

UNIVERSITY OF THE WESTERN CAPE

**The Environment as a Casualty of War: The Role of the
African Union Regulatory Framework towards
Securing Environmental Protection During Armed
Conflicts**

Mini-Thesis submitted in partial fulfilment of the requirements for the LLM degree in the
Faculty of Law of the University of the Western Cape

CHARLYN KENTARO

3117607

PREPARED UNDER THE SUPERVISION OF

PROF. WERNER SCHOLTZ

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Plagiarism Declaration

I declare that this mini-thesis is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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Abstract

This mini-thesis analyses the international legal framework governing the protection of the natural environment during armed conflicts. It critically examines the normative rules in international humanitarian law and international environmental law in respect of environmental damage during armed conflicts and it highlights the strengths and shortcomings of international law in this regard.

Furthermore, this thesis investigates how the regulatory structures of the African Union (AU) address the problem of environmental damage during armed conflict. It draws on the aforementioned analyses to determine how regional law in Africa differs from the international regime and in what ways the regional framework may serve to complement the international legal regime in order to strengthen the protection of the environment during armed conflict on the continent.

Title

The Environment as a Casualty of War: The role of the African Union regulatory framework towards securing environmental protection during armed conflicts

Keywords

- African Union
- Armed conflict
- Environmental protection
- International environmental law (IEL)
- International humanitarian law (IHL)
- Natural resource exploitation
- Principle of permanent sovereignty

Chapter 1

1.1 Problem Statement

Typically, the primary casualties of armed conflict are human beings. However, wars are always fought within the natural environment and this usually results in harm to the environment.

Throughout history, the environment has been the casualty of deliberate damage as a strategy of war, for example through pollution of water resources or scorched earth policies. An infamous recent example is the 1991 Gulf War in which Saddam Hussein set fire to Kuwaiti oil wells.¹ More frequently than deliberate damage, the natural environment suffers collateral harm during armed conflict. During the 1994 Rwandan conflict, for example, Hutu militia groups dumped bodies of victims into the Kagera River, poisoning the water and killing aquatic life. The potential for harm has increased over the years, as advancements in technology and science have provided weapons of mass destruction such as biological and nuclear warfare which can have devastating impacts on the environment.

In Africa, the environment continues to suffer from the effects of wars and insurgencies alike: Millions of refugees and internally displaced people place a strain on existing resources; armed conflict affects conservation mechanisms as game reserves and wildlife become a target for belligerents;² and the extraction of minerals is often undertaken without regard to sustainable use, environmental impact assessments or plans for rehabilitation.

¹ Hulme K 'Armed conflict, wanton ecological devastation and scorched earth policies: How the 1990-91 Gulf conflict revealed the inadequacies of the current laws to ensure effective protection and preservation of the natural environment' (1997) 2 *Journal of Armed Conflict Law* 45.

² It was reported in June 2013 that the Lord's Resistance Army was engaged in elephant poaching and illegal ivory trade to sustain the group's activities in Democratic Republic of Congo. See Agger K & Huston J 'Kony's Ivory: How Elephant Poaching in Congo Helps Support the Lord's Resistance Army' (2013) Enough Project. See also UNEP, CITES, IUCN, TRAFFIC "Elephants in the Dust – The African Elephant Crisis," A Rapid Response Assessment. United Nations Environment Programme (2013), available at http://www.cites.org/common/resources/pub/Elephants_in_the_dust.pdf [accessed 10 October 2013].

In the DRC where fighting continues, the environment suffers direct impact from the armed conflict in the form of landmines and other unexploded ordnance. The conflict has forced more than 2.4 million people to flee their homes,³ and encroach on protected areas. The Virunga National Park lost the equivalent of 89 hectares a day in illegal firewood harvesting by internally displaced persons.⁴

During the war in Sierra Leone, Revolutionary United Front (RUF) fighters targeted water resources such as tanks and wells, and engaged in illicit diamond mining.⁵ These mining sites were left un-rehabilitated after the conflict, leading to the loss of arable land.⁶

The extraction of natural resources often takes place in areas which are rich in bio diversity, affecting wildlife reserves, endangered and vulnerable species, for example the mountain gorilla population of the DRC.⁷ In Angola and Mozambique, thousands of antelope and elephant fall prey to landmines.⁸

The laws governing environmental protection during armed conflict are to be found in the rules of international humanitarian law – specifically the law of armed conflict (*jus in bello*) and international environmental law. The intersection of these bodies of rules is a relatively recent development, as it was traditionally believed that the laws of wars and peacetime laws were mutually exclusive.⁹ The gradual disappearance of the dichotomy between war and

³ UNEP (2011) ‘The Democratic Republic of Congo: Post conflict environmental assessment synthesis report for policy makers’ available at <http://unep.org/drcongo/> 26 (accessed 22 October 2013).

⁴ UNEP (2011) ‘The Democratic Republic of Congo: Post conflict environmental assessment synthesis report for policy makers’ available at <http://unep.org/drcongo/> 26 (accessed 22 October 2013).

⁵ UNEP (2010) ‘Sierra Leone: Environment, conflict and peace building assessment Technical report’ available at <http://unep.org/conflictsanddisasters/45> (accessed 23 October 2013).

⁶ UNEP (2010) ‘Sierra Leone: Environment, conflict and peace building assessment Technical report’ available at <http://unep.org/conflictsanddisasters/45> (accessed 23 October 2013).

⁷ See generally Kalpers J et al ‘Gorillas in the crossfire: population dynamics of the Virunga mountain gorillas over the past three decades’ (2003) 37 *International Journal of Conservation* 326

⁸ UNEP (2006) ‘Africa Environment Outlook 2’ available at <http://www.unep.org/dewa/Africa/publications/AEO-2/content/203.htm> (accessed 01 November 2013).

⁹ Boelaert-Suominen SAJ ‘International Environmental Law and Naval War: The Effect of Marine Safety and Pollution Conventions During International Armed Conflict’ (2000) *Newport Paper No.15* 100.

peace raises interesting questions about the relationship between IEL and *jus in bello*, and its implications for environmental protection.

Several scholars have indicated that an analysis of both international humanitarian law and international environmental law reveals deficiencies in their application.¹⁰

1.2 Significance of this Study

It is the aim of this thesis to make a two-fold contribution. First, it provides an assessment of the protection afforded to the environment during armed conflict by international humanitarian law and international environmental law.

Secondly, it undertakes an analysis of the African regional legal framework of environmental protection in armed conflict, which is a needed and valuable contribution to the existing analyses on the subject.

Finally, this thesis determines how regional law in Africa may serve to complement the international legal regime in order to strengthen the protection of the environment during armed conflict on the continent.

1.3 Research Question

Does the existing international law provide a complete and coherent framework to deal with the issue of deliberate and collateral damage to the environment as a result of armed conflict?

How does African Union law complement and shore up the weaknesses in the international legal regime protecting the environment during armed conflict on the African continent?

¹⁰ Dam de Jong D 'International law and resource plunder: the protection of natural resources during armed conflict' (2008) *YIEL* 29.

1.4 Hypothesis

Deficiencies exist in the current normative framework of international humanitarian law and environmental law. African Union law may function as a complement in these gaps for environmental protection on the continent and investigates what can be done to strengthen the regional legal regime.

1.5 Literature Review

A considerable body of literature has been written on the protection of the environment from damage during armed conflicts.¹¹ Most authors focus on the international legal regime for the protection of natural resources during armed conflicts and its general criticisms. In the 2008 Oxford Yearbook of International Environmental Law, Dam de Jong examined the international legal framework for the protection of natural resources during armed conflict. However, the article focused specifically on the rules relating to the exploitation of natural resources by parties to armed conflict. It does not address the role of the African Union legal framework on environmental protection during armed conflict.

Okowa suggests that the African Charter on Human and People's Rights read together with the 1966 Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights could provide a medium for accountability for illegal exploitation of natural resources in the context of armed conflict.¹² However, she does not address the enforcement hurdles in any detail.¹³

Van der Linde in an article reviewing the African Convention on Nature and Natural Resources mentions the inclusion of provisions relating to environmental protection during

¹¹See generally Gleditsch N 'Armed conflict and the environment: A critique of the literature' (1998) 5 *Journal of Peace Research* 381- 400; Richards PJ 'Mars meets mother nature: Protecting the environment during armed conflict' (1999) *Stetson Law Review* 1047 -1090; Dinstein Y 'Protection of the environment in international armed conflict' 2001 *Max Planck Yearbook of United Nations Law* 523-549.

