

# Cases

## Legal Protection Of The Environment In Wartime

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The Gulf War is possibly the most recent reminder that however many international legal instruments may exist to protect the environment in peacetime, these may all be rendered nugatory by the sheer capacity for destruction possessed by modern armed hostilities. At both treaty and customary levels, international environmental law fails to directly address situations of armed conflict.<sup>1</sup> However, some environmental protection provisions are to be found in humanitarian conventions, as an expression and extension of the customary humanitarian principle of *durante bello*, (the rights of belligerents to injure the enemy are not unlimited, but rather must be proportional to the military need). This article proposes to consider the inadequacy of the existing provisions.

There are two main conventions that offer protection to the environment during armed conflict. The first additional Protocol to the Geneva Conventions of 1949<sup>2</sup> develops the concern for the protection of human rights in the 1949 Geneva Conventions, by seeking to regulate the means and methods of warfare. The other instrument is the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques.<sup>3</sup> This Convention arose from a proposal by the USSR in 1974 concerning the use of environmental techniques for military purposes, possibly made in response to the general omission of the subject from the UN Conference on the Human Environment in Stockholm in 1972.<sup>4</sup>

### Protocol I<sup>5</sup>

Protocol I extends the application of the Geneva Conventions by broadening the definition of "international armed conflicts"<sup>6</sup> and the range of people

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- 1 For example, *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties* 1969, (1975) UKTS 77, Cmnd 6056; 9 ILM 25 (1970) Art 1.2: "However, no measures shall be taken under the present Convention against any warship . . . Customary law in this area is confined in scope to liability of a State for transboundary harm caused by activity within its territory (and implicitly, over which the State had control): see the "Trail Smelter Arbitration" (1941) 3 RIAA 1905 and *Corfu Channel (Merits) Case* (1949) ICJ Rep 4.
- 2 Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted (at Geneva) 8 June 1977, entry into force 7 December 1978, 16 ILM 1391, (hereinafter Protocol I). As of February 1990, 99 states were parties.
- 3 Adopted by UNGA Res 31/72 on 10 December 1976, entry into force 5 October 1978, 16 ILM 88. As of May 1991, 55 states were parties.
- 4 Schindler, D, and Toman, J, (eds) *The Laws of Armed Conflicts* (1988) at 163.
- 5 While some provisions of Protocol I echo customary principles, this is not true of the environmental ones. It is unlikely these have since become customary, despite the large number of parties to Protocol I, (see above n2), given that such nations as the US, UK and France are not yet parties.
- 6 Article 1(4) Protocol I, above n2.

protected. It also strengthens the protection of the civilian population during hostilities by defining military objectives and prohibiting attack on civilian persons and objects. Most environmental provisions in Protocol I<sup>7</sup> are expressions of the general requirement to distinguish between civilian and military targets and to direct attacks only against the latter.<sup>8</sup> They originate from and are generally limited to a concern with the ultimate impact of environmental damage upon human welfare. However, there is some advancement made upon this in article 35 of Protocol I and also in the Environmental Modification Convention, both of which seek to protect the environment itself.

*Objects indispensable to the survival of the civilian population*

Article 54 seeks to protect objects indispensable to the survival of the civilian population, and prohibits attacks on such things as foodstuffs, agricultural areas and water supplies. However the provision is qualified, firstly by the fact that any target that may partially aid the military effort becomes legitimate and secondly by the requirement of a specific intention to deprive the civilian population of the sustenance afforded by the target. Since the provision expresses a customary prohibition on starving the enemy population as a means of warfare, it does not offer protection to a party's own environment or population. Indeed, paragraph 5 exempts a party from liability for acts done in territory under its control in defence against invasion, where required by imperative military necessity. This is a significant limitation on the operation of the provision.

*Works or installations containing dangerous forces*

Article 56 prohibits attacks against works or installations containing dangerous forces. However, the article's scope is limited to three objects: dams, dykes and nuclear generating installations. It would therefore be of no relevance to the torching of oil fields or oil spills, for instance. The protection only applies "if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population". Furthermore, paragraph 2 permits exceptions, such as where the installation is being used in direct support of military activity. This provision would be supplemented by the Environmental Modification Techniques Convention, which will be dealt with below.

