims at imposing upon states and non-state actors vertical obligations protecting individuals from the dangers of war and regulating the conduct of hostilities. IEL is less vertical in nature. It is essentially geared towards reinforcing horizontal cooperation among states to prevent, control, and repair transboundary environmental harm. Obviously, preserving such a horizontal relationship might appear to be incompatible with a state of war, especially between belligerents which are fighting against each other. The relative paucity of interest by IHL scholars for IEL might also be explained by the highly technical nature of this body of international law, which appears to be piecemeal and fragmented in comparison to IHL.

As a result, by studying the protection of the environment in armed conflict mainly from an IEL perspective, this symposium aims at filling an important gap which exists in the academic literature and in institutional reports. To do so, a first contribution — by Raphaël van Steenberghe — will address cross-cutting challenges created by the interaction between IHL and IEL. A theoretical approach, inspired from an analogy with the interplay between IHL and IHRL, will be developed. That approach involves an ‘interpretation process’, whereby IHL concepts and norms are interpreted in light of IEL standards and values, and an ‘application process’, by which IEL conventions and principles are used to complement IHL through their direct application to war-related activities or incidents. Once established, this theoretical framework will be tested and concretely applied in relation to certain fields regulated under IEL,¹⁹ including biodiversity — by Karen Hulme; freshwater resources — by Mara Tignino and Tadesse Kebebew; the sea — by Andrew Norris; and hazardous substances and activities — by Jérôme de Hemptinne. The symposium will end with some general thoughts on the repression of environmental crimes under ICL and the impact that IEL may have on this field of law.

18 See however, for recent detailed studies fully devoted to that issue, B. Sjöstedt, *The Role of Multilateral Environmental Agreements: A Reconciliatory Approach to Environmental Protection in Armed Conflict* (Hart, 2020); A. Dienelt, *Armed Conflicts and the Environment: Complementing the Laws of Armed Conflict with Human Rights Law and International Environmental Law* (Springer, 2022).

19 P. Sands and J. Peel, *Principles of International Environmental Law* (Cambridge University Press, 2018).