¹²Okowa P 'Natural resources in situations of armed conflict' 258.

¹³Okowa P 'Natural resources in situations of armed conflict' 260-1.

armed conflict in the convention.¹⁴ However the article does not deal with these provisions in any depth.

Van der Poll and Booley examined the effectiveness of the principles and rules which protect the environment during armed conflict, but the focus of this article was not on the role of the African regional framework in securing environmental protection, but rather on general international law.¹⁵

In conclusion, the role of African Union law in protecting the environment in armed conflict is an understudied topic. An investigation of what lessons can be learned from international law to bolster the effectiveness of AU law also has not been undertaken in legal literature. This thesis will therefore provide a unique contribution.

1.6 Preliminary Structure

Chapter One: Introduction

Chapter Two: Protection of the Environment during Armed Conflict under International Humanitarian Law

This chapter provides a critical assessment of international humanitarian law, particularly the law of armed conflict (*jus in bello*) in regard to environmental protection. It will analyse international humanitarian law in relation to four categories: treaty laws which provide direct protection to the environment; those which indirectly provide environmental protection during times of armed conflict; customary international humanitarian law and the general principles of IHL that are applicable to the environment.

¹⁴ Van der Linde M 'A review of the African Convention on Nature and Natural Resources' (2002) 2 *African Human Rights Law Journal* 55.

¹⁵ Van der Poll L and Booley A 'In our common interest: Liability and redress for damage caused to the natural environment during armed conflict' (2011) 15 *Law, Democracy and Development* 90.

It highlights the key gaps and deficiencies in the IHL framework and discusses proposals which have been forwarded to strengthen environmental protection in international and non-international armed conflict.

Chapter Three: Protection of the Environment during Armed Conflict under International Environmental Law

This chapter will assess the extent to which peacetime environmental law is applicable during armed conflict. It discusses the scholarly perspectives forwarded as to whether and to what extent multilateral environmental agreements continue to apply during armed conflict. It will also highlight the applicability of customary IEL and soft-law instruments. Finally, the shortcomings of the current regime in its approach to environmental protection in armed conflict are discussed.

Chapter Four: The African Regional Legal Regime on Protection of the Environment during Armed Conflict

This chapter considers the legal framework governing environmental protection in Africa, specifically during armed conflict. It analyses the relevant treaties and protocols adopted under the African Union; as well as other regional mechanisms such as the New Partnership for Africa's Development (NEPAD). It provides an assessment of the potential contribution of African Union law to the international discourse on environmental protection during armed conflict and argues that regional framework goes further than IHL and IEL in securing the protection of natural resources in armed conflict.

Chapter Five: Concluding remarks

1.7 Research Methodology

The research for this thesis will be undertaken as a desktop study. The study will be based primarily on international treaty documents and protocols to these treaties, as well as regional conventions and additional protocols. Research will also be drawn from academic books and journal articles by legal scholars.

Chapter Two: Protection of the Environment during Armed Conflict under International Humanitarian Law

2.1 Introduction

The corpus of international humanitarian law (IHL) plays an important role in relation to the protection of the environment in times of armed conflict. This is addressed by the law of war and armed conflict, or *jus in bello*, which focuses on the protection of people who are not, or are no longer, taking part in armed conflict as well as limiting the methods and means of warfare available to States.¹⁶

The rules of international humanitarian law were largely developed to protect human beings and their property; and therefore only a few provisions afford direct protection to the environment during times of war and armed conflict.¹⁷ Protection of natural resources is usually inferred from the rules regulating the means and methods of warfare as well as from the protection afforded to civilian objects and property.

It is further important to note that the rules of international humanitarian law were developed at a time when international conflicts were common. However, today, the overwhelming majority of conflicts are internal in nature, particularly in Africa.¹⁸ Therefore, many laws within the IHL regulatory framework are inapplicable or restrictive with regard to internal armed conflict.

Accordingly the aim of this chapter is to provide a critical and comprehensive assessment of international humanitarian law, particularly the law of armed conflict (*jus in bello*), as found in treaty law and custom. It analyses the approach of *jus in bello* to environmental protection during armed conflict, and identifies the areas in which the current regime does not

¹⁶ Sands P& Peel J *Principles of International Environmental Law* 3ed (2012) 792-793.

¹⁷Sands P & Peel J (2012) 793.

¹⁸Uppsala Conflict Data Program Database <http://www.ucdp.uu.se/gpdatabase/search.php> (last accessed on 22 October 2013).

adequately address environmental degradation attendant to international and internal armed conflict.

This chapter will analyse international humanitarian law in relation to four categories: treaty law which provides direct protection to the environment; treaties which indirectly provide environmental protection during times of armed conflict; customary international humanitarian law and the general principles of IHL that are applicable to the environment.

2.2 Treaty Law

2.2.1 1907 Hague Regulations (Convention Respecting the Laws and Customs of War on Land)

International treaty law has been slow to recognise that the natural environment requires the protection of specific legal rules. The concept of the “natural environment” does not appear in an instrument of international humanitarian law until 1977.¹⁹ Notwithstanding, the 1907 Hague Regulations are relevant for the purpose of regulating methods and means of warfare to protect the natural environment.²⁰ Article 22 of the Regulations states that “the right of belligerents to adopt means of injuring the enemy is not unlimited.”²¹

The Regulations also provide indirect protection for the natural environment by prohibiting the useless destruction of property in terms of Article 23 (g). It prohibits the destruction and seizure of enemy property, unless it is imperatively demanded by the necessities of war. Leibler criticises this formulation as deficient for the protection of the environment because there are forms of environmental damage which do not fit neatly into the scope of

¹⁹Gasser H ‘For better protection of the natural environment in armed conflict: A proposal for action’ (1995) 89 *American Journal of International Law* 637 at 638.

²⁰1907 Regulations attached to the 1907 Convention (IV) Respecting the Laws and Customs of War on Land, (Hague); opened for signature 18 October 1907, in force 26 January 1910; (1910) UKTS 9, Cd.5030 (hereinafter Hague Regulations).

²¹Hague Regulations, Article 22.

“destruction of property.”²² Such forms of damage include atmospheric pollution, ozone depletion or even weather modification. It is also arguable that the exception made in the case of “necessities of war” introduces a problem of uncertainty. When is it necessary to cause damage to the environment in the course of military activity? The general principles of proportionality and military necessity in international humanitarian law – discussed herein – may provide direction in this regard.

Nevertheless, Article 23(g) does provide protection for the environment in extreme cases where the damage is clearly beyond what is necessitated by war, and impacts upon property.

2.2.2 1976 UN Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)

The ENMOD Convention was the first treaty to establish specific rules for the protection of the environment during armed conflict.²³ Established in the aftermath of the Vietnam war, it was aimed at regulating large-scale environmental modification techniques in which the environment could be used as a weapon of war. Examples given of such environmental modification techniques have included the use of nuclear explosions to induce earthquakes or volcanic eruptions;²⁴ the seeding of clouds with lead iodide to create flooding;²⁵ and creating drought conditions to starve enemy combatants.

Article 1 of the ENMOD Convention prohibits any “military or any other hostile use of environmental modification techniques having wide-spread, long-lasting or severe effects as the means of destruction, damage or injury.”²⁶ The threshold of damage in the ENMOD

²²Liebler A ‘Deliberate wartime environmental damage: New challenges for international law’ (1993) 23 *Cal.W. Int’l L.J.* 67 at 105.

²³ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, in force 18 May 1978 (1977) 16 ILM 88-94 (hereinafter ENMOD Convention). See also Sands P & Peel J (2012) 794.

²⁴ Fauteux P ‘The Gulf War, the ENMOD Convention and the Review Conference’ (1992) 18 *UNIDIR Newsl.* 6.

²⁵ The US attempted the technique of cloud-seeding during the Viet Nam war to flood the Ho Chi Minh Trail.

²⁶ ENMOD Convention, Article 1.

Convention is relatively high, albeit requiring an alternative standard – damage to the natural environment is prohibited where it is widespread, long-lasting *or* severe.