The above provisions make it clear that protection of the environment is limited firstly by loss to the human population, and secondly by the fact that while humanitarian concerns are the impetus behind Protocol I, they are imperfectly expressed in its provisions, which are the result of the consensus of nations. The Protocol itself reflects a compromise, a pragmatic acceptance of the continued use of force by states in spite of Article 2(4) of the United Nations Charter. Accordingly, there is a tension in several provisions between military necessity and humanitarian concerns, with the former generally prevailing. This is evident even in the positive duty in Article 57 for states to take all feasible precautions in attack, to the extent of calling off an

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7 For example, arts 54, 55, 56, 57.

8 Article 48, Protocol I, above n2.

offensive where in doubt as to the legitimacy of target. Several states have interpreted "all feasible precautions" as including not only humanitarian, but also military considerations.<sup>9</sup>

*Widespread, long-term and severe damage to the environment*

Article 35.3 of Protocol I prohibits employment of means or methods of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. Article 55 repeats the prohibition, with an emphasis on protection of the health or survival of the population. "Population" is used rather than the usual "civilian population" to reflect the provision's emphasis upon long-term, ecological damage that will last well beyond the duration of the conflict itself.<sup>10</sup> Article 55.2 prohibits reprisals against the environment.

At first glance, Articles 35.3 and 55 appear to be far more comprehensive than the other Protocol I provisions. Article 35.3 follows and elaborates upon the prohibition in paragraph 2 against means or methods of warfare that create "unnecessary suffering". Accordingly, the context infers that long-term damage to a nation's environment is not justifiable by military necessity. The two articles cover not only intended but collateral effects, and do not permit exceptions/derogation on grounds of self defence or other military considerations. No distinction is drawn between a party's own and enemy territory. Protection is extended to the environmental damage rather than the effects of such damage on humans.<sup>11</sup>

However, the above features come at a price — the high threshold of damage required before the provisions come into operation. The damage must satisfy a threefold requirement that it be "widespread, long-term and severe". Secondly there is no agreement upon the definition of these terms. Regarding the meaning of "long-term" in particular, the Rapporteur stated, after extensive discussion by the Drafting Committee that "it is impossible to say with certainty what period of time might be involved".<sup>12</sup> The general consensus was in the order of decades, since Articles 35 and 55 are addressed to ecological harm, (such as interruptions of food chains, or destruction having carcinogenic or mutagenic effects) which is conventionally measured in terms of decades: "references of twenty to thirty years were made by some representatives as being a minimum."<sup>13</sup>

The Commentator on Protocol I states that "like the oceans, the natural environment in an ecological sense is *res communis*",<sup>14</sup> the common heritage of mankind, not subject to appropriation but for use by all, without

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9 See declarations made by Austria, Belgium, Italy, Netherlands, Switzerland, United Kingdom, above n4 at 704 ff.

10 International Committee of the Red Cross, Commentary on the Additional Protocols to the Geneva Conventions (1987) at 663, par 2134.

11 Although even here this is doubtful. The Rapporteur wrote: "What the article is primarily directed to is . . . such damage as would be likely to prejudice, over a long term, the continued survival of the civilian population or would risk causing it major health problems" above n10 at 417, par 1454.

12 Ibid.

13 Ibid.

14 Above n10 at 416, n116.

exclusive jurisdiction or sovereign rights. However, until a case on article 35 and/or 55, their extraordinarily high threshold renders their value uncertain, and really reflects the reluctance on the part of the negotiating nations to surrender their territorial sovereignty.

### *Environmental Modification Techniques Convention*<sup>15</sup>

Parties to this convention undertake 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.<sup>16</sup> It 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.<sup>17</sup> “Long-lasting” is to be interpreted in contradistinction to “long-term” in the Protocol I provisions,<sup>18</sup> and is satisfied by seasonal disturbances and phenomena rather than ecological imbalances (conventionally measured in terms of decades). Like the Protocol, the Convention affords protection to the environment incidentally, its central focus being against “effects extremely harmful to human welfare”.<sup>19</sup> There is the possibility that the phrase “as the means of destruction, damage or injury to another state” in Article I implies that unintended effects of, say, acts done in defence of territory may not be covered by the prohibition. In short, it is uncertain until the provision is actually invoked how strong it will prove against deeply ingrained notions of “military necessity”.