The *travaux préparatoires* of the United Nations Committee of the Conference on Disarmament (CCD) indicate how to interpret the terms. Widespread is defined as “encompassing an area on the scale of several hundred square kilometres”; whereas long-lasting is defined as “a period of months or approximately a season” and severe means “involving serious or significant disruption or harm to human life, natural and economic resources or other assets.”²⁷

It must be noted that a Review Conference in 1992 declared that the “military or any other hostile use of herbicides” is an environmental modification technique falling within the scope of the ENMOD Convention.²⁸ Despite this, ENMOD is considered to be of limited value in protecting the environment in armed conflict.²⁹ It does not outlaw environmental damage as such, but prohibits the use of elements of the environment as weapons in armed conflict.

The ENMOD Convention protects the environment from what has been termed “geophysical warfare”³⁰ – a highly destructive, and yet also unlikely, category of military actions. For this reason, it has been regarded as belonging to “an era of science fiction”.³¹

2.2.3 1977 Additional Protocol I to the 1949 Geneva Conventions

The 1949 Geneva Conventions regulate, *inter alia*, the protection of civilians and their property during armed conflict; and natural resources have generally been considered as part

²⁷ See Understanding Relating to Article 1 of ENMOD, 31 GAOR Supp. No. 27 (A/31/27), Annex 1.

²⁸ Final Declaration, Second Review Conference of the ENMOD Parties, 17 *Disarmament Yearbook* (1992) 242, Article II, para 3.

²⁹ Boeleart-Suominen SAJ ‘International Environmental Law and Naval War: The Effect of Marine Safety and Pollution Conventions During International Armed Conflict’ (2000) *Newport Paper No. 15* 59.

³⁰ Hulme K *War Torn Environment: Interpreting the Legal Threshold* (2004) 73.

³¹ Hulme K (2004) 73.

of civilian property.³² Shortly after ENMOD was concluded in 1977, the Diplomatic Conference on the Reaffirmation and Development on International Humanitarian Law Applicable in Armed Conflicts (CDDH) adopted two Additional Protocols to the Geneva Conventions.³³ Additional Protocol I relates to the protection of victims in international armed conflict, whilst Additional Protocol II is specific to non-international armed conflicts. For the purpose of this discussion, Additional Protocol I will be dealt with first. This Protocol contains provisions which protect the environment during armed conflict, indirectly and specifically.

Article 48 of Additional Protocol I establishes the basic principle of distinction. It states that parties to armed conflict must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives; and must accordingly direct all their operations only against military objectives.³⁴ In this way, civilians and their property are protected and thus Article 48 provides indirect protection to the natural environment as part of civilian property.

Article 52 reiterates the principle that hostilities may only be directed at military objectives. Military objectives are “all objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation... offers a definite military advantage.”³⁵ Therefore, natural resources may be attacked if they make an effective contribution to military action.

³² Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949; *opened for signature* 12 August 1949, *in force* 21 October 1950; (1950) 75 UNTS 287-417.

³³ 1977 Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Geneva); *opened for signature* 12 Dec 1977, *in force* 7 Dec 1978 (1977) 16 ILM 1391-1441 (hereinafter Additional Protocol I); Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Geneva), 1977 16 ILM 1442-9 (hereinafter Additional Protocol II).

³⁴ Additional Protocol I, Article 48.

³⁵ Additional Protocol I, Article 52.

It is all too easy to identify examples in which the environment can become a military objective. For instance, during the Vietnam conflict, dense forests which provided cover for the enemy became a military objective, and their defoliation with the use of herbicides constituted a definite military advantage for the US. It seems that under Article 52, environmentally destructive activities such as large-scale deforestation or poisoning of ground water may be justified as destruction which offers a military advantage. This presents a weakness in the environmental protection afforded by Article 52 – elements of the environment which are likely to become military objectives too easily lose their protection.

Article 54(2) also indirectly protects the environment by prohibiting attacks against objects which are “indispensable to the survival of the civilian population.”³⁶ Such objects have been defined as objects which are of basic importance to the civilian population’s livelihood.³⁷ Therefore, natural resources such as land, forests, ground water and cattle could fall under this definition.

Article 54(3) (b) goes further to prohibit actions against these objects which “may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.”³⁸ This provision effectively excludes recourse to military actions such as scorched-earth policies which destroy the environment, as these tactics amount to actions which could be expected to leave the civilian population with such inadequate food as to cause starvation or force migration.

Specific protection of the natural environment in times of international armed conflict is provided by Articles 35 (3) and 55. Article 35(3) states that it is “prohibited to employ methods and means of warfare which are intended, or may be expected, to cause widespread,

³⁶ Additional Protocol I, Article 54(2).

³⁷ International Committee of the Red Cross (ICRC) Commentary on Additional Protocol I to the Geneva Conventions, available at <http://www.icrc.org/ihl.nsf/COM> (accessed on 22 October 2013).

³⁸ Additional Protocol I, Article 54(3) b.

long-term and severe damage to the natural environment”.³⁹ This prohibition applies exclusively to international armed conflict and only binds State parties to Additional Protocol I.⁴⁰

According to the International Committee of the Red Cross (ICRC) Commentary on the Additional Protocols, the prohibition in Article 35(3) is not limited to the environment of the enemy, but rather extends to the global environment. The use of the means and methods of warfare must be intended or expected to cause damage to the environment above a specified threshold.

Article 55 entitled “Protection of the Natural Environment” provides that:

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.⁴¹

It establishes two related provisions – the obligation of care to protect the environment and the prohibition included therein. The first sentence of Article 55 “lays down a general norm, which is then particularised in the second sentence.”⁴² Care must be taken in warfare to protect the environment generally whereas the prohibition applies in particular circumstance, i.e. when there is a foreseeable form of damage to the environment and thereby to human health or survival.⁴³

³⁹ Additional Protocol I, Article 35(3).

⁴⁰ The ICJ expressly stated that Articles 35(3) and 55 were ‘powerful constraints for all the States having subscribed to these provisions’: ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, [1996] I.C.J. Rep., para. 30.

⁴¹ Additional Protocol I, Article 55.

⁴² Report to the Third Committee on the Work of the Working Group, Committee III, 3 April 1975, O.R. Vol XV, CDDH/III/275, 4.

⁴³ Hulme K (2004) 80.

Article 55 is positioned under the Chapter of Protocol I entitled “Civilian Objects” which speaks of the protection of civilian objects both generally and when used by the military. Notably, Article 54 provides protection for “objects indispensable to the survival of the civilian population”⁴⁴ and Article 56 governs the protection of “works and installations containing dangerous forces.”⁴⁵ Viewed in this context, the environment should be regarded as *prima facie* a civilian object. Indeed, Hulme argues that the “care obligation” in Sentence 1 of Article 55(1) values the environment intrinsically as a civilian object which requires protection of its own accord.⁴⁶

Protocol I does not elaborate on what this obligation of “care” entails. The obligatory word “shall” means that this is conduct which the parties to Protocol I *must* undertake. The duty has been phrased as one of “taking steps to protect the environment”⁴⁷ which is also known as due diligence.⁴⁸ The obligation imposed by Article 55(1) is a positive duty – States parties must take positive steps to protect the environment from damage. Some practical examples that have been given include conducting environmental assessments of the effects of the means of warfare to be used; or altering or calling off an attack to avoid potential environmental harm.⁴⁹

Hulme criticises Article 55(1) for its lack of clarity as to whether the party to armed conflict must intend to cause damage to the environment as well as intend to cause human harm as a consequence; or it is enough to intend only the first element.⁵⁰ Unfortunately, the *travaux preparatoires* do not indicate which interpretation is preferable. It is submitted that the term

⁴⁴Additional Protocol I, Article 54.

⁴⁵Additional Protocol I, Article 56.

⁴⁶ Hulme K ‘Taking care to protect the environment against damage: A meaningless obligation?’ (2010) Vol.92 No. 879 *International Review of the Red Cross* 675 at 677-678 (hereinafter Hulme K (2010)).

⁴⁷ Hulme K (2010) 680.

⁴⁸ Hulme K (2004) 80-88.

⁴⁹ Hulme K (2010) 681.

⁵⁰ Hulme K (2004) 75.

“thereby” indicates that it is sufficient that human harm has occurred, whether it was foreseen or not.

It is further unclear whether Article 55(1) requires that the health or survival of human beings must be prejudiced before the provision can be violated. The inclusion of “thereby” suggests that the prohibition will only apply where environmental damage has a potential consequence of causing harm to human beings. However, read together with the care obligation in the first part of Article 55 (1) it may be argued that the care obligation may be breached even where environmental harm was intended but it did not occur and consequently did not result in harm to human health.⁵¹

It is submitted that this interpretation by Hulme provides a higher standard of protection for the environment and for humans, and accords with the intrinsic value of the environment recognised in Sentence 1 of Article 55(1); and is therefore favourable.

Another point of contention in both Articles 35(3) and 55(1) is the standard of harm contained therein. Unlike the similar criteria in ENMOD, the three conditions of “widespread, long-term *and* severe damage” in Additional Protocol I are cumulative – all three criteria must be met for the prohibition to apply. This is a rather high threshold of damage and it would seem that the provisions were intended to cover more than incidental damage to the environment arising from conventional warfare.⁵² This restriction makes them of “marginal relevance” in most conflicts, from an environmental point of view.⁵³

⁵¹ Hulme K (2004) 77.

⁵² *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, (Geneva 1974-77) Vol. XV, Doc. CDDH/215/Rev.1, para. 27, at 268.

⁵³ Okowa PN ‘Natural resources in situations of armed conflict: Is there a coherent framework for protection?’ (2007) 9 *Int’l Comm. L. Rev.* 250.

The effectiveness of the obligation of care in Article 55(1) is reduced by this high threshold as it would seem that States must take steps to protect the natural environment from damage only where that damage is widespread, long-term and severe.

Notwithstanding this threshold, Hulme submits that the obligation to take care of the environment in Article 55(1) still “shines like a beacon”⁵⁴ as it requires States parties to, at the very least; give consideration to the environmental damage which might be caused by their military activities. This argument draws strength from the practical examples, such as States which have abandoned depleted uranium weapons for less harmful alternatives such as tungsten; the Security Council’s decision to include compensation for environmental rehabilitation in Iraq following the destruction of oil wells;⁵⁵ as well as the inclusion of environmental protection within the Rome Statute of the International Criminal Court.⁵⁶

Further, the threshold of harm in Additional Protocol I suffers from ambiguity. It is not clear from the Protocols or the *travaux preparatoires* what the extent of the damage is that is required by the provisions. According to the *travaux preparatoires* of the CDDH, the term “widespread” refers to “the scope or area affected” but no elaboration as to the scope required is provided.⁵⁷ In recent years, however, the US appears to have adopted the definition of widespread provided in the Annex to the ENMOD Convention, i.e. “several hundred square kilometres”.⁵⁸

⁵⁴ Hulme K (2010) 689.

⁵⁵ Security Council Resolution 687 (1991) of 3 April 1991.

⁵⁶ Rome Statute of the International Criminal Court UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 Article 8(2) (b) (iv) (hereinafter Rome Statute).

⁵⁷ Report of Committee III, Second Session, O.R.Vol.XV, CDDH/215/Rev.1, para 27.

⁵⁸ Bill B, Anderson M & Marsh JJ (eds), Operational Law Handbook 2009, International and Operational Law Department, Judge Advocate General’s Legal Center and School, Charlottesville, VA, 2009 (hereafter US Operational Law Handbook) 351, available at: [https://www.jagcnet.army.mil/JAGCNETPortals/Internet/DocLibs/kfiddoclib.nsf/f45bab0efc3ec172852574d00068d6a5/23842DE37A0862CF852576E7004B669E/\\$FILE/2009%20operational-law-handbook.pdf](https://www.jagcnet.army.mil/JAGCNETPortals/Internet/DocLibs/kfiddoclib.nsf/f45bab0efc3ec172852574d00068d6a5/23842DE37A0862CF852576E7004B669E/$FILE/2009%20operational-law-handbook.pdf) (last accessed on 25 October 2013).

The term “long-term” refers to damage lasting “a scale of decades, twenty or thirty years being a minimum”.⁵⁹ Clearly, actions causing short-term environmental damage were not envisaged as part of the scope. This requirement makes it difficult to hold States liable for military activities whose long-term effects on the natural environment cannot be reasonably assessed from the start of the damage.

The *travaux préparatoires* indicate that the element of “severe” damage refers to the “severity or prejudicial effect of the damage to the civilian population”⁶⁰ suggesting that the element of severity is not reached unless human beings are prejudiced.⁶¹ This definition of severe fails to protect the environment for its inherent value.

Despite the precautionary language employed in Articles 35(3) and 55, the criteria for damage are excessively restrictive and the prohibition’s exact scope is ambiguous. Thus, the two provisions of Additional Protocol I which ought to provide direct protection for the natural environment in armed conflict are difficult to apply in conventional warfare and only provide limited protection.

2.2.4 1977 Additional Protocol II to the 1949 Geneva Conventions

Additional Protocol II, relating to the protection of victims of non-international armed conflict develops Article 3 common to the 1949 Geneva Conventions.⁶² Article 3 lays down provisions applicable to “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”. Additional Protocol II however, is not

⁵⁹ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, (Geneva 1974-77) Vol. XV, Doc. CDDH/215/Rev.1, para. 27, at 268.

⁶⁰ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, (Geneva 1974-77) Vol. XV, Doc. CDDH/215/Rev.1, para 27.

⁶¹ Hulme K (2004) 96.

⁶² Geneva Convention relative to the Protection of Civilian Persons in Time of War 75 UNTS 287, Article 3.

identical in its scope to Article 3. It applies in non-international armed conflicts which have reached a certain level of intensity.⁶³

Additional Protocol II is much briefer than its counterpart regulating international armed conflict. The reason for this was the concern that Protocol II might affect State sovereignty and be invoked to justify outside intervention – which resulted in the decision of the Diplomatic Conference to adopt only 28 of the proposed 47 Articles.⁶⁴

This Protocol could potentially have provided adequate protection for the natural environment in situations of internal armed conflict, but it is a lot less substantive than Additional Protocol I. It particularly lacks the basic principle of distinction enunciated in Article 48 of the first Additional Protocol.

Notwithstanding, it contains certain provisions which may provide indirect protection for the environment during armed conflict. Article 13 states that the civilian population shall enjoy protection against the dangers arising from military activities;⁶⁵ and Article 14 follows on to prohibit starvation of the population caused by any attack, destruction, removal, or rendering useless of objects indispensable to the survival of the population.⁶⁶

According to the ICRC Commentary, the words “attack, destroy, remove or render useless” are used to cover all eventualities which may result in starvation, including pollution of water supplies by chemical agents or destroying a harvest by defoliants. It can be inferred from this that Article 14 of Protocol II indirectly protects the natural environment in so far as it is

⁶³ Additional Protocol II, Article 1.

⁶⁴ See Junod S ‘Additional Protocol II: History and Scope’ (1983) 33 *American University Law Review* 32-4; ICRC Commentary to the Additional Protocol II (1987) para 4414, available at <http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&documentId=0F47AE2F6A509689C12563CD004399DF&action=openDocument> (last accessed on 25 October 2013).

⁶⁵ Additional Protocol II, Article 13.

⁶⁶ Additional Protocol II, Article 14.

indispensable to the survival of the population. The examples listed in Article 14 include foodstuffs, crops, livestock and drinking water installations.

Additional Protocol II makes no mention of protecting the environment from exploitative activities such as the extraction of minerals, logging of timber or poaching of wildlife, which are common military activities in recent internal armed conflicts, particularly in Africa. However, the list in Article 14 is not exhaustive and any act or omission by which starvation of the civilian population may be brought about would be prohibited under this Article.⁶⁷

Clearly, Article 14 operates to protect the civilian population from starvation. In other words, it is prohibited to attack or destroy objects with the aim of starving out civilians. But what happens where objects indispensable to the population's survival hinder the enemy in observation or attack? The example given in the ICRC Commentary is where agricultural crops are very tall and suitable for concealment in a combat zone.⁶⁸ If the objects are used for military purposes by the adversary, they may become a military objective and prone to attack, unless such action would reduce the civilian population to starvation.

2.3 The Rome Statute of the International Criminal Court

Article 8 (2)(b)(iv) of the Rome Statute of the International Criminal Court makes it a war crime to:

Intentionally launch an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.⁶⁹

⁶⁷ ICRC Commentary to Additional Protocol II at para 4800.

⁶⁸ ICRC Commentary on Additional Protocol II at para 4807.

⁶⁹ Rome Statute, Article 8(2)(b)(iv).

Prior to Article 8(2)(b)(iv), there was no explicit environmental war crime in international law. The inclusion of this Article in the Rome Statute marks a significant step in the protection of the environment during armed conflict. What is remarkable about Article 8(2)(b)(iv) is that individual criminal responsibility for damage to the environment is not tied to damage to civilians or their property – the use of the disjunctive “or” indicates that environmental damage alone can raise criminal responsibility, making it a truly eco-centric war crime.⁷⁰

Further, Article 8(2)(b)(iv) goes beyond the reach of other international agreements which bind States parties, to potentially prosecute war crimes that are committed anywhere in the world. Article 12 of the Rome Statute allows non-State parties to consent to ICC jurisdiction over specific situations.⁷¹

For all its novelty, however, Article 8(2)(b)(iv) has been the subject of some criticism. It prohibits “widespread, long-term and severe damage to the natural environment” but neither the Rome Statute nor its Elements of Crimes provide any definition for these terms.⁷² This uncertainty goes against the principle of legality and makes it difficult to apply the provision. Dormann suggests that the drafters of Article 8(2)(b)(iv) intended to borrow from Protocol I to the Geneva Convention, as evidenced primarily by the cumulative requirement – “widespread, long-term and severe damage” which mirrors Protocol I.⁷³

⁷⁰Lawrence J & Heller K ‘The first eco-centric environmental war crime: The limits of Article 8(2)(b)(iv) of the Rome Statute’ (2008) 20 *Geo. Int'l Envtl. L. Rev.* 61 at 71.

⁷¹The Rome Statute, Article 12(3).

⁷²Lawrence J & Heller K (2008) 72.

⁷³Dormann K *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary* (2003) 166.

If the Article does borrow from Protocol I then it encounters the problems associated with the incredibly high threshold for application, as discussed herein. The Protocol I threshold has been described as “nearly impossible to meet in all but the most egregious circumstances.”⁷⁴

Additional Protocol I requires that the environmental damage must last “a scale of decades, twenty or thirty years as being a minimum” in order to qualify as long-term damage.⁷⁵

Widespread damage is not elaborated under Additional Protocol I, but the general understanding is that it extends beyond the “several hundred square kilometres” required by ENMOD;⁷⁶ and it must “prejudice the health or survival of the population” to be severe damage.⁷⁷ An act by a party to an armed conflict must meet all three requirements. Even if the act is “clearly excessive in relation to the concrete and direct overall military advantage anticipated”, it will not be prohibited under Article 8(2)(b)(iv) unless it meets the threshold.

The requirement of “severe” damage is particularly problematic as its definition is anthropocentric in nature – environmental damage will not be regarded as severe unless it prejudices the health or survival of a population. If this definition is to be followed, it would detract from a key strength of Article 8(2)(b)(iv) – that the prosecution of environmental war crimes is not tied to damage to civilians or their property.⁷⁸

Another shortcoming of Article 8(2)(b)(iv) is that it prohibits “intentionally launching an attack in the knowledge that such attack will cause... widespread, long-term and severe environmental damage *if* it would be clearly excessive to the concrete and direct overall

⁷⁴ Schmitt M ‘Green War: An Assessment of the Environmental Law of International Armed Conflict’ (1997) 22 *Yale Journal of International Law* 71.

⁷⁵ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, (Geneva 1974-77) Vol. XV, Doc. CDDH/215/Rev.I, para 27

⁷⁶ Hulme K (2004) 91-3.

⁷⁷ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, (Geneva 1974-77) Vol. XV, Doc. CDDH/215/Rev.I, para. 27.

⁷⁸ Lawrence J & Heller K (2008) 73.

military advantage anticipated.”⁷⁹ This means that the prohibition against damage is tied to the condition that the damage must clearly outweigh the overall military advantage to be gained.

It is submitted that this proportionality standard is too heavy. As Cryer argues, the term “clearly excessive” is unprecedented in international humanitarian law and only serves to “raise the threshold and introduce greater uncertainty into the law in this area.”⁸⁰

Further, Article 8(2)(b)(iv) requires that the perpetrator acts with intention, in the knowledge that the attack will cause the prohibited harm. The necessary *mens rea* is one of actual knowledge. The Statute defines knowledge as an “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”⁸¹ The ambiguity surrounding the threshold of “widespread, long-term and severe damage” makes it difficult for a Court to conclude that the actor knew that such damage would occur. Second, even if the meaning of the terms were clear, there is still an uncertainty inherent in predicting environmental damage on such a large scale.⁸²

Article 8(2)(b)(iv) does not apply to non-international armed conflicts.⁸³ Although the Rome Statute does prohibit “destroying or seizing the property of an adversary” during internal armed conflicts,⁸⁴ it still leaves all un-owned land and natural resources without protection in the case of internal armed conflict.⁸⁵

⁷⁹Rome Statute, Article 8(2)(b)(iv)(emphasis added).

⁸⁰Cryer R ‘Of Customs, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study’ (2006) 11 *Journal of Conflict and Security Law* 239 at 260.

⁸¹The Rome Statute, Article 30(3).

⁸²Lawrence J & Heller K (2008) 80.

⁸³Article 8(2)(b) of the Rome Statute states that it only applies to international armed conflicts.

⁸⁴Rome Statute, Article 8(2)(e)(xii).

⁸⁵Lawrence J & Heller K (2008) 85.

2.4 Customary International Humanitarian Law

In 2005, the International Committee of the Red Cross (ICRC) published a Customary International Humanitarian Law Study containing 161 rules deduced from State practice, principles and treaty laws.⁸⁶ Of these rules, the Chapter dealing with ‘The Natural Environment’ is relevant for the purposes of this thesis. It contains three rules which are worth reproducing here in full:

Rule 43

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

- A. No part of the natural environment may be attacked unless it is a military objective.
- B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.
- 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.

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 minimise, 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.

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.⁸⁷

The authors suggest that these Rules have achieved customary status in international armed conflicts. In situations of non-international armed conflicts, they submit that only Rule 43 is definitely customary; while Rules 44 and 45 are arguably customary.

Rule 43 is based on the principles of distinction between military objectives and civilian objects; and proportionality. Despite the fact that the principle of distinction was left out of Additional Protocol II to the Geneva Convention, ICRC Rule 7 states that it applies equally in

⁸⁶Henckaerts J & Doswald-Beck L *Customary International Humanitarian Law Volume 1: Rules*, International Committee of the Red Cross (2009) 143.

⁸⁷Henckaerts J & Doswald-Beck L (2009) 143-6.

international armed conflicts and non-international armed conflict in relation to the environment.⁸⁸

Hulme has argued that the introduction in Rule 43 of the notion of “part” of the environment is foreign to environmental law and the law of armed conflict.⁸⁹ Rather than simplifying the existing threshold, it raises new questions for definition. She proposes that this rule needs to be elaborated further.

Rule 44 recognises an obligation of “due regard” to protect and preserve the natural environment. Due regard requires states to incorporate plans for environmental protection into their military activities and to minimise the damage caused during warfare.

In addition, Rule 44 requires States to take feasible precautions to avoid or minimise incidental damage to the environment. The authors of the Study assert that this customary rule is an explicit reference to the application of the precautionary rule during armed conflict – an assertion which has been criticised. They quote limited state practice to support this, citing mainly the ICJ advisory opinions in the *Nuclear Tests* case (1995) and the *Nuclear Weapons* case (1996). In effect, the authors argue that the precautionary principle ought to be reflected in the law of armed conflict.⁹⁰

Hulme argues that the application of the precautionary principle in armed conflict would only complicate matters. It is not clear who should bear the burden of proving that the military activity will not cause significant harm. If it rests on the military, this raises questions of objectivity and validity.⁹¹

⁸⁸Henckaerts J & Doswald-Beck L (2009) 25-9.

⁸⁹ Hulme K ‘Environmental Protection in Armed Conflict’ in Fitzmaurice M, Ong DM & Merkouris P (eds) *Research Handbook on International Environmental Law* (2010) 588-601.

⁹⁰ Bothe M, Bruch C et al ‘International law protecting the environment during armed conflict: gaps and opportunities’ (2010) Vol.92 No. 879 *International Review of the Red Cross* 569 at 575.

⁹¹ Hulme K ‘Environmental Protection in Armed Conflict’ in Fitzmaurice M, Ong DM & Merkouris P (eds) *Research Handbook on International Environmental Law* (2010) 593-4.

Rule 45 of the ICRC Study is a simplified version of the provisions of Additional Protocol I – it retains the threshold of environmental damage in Article 35(3) of “widespread, long-term and severe damage”. The authors argue that significant State practice has emerged to make this prohibition a part of customary international humanitarian law.

This state practice includes the military manuals of several countries, as well as national legislation. However, France, the UK and United States have indicated their acceptance of the rule in so far as it applies to conventional weapons, but not to nuclear weapons. This position is evident from the UK Law of Armed Conflict Manual and the USAir Force Commander’s Handbook, and from the reservations made by France and UK upon ratifying Additional Protocol I to the effect that the Protocol did not apply to nuclear weapons.⁹² Furthermore, France and the United Kingdom have stated that Articles 35(3) and 55(1) of Additional Protocol I are not customary.⁹³ Thus the *opinion juris* of these three countries is that these rules do not prohibit the use of nuclear weapons.⁹⁴

It must be noted that the authors of the ICRC concluded that Rules 44 and 45 may *arguably* represent customary law in the case of non-international armed conflict. In addition to the scant protection given to the environment in Additional Protocol II, State practice is unclear regarding internal conflicts. Consequently, gaps still exist in the protection of the environment in situations of non-international armed conflicts globally.

⁹²France, Declaration made upon ratification of Additional Protocol I; United Kingdom, Reservations and declarations made upon ratification of Additional Protocol I. Gaudreau J ‘The reservations made to the Protocols additional to the Geneva Conventions for the protection of war victims’ (2003) 849 *International Review of the Red Cross* available at <http://www.icrc.org/eng/assets/files/other/irrc_849_gaudreau-eng.pdf> (accessed on 20 October 2013).

⁹³France, Reservations made upon ratification of the 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 (1980); United Kingdom, Written statement submitted to the ICJ in the *Nuclear Weapons case*.

⁹⁴Henckaerts J & Doswald-Beck L (2009) 154.

2.5 Soft Law: General Principles of IHL

2.5.1 The principle of proportionality

The principle of proportionality is codified in Article 57 of Additional Protocol I which provides that disproportionate attacks are attacks in which the “collateral damage” would be regarded as excessive in comparison to the anticipated direct military advantage gained. For example, burning an entire forest or a significant part thereof to reach a single minor target would be considered as disproportionate.

One of the uncertainties regarding proportionality is determining the legal yardstick thereof. Proportionality is difficult to determine in the case of environmental damage, especially long-term damage.⁹⁵ In situations where an element of the environment is attacked because it constitutes a military objective (as per Article 52), there might be long-term environmental damage beyond actual destruction, i.e. collateral damage. It is not clear whether or not Articles 35 and 55 are subject to the principle of proportionality in IHL. There is also a general lack of clarity around the practical issues of proportionality where environmental damage is collateral damage caused by attacks against military objectives.

2.5.2 The principle of military necessity

The principle of military necessity prohibits destructive acts that are unnecessary to secure a military advantage.⁹⁶ As was stated in the Hostage case, “the destruction of property to be lawful must be imperatively demanded by the necessities of war”.⁹⁷ This principle against the “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” has been codified in The Hague Regulations, the

⁹⁵ Bothe M & Bruch C (2010) 578.

⁹⁶ Schmitt M (1997) 54.

⁹⁷ Hostage (*U.S. v List*) 11 TWC 759, 1253 (1950).

Geneva Conventions and the Rome Statute of the ICC.⁹⁸ This principle has been criticised by some commentators as going against the purposes of the law of armed conflict.⁹⁹ However, Schmitt argues that the principle of military necessity does not justify or authorise illegal activity, but rather limits it.¹⁰⁰ The principle remains an integral part of the law of armed conflict.

2.5.3 The principle of humanity

The principle of humanity prohibits methods and means of warfare which are inhumane.¹⁰¹ While this principle is clearly anthropocentric in nature, it is obvious that environmental destruction can easily violate the interests of humanity, and the principle of humanity. Therefore, a party to armed conflict may not use starvation as a method of warfare, or poison drinking water, or attack, destroy or render useless objects which are indispensable to the survival of the civilian population.

2.5 Conclusions

The international humanitarian law framework on the protection of the natural environment during armed conflict is extensive, including treaty law, customary law and principles that have developed over many decades. However there are several significant gaps and deficiencies which exist within this framework.

A majority of the more recent and ongoing armed conflicts are internal in nature, particularly in Africa, yet the body of IHL is inadequate in addressing internal armed conflict. Currently no treaty norm explicitly addresses the issue of environmental damage in non-international

⁹⁸ See Article 23(g) Hague Regulations; Article 50 First Geneva Convention; Article 51 Second Geneva Convention; Article 147 Fourth Geneva Convention; Article 8(2)(b)(xiii) Rome Statute.

⁹⁹ Falk R, *Revitalising International Law* (1989) 168.

¹⁰⁰ Schmitt M (1997) 55.

¹⁰¹ This principle is articulated in Article 23(e) 1907 Hague Regulations; Articles 51, 52 and 55 Additional Protocol I 1977.

armed conflict. Protocol II is not very substantive in detailing the means and methods of warfare applicable to internal armed conflicts.

However, the ICRC Study on Customary IHL argues that many of the prohibitions found in Additional Protocol I relating to international armed conflict also apply to internal armed conflict. Similarly cases decided by the ICJ and International Criminal Tribunal for the former Yugoslavia (ICTY) also suggest that where that a provision of law can be said to have assumed the status of customary international law, it is applicable equally to international and non-international armed conflict.¹⁰² It remains unclear which provisions of IHL protecting the environment (directly or indirectly) have entered into customary law and may, therefore, be applicable to non-international armed conflicts.

Except for Articles 35(3) and 55 of Additional Protocol I, few other norms in IHL directly protect the environment. Even then, this protection proves inadequate because of a significantly high threshold for application. The threshold of “widespread, long-term and severe damage” is ambiguous and difficult to meet – and consequently difficult to enforce.

The IHL norms which protect civilian persons and objects arguably do a better job in providing indirect protection to the environment. However, it is all too easy for environmental elements to become military objectives and consequently lose this protection. This problem only emphasises the need for clearer and more appropriate definitions for those laws which directly protect the environment.

The IHL framework depends on ratification by States and compliance therewith. However, the United Nations Environment Programme (UNEP) reports a lack of State compliance to

¹⁰²*Prosecutor v Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, available at <http://www.refworld.org/docid/40277f504.html> (last accessed 22 October 2013).

the norms of IHL even where they are signatories to the relevant treaties.¹⁰³ It has been observed that where applicable environmental provisions do exist, States may not to enforce them for political or military reasons. 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.

¹⁰³ United Nations Environment Programme *Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law* November 2009 at 28.

Chapter 3: Protection of the Environment during Armed Conflict under International Environmental Law

3.1 Introduction

International environmental law (IEL) consists of a well-established body of rules, principles and agreements aimed at preventing and redressing damage to the environment during times of peace. In regard to environmental damage during armed conflict, the question to be asked is whether these peacetime provisions continue to apply and, if so, to what extent they do apply.

It must be noted at the outset that questions regarding the application of peacetime IEL during armed conflict are complicated to resolve for a number of reasons. International environmental law is still dynamic – it is a relatively recent body of law which is still developing. It must also be noted that international environmental law was never intended to cover intentional infliction of damage to the environment.¹⁰⁴

For some agreements, the issue has been resolved by provisions which explicitly exclude applicability during armed conflict.¹⁰⁵ However, in the case of many agreements, questions still arise as to whether and how they ought to be applied to protect the environment in armed conflict. Several theories have been forwarded in answer to these questions.

This chapter examines international MEAs and the existing theories on their applicability in order to address three issues: whether IEL continues to apply to prevent and redress environmental damage during armed conflict; when and how it applies; and whether this protection is meaningful in light of the specific risks of warfare.

¹⁰⁴ Schmitt MN 'Green War: An Assessment of the Environmental Law of International Armed Conflict' (1997) 22 *Yale J. Int'l L.* 36.

¹⁰⁵ See for example 2003 Liability Protocol to the Industrial Accidents and Watercourses Conventions Art. 4(2)(a); 2010 Nagoya-Kuala Lumpur Supplementary Liability Protocol to the Biosafety Protocol Art.6(1).

3.2 The Applicability of Multilateral Environmental Agreements (MEAs)

The approach taken by MEAs to the question of applicability during armed conflict can be grouped, for simplicity's sake, into three basic categories: some MEAs provide, explicitly or indirectly, for their continued application during armed conflict; others specifically state that they must be automatically suspended or terminated once armed conflict has begun;¹⁰⁶ while yet others – a majority of MEAs – remain silent on the issue.

3.2.1 MEAs providing for continued application

A treaty may indirectly provide that it continues to apply during armed conflict. For example, the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) establishes a list of world heritage sites which are in danger, i.e. “threatened by serious and specific dangers”. Serious and specific dangers under the Convention may include “the outbreak or the threat of an armed conflict”.¹⁰⁷

The Convention on Wetlands of International Importance (Ramsar Convention), which establishes a List of Wetlands of International Importance, also includes a provision for possible indirect application during armed conflict.¹⁰⁸ A party to the Convention has a right “because of its urgent national interests, to delete or restrict the boundaries of wetlands already included by it on the List”.¹⁰⁹ It has been submitted that such situations of ‘urgent national interests’ may include armed conflict.¹¹⁰

¹⁰⁶ 1954 Convention on the Prevention of Pollution of the Sea by Oil Article XIX (1) allowed parties to suspend operation of whole or part of Convention in case of war or other hostilities if they consider themselves affected as a belligerent or as a neutral.

¹⁰⁷ Convention Concerning the Protection of the World Cultural and Natural Heritage 1037 UNTS 151; 27 UST 37; 11 ILM 1358 (1972), Article 11(4).

¹⁰⁸ Convention on Wetlands of International Importance (Ramsar Convention) 11 ILM 963 (1972), Article 2 (hereinafter Ramsar Convention).

¹⁰⁹ Ramsar Convention, Article 3.

¹¹⁰ Bunker AL ‘Protection of the Environment During Armed Conflict: One Gulf, Two Wars’(2003) 13 (2) *RECIEL* 201 at 211.

The obligations contained within these treaties will of course only apply to those States which have elected to be party to the treaties. Further, these agreements are territory-specific, i.e. the World Heritage Convention and the Ramsar Convention only apply if the belligerent State contains a World Heritage listed area or a Ramsar-listed wetland.¹¹¹

The UN Convention on the Law of the Sea (UNCLOS), which requires parties to take measures to prevent, reduce and control marine pollution, makes explicit reference to armed conflict or military activities in Article 236. It states that the Convention's provisions protecting the marine environment do not apply to "any warship, naval auxiliary, other vessels or aircraft owned by the State". However, each State is obliged to ensure that these vessels act in a manner that is consistent with the Convention, in so far as is reasonable and practicable.¹¹² UNCLOS varies the standards applicable to military vessels and non-military vessels, but it may still apply during armed conflict. Where a State causes a spill of marine pollutants from vessels that are not exempted, the provisions of UNCLOS will find application. This was the case in the 1991 Gulf War when Iraq released oil from commercial tankers.¹¹³ More importantly, UNCLOS encompasses pollution activities from sources other than just vessels – Article 194 obliges states to minimise the release of "toxic, harmful or noxious substances, especially those which are persistent, from land-based sources".¹¹⁴

The San Remo Manual on International Law Applicable to Armed Conflicts at Sea provides further specific requirements. Article 44 states that "damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited".¹¹⁵

¹¹¹ Bunker AL (2003) 202-3.

¹¹² UN Convention on the Law of the Sea, reprinted in 21 ILM (1982) 1261 Art. 236 (hereinafter UNCLOS).

¹¹³ Schmitt MN(1997)48.

¹¹⁴ UNCLOS Article 194, para. 3(a).

¹¹⁵ San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, IRRC, Nov-Dec 1995 no 309, pp 583-594, Art 44 (hereinafter San Remo Manual).

The Manual is not binding on states, and only constitutes a contemporary restatement of the international law on armed conflict at sea.

Voneky contends that those treaties which expressly provide for their continuance during war cannot be suspended or terminated.¹¹⁶ Further, peacetime environmental treaties whose continuance is compatible with the maintenance of armed conflict generally cannot be suspended or terminated, for example treaties which protect the marine environment during land warfare will continue to apply during war.¹¹⁷

3.2.2 MEAs which suspend or terminate application

Some treaties expressly suspend or terminate their application during armed conflict. Examples of such treaties are the Convention on Third Party Liability in the Field of Nuclear Energy¹¹⁸ and the Convention for the Prevention of Pollution of the Sea by Oil (OILPOL).¹¹⁹ OILPOL permitted state parties “to suspend the operation of the whole or any part of the present convention” in case of war or other hostilities.

3.2.3 MEAs which are silent on their application in armed conflict

As mentioned earlier herein, most MEAs are silent on the issue of their applicability during armed conflict, notably the Convention on Biological Diversity (CBD),¹²⁰ Convention on the Conservation of Migratory Species of Wild Animals¹²¹ and the UN Convention to Combat Desertification.¹²² The effect of this silence on environmental protection is uncertain in IEL.

¹¹⁶ Voneky S ‘A New Shield for the Environment: Peacetime Treaties as Legal Restraints of Wartime Damage’ (2000) 9 (1) *RECIEL* 20 at 22.

¹¹⁷ Voneky S (2000) 23.

¹¹⁸ Article 9, Convention on Third Party Liability in the Field of Nuclear Energy, 29 July 1960, amended 28 January 1964, 956 UNTS 264.

¹¹⁹ Article XIX (1) Convention on the Prevention of Pollution of the Sea by Oil 1954. This Convention was replaced in 1973 by the Convention for the Prevention of Pollution by Ships, reprinted in 12 ILM (1973) 1085, which does not contain a similar provision.

¹²⁰ Convention on Biological Diversity, 5 June 1992, 31 ILM 818 (1992).

¹²¹ Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 1651 UNTS 333.

¹²² United Nations Convention to Combat Desertification, 17 June 1994, 1954 UNTS 3.

The Vienna Convention on the Law of Treaties provides no guidance on the issue.¹²³ However, where treaty law has been silent, theories on the appropriate method of determining the applicability (or not) of MEAs abound. These theories include intention theory, the context and nature of the MEA, classification theory and the sliding scale approach.¹²⁴ These approaches, while diverse, are helpful in highlighting opportunities to complement the law of armed conflict in protecting the environment; and are therefore worth analysing.

Intention theory

The intention theory holds that the intention of the parties to an environmental agreement, where not express, ought to be derived by examining the language of the treaty and its *travaux préparatoires*.¹²⁵ It requires an examination of the nature of the treaty; or of the treaty's compatibility with war.

On this theory, Low and Hodgkinson conclude that the environmental law provisions in UNCLOS were not intended to apply in wartime. It contains a "sovereign immunity clause exempting its applicability to warships, with a limited proviso that each state shall operate warships 'in a manner consistent, so far as is reasonable and practicable with the Convention'".¹²⁶ Further, they argue that the Preamble to UNCLOS suggests that the parties contemplated its application in peacetime only.¹²⁷

¹²³ Vienna Convention on the Law of Treaties UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969).

¹²⁴ Bothe M, Bruch C et al 'International Law protecting the environment during armed conflict: gaps and opportunities' (2010) 92 No. 879 *IRRC* 569 at 587.

¹²⁵ Low L & Hodgkinson D 'Compensation for War-time Environmental Damage: Challenges to International Law after the Gulf War' (1995) 35 (2) *Virginia Journal of International Law* 443-445.

¹²⁶ Low L & Hodgkinson D (1995) 444; UNCLOS, Article 236.

¹²⁷ Low L & Hodgkinson D (1995) 444-5.

Context and nature of the MEA

Schmitt identifies three approaches to determining whether a peacetime treaty should apply during armed conflict. The first and most traditional school of thought proposes that treaties are not consistent with the outbreak of military hostilities, since treaty relationships are not “concluded with war in mind”.¹²⁸ Bothe notes that as a rule, bilateral and multilateral treaties are *ipso facto* terminated or suspended at the outbreak of armed conflict, unless they were concluded to operate during war.¹²⁹ Schmitt argues that this approach ignores the States’ mutual interests which may be wholly unrelated to the armed conflict.¹³⁰

A second approach takes the opposing view that treaties do survive the outbreak of war, unless their specific nature is inconsistent with military hostilities, for example alliance agreements or military aid agreements. However, this approach is unrealistic in that where a treaty is destined to falter during armed conflict; it ought not to be “artificially perpetuated.”¹³¹

The third approach lies somewhere in the middle of the preceding two. The differentiation approach aims to balance the survival of treaties with the recognition that sometimes, fulfilment of treaty obligations “may be at odds” with armed conflict.¹³² In order to determine whether a treaty regime should survive during armed conflict, it is necessary to ask whether its continuance is consistent with the larger context in which the treaty operates.¹³³

¹²⁸ Bothe M ‘The Protection Of The Environment In Times Of Armed Conflict: Legal Rules, Uncertainty, Deficiencies And Possible Developments’ (1991) Vol. 34 Issue 54 *Germ. Yearbook of International Law* 59. See also Delbruck J ‘War, Effect on Treaties’ (1982) 4 *EPIL* 310 at 311; and Prescott MK ‘How War Affects Treaties between Belligerents: A Case Study of the Gulf War’ (1993) 7 *Emory ILR* 197 at 201.

¹²⁹ Bothe M (1991) 59.

¹³⁰ Schmitt MN (1997) 38.

¹³¹ Schmitt MN (1997) 38.

¹³² Schmitt MN (1997) 38.

¹³³ Schmitt MN (1997) 38.

As such, Schmitt proposes a number of factors which might indicate the survivability of a treaty: 1) whether the treaty regulates private interests or public interests – treaties regulating private interests are more likely to survive armed conflict; 2) Whether it is a multilateral or bilateral treaty – bilateral treaties are more likely to be suspended, as between opposing belligerent states, while multilateral treaties might remain effective between belligerent and non-belligerent States; 3) Whether the treaty obligations and/or rights executed or executory – most environmental treaties are not final, but rather impose continuing obligations. They are thus more likely to be suspended during armed conflict; 4) The nature of the conflict also impacts on the survival or suspension of a treaty, as military hostilities which are significantly aggressive and prolonged likely indicate a “breakdown in relations” between the opposing parties and hence a suspension or termination of a treaty regime. On the other hand, low-intensity military operations other than war (MOOTW) favour the presumption of continued legal relations between States.¹³⁴

In other words, where a treaty is neither *de facto* incompatible with a state of armed conflict nor contains an explicit provision for termination at the outbreak of war, the approach to be taken is one of a presumption that it survives armed conflict, taking the above factors into consideration.

Classification theory

The classification theory, submitted by Voneky, places environmental laws in categories which determine their applicability during armed conflict.¹³⁵ She states that there are three groups of environmental treaties which will continue to be in effect on belligerent states, namely: treaties which provide for their continuance during war or which are compatible with the maintenance of war; rules and obligations to protect the environment which are *erga*

¹³⁴ Schmitt MN (1997) 39-41.

¹³⁵ Voneky S (2000) 22-32.

omnes or *jus cogens* (peremptory in nature); and human rights provisions which require the preservation of a specific condition of the environment.¹³⁶

She further argues that certain environmental treaties are similar to the above mentioned categories – sufficiently so that by analogous application, one can conclude that these treaties are applicable between belligerents during armed conflict.

Treaties creating an objective regime continue to apply during armed conflict because they seek to serve the interests of a community as a whole. Some scholars contend that “pollution reaching such a degree that it would represent a threat to the entire international community” would contravene a peremptory norm of IEL.¹³⁷ Such treaties, according to Voneky, are analogous to agreements which regulate the use and protection of areas beyond national jurisdiction such as the deep sea-bed, the high seas, outer space and the Antarctic.¹³⁸ In other words, where a treaty protects the common interests of the community of States, it is not terminated during armed conflict.

The concept of common heritage of mankind developed initially as a response to the need for an international law of the sea regime.¹³⁹ There is no single definition for the common heritage principle; however five elements have been identified.¹⁴⁰ States cannot make territorial claims to areas which are the common heritage of mankind; all people must participate and share in the management of the area; pursuant to that, all benefits from the exploitation of an area of common heritage must be shared by all; such areas must be used

¹³⁶ Voneky S (2000) 22-4.

¹³⁷ Brunnee J ‘Common Interest - Echoes from an Empty Shell? Some Thoughts on Common Interest and International Environmental Law’ (1989) 49 *Heidelberg J. Int’l L.* 791 at 804.

¹³⁸ Voneky S (2000) 25.

¹³⁹ Scholtz W ‘Common heritage: saving the environment for humankind or exploiting resources in the name of eco-imperialism?’ (2008) 41 (2) *Comparative and International Law Journal of Southern Africa* 273 at 274.

¹⁴⁰ Scholtz W (2008) 275.

sustainably for the benefit of future generations; and – most importantly for our purposes – these areas must be used for peaceful purposes and not armed conflict.¹⁴¹

An area which is considered common heritage is the deep sea-bed – Article 136 of UNCLOS states that the sea-bed, ocean floor and subsoil thereof are beyond the limits of national jurisdiction, and its resources are the “common heritage of mankind.”¹⁴² The deep sea-bed must be used for peaceful purposes only,¹⁴³ and States have an obligation to protect and preserve the marine environment.¹⁴⁴ This obligation makes no provision for national or territorial interests, but is rather in the interest of the international community as a whole.¹⁴⁵ As such, Voneky makes the compelling argument that the provisions of UNCLOS continue to apply during wartime because they seek to serve the collective interests of the state community.

Similarly then, the Antarctic Treaty which governs Antarctica as a common heritage of mankind creates an objective regime which continues to bind belligerent states in wartime.¹⁴⁶ This treaty states in its Preamble that “it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord.”¹⁴⁷

Voneky extends this argument beyond areas of the global environment which are the common heritage of mankind to resources which are common goods. Common goods, or global public goods, have been defined as common resources whose benefits are “indivisibly spread among the entire community” – they are “goods of universal character which require

¹⁴¹ Scholtz W (2008) 275.

¹⁴² UNCLOS Article 136.

¹⁴³ UNCLOS Article 141.

¹⁴⁴ UNCLOS Article 192.

¹⁴⁵ Voneky S (2000) 26.

¹⁴⁶ Voneky S (2000) 26-27.

¹⁴⁷ Antarctic Treaty 19 ILM 860 (1980) Preamble para 2.

collective global action, they give rise to a legitimate interest of the whole international community and to a common responsibility to assist in their protection.”¹⁴⁸ According to Voneky, international agreements which protect common goods, such as the ozone layer, biological diversity and the efforts against climate change, protect elements of the environment which are essential for the entire state community.¹⁴⁹ As such, treaties such as the UN Framework Convention on Climate Change (UNFCCC),¹⁵⁰ Convention on Biodiversity,¹⁵¹ and the Vienna Convention for the Protection of the Ozone Layer¹⁵² all oblige state parties to protect the environment in peacetime as well as during armed conflict due to the application of the common concern of mankind which is a facet of the common interest.

Sliding scale approach

The sliding-scale theory balances environmental protection against military mission success. It states that where military operations are low-intensity, peacetime environmental laws ought to be in full effect; whereas the effect of these laws decreases as the intensity of the military activity increases.¹⁵³ This approach has been criticised for failing to provide any criteria regarding which rules ought to bind military groups at the different phases of armed conflict.¹⁵⁴

¹⁴⁸ Morgera E ‘Bilateralism at the Service of Community Interests? Non-Judicial Enforcement of Global Public Goods in the Context of Global Environmental Law’ (2013) 23 *EJIL* 743 at 748-9.

¹⁴⁹ Voneky S (2000) 27.

¹⁵⁰ United Nations Framework Convention on Climate Change 31 ILM (1992) 849 (hereinafter UNFCCC).

¹⁵¹ Convention on Biological Diversity, 5 June 1992, 31 ILM 818 (1992) (hereinafter CBD).

¹⁵² Vienna Convention for the Protection of the Ozone Layer 26 ILM (1987) 1592.

¹⁵³ Bothe M, Bruch C et al ‘International Law protecting the environment during armed conflict: gaps and opportunities’ (2010) 92 No. 879 *IRRC* 569 at 588.

¹⁵⁴ Bothe M, Bruch C et al (2010) 588.

ILC Draft Articles on the Effect of Armed Conflict on Treaties

In 2004, the UN General Assembly approved a proposal by the International Law Commission (ILC) to prepare a set of draft articles which attempt to regulate the applicability of treaties during armed conflict.¹⁵