In summary, consideration of Protocol I and the Environmental Modification Convention provisions yields the conclusion that the threshold at which they prohibit environmental destruction is too high, and that they permit broad exceptions. This is because any environmental protection in Protocol I is essentially a derivative of humanitarian concerns. Secondly, humanitarian principles are themselves imperfectly realised in the Protocols.<sup>20</sup> These two factors represent serious hurdles to development of environmental laws that prevail over military considerations.

### *Prospects for International Environmental Protection in War*

In a time when people are beginning to recognise the environment itself as a new victim in armed conflict,<sup>21</sup> current laws of war are inadequate to address

15 The large number of parties to the Convention is a good indication of its acceptance as customary law, however the large proportion of developing nations represented in the abstentions (29 out of 30 abstentions) casts some doubt upon this: above n2.

16 Article 1, above n2.

17 Understanding relating to art 2, above n2.

18 Above n10 at 416, par 1453.

19 Introductory Paragraph of the Convention, above n2.

20 The Protocols are anomalous in nature. The Commentary hails them as an advance from and rejection of “Kriegsraison” (“the necessities of war take precedence over the rules of war”), see above n10 at 391, and yet their existence is evidence that humanitarian sentiment is not fully realised; that war continues to occur (as pointed out in the declaration on signature by the Holy See, see above n4 at 710).

21 As reflected by the introduction of terms such as “environmental terrorism” and “ecocide” into the military jargon accompanying the Gulf conflict, see Lee, S, “A Geneva Convention for the Environment” (1991) 135 *Sol J* 386.

the threat. In wartime, it seems that economic effects, plague and pollution refuse to observe national boundaries, but that international law plainly still does.<sup>22</sup> Indeed, it is in belligerent contexts that arguments of autonomy and sovereignty are most forcefully invoked. For example, the Commentator upon article 54.5 states, "at the Diplomatic Conference it soon became clear that many States did not wish to limit the means available to them of defending their national territory against an invader, including carrying out 'scorched earth' actions which would prevent or slow down the advance of the adverse forces. There have been some notorious examples of such 'total defence' in the recent past which have often resulted in significant long-term damage . . . : forest fires, breaching dykes, flooding cultivated land with sea water".<sup>23</sup>

There are two possible bases upon which international law can proceed and develop.<sup>24</sup> One is that viewing the environment's welfare as incidental to human welfare is sufficient and that environmental law can be advanced within humanitarian parameters. For instance, accountability for the torching of the oil fields in the recent Gulf War might be covered by Article 53 of the fourth Geneva Convention of 1949, which prohibits unnecessary destruction of property by the Occupying Power,<sup>25</sup> or even more generally, as an aspect of general responsibility for unlawful aggression.<sup>26</sup> The success of this notion will depend on the ability of nations to identify their own self interest as inextricably linked with that of others. The second view is that these principles would not provide a basis for states to sacrifice short term, national, military interests to ecological considerations. The humanitarian commitment of nations has been characterised as much by self interest and concern for the efficient use of force as by altruism.<sup>27</sup> Accordingly, international protection can only proceed on an independent foundation of environmental stewardship.

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- 22 Thorne, M, "Establishing the Environment as a Human Right" (1991), 19 *Denver J Int'l L Pol* 301 at 323.
- 23 Above n10 at 658, par 2116.
- 24 The debate is canvassed in the context of the Gulf War in *Proceedings of the 85th Annual Meeting of the Am Soc Int'l L* (1991) at 214-29.
- 25 Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, 1949, 75 *UNTS* 287 at 332. It has been suggested that art 53 is less applicable in this context than art 23(g) of the regulations annexed to the (Hague) Convention Respecting the Laws and Customs of War on Land, 18 October 1907, 36 *Stat* 2277 at 2302: see Zedalis, R J, "Burning the Kuwaiti Oilfields and the Laws of War" (1991) 24 *Vanderbilt J Transn'l L* 711.
- 26 Security Council Resolution 687, 3/4/91: "The Security Council reaffirms that Iraq . . . is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait . . ." (see also 30 *ILM* 846).
- 27 Jessup, P C, "Political and Humanitarian Approaches to Limitation in Warfare" (1957) 51 *AJIL* 757, at 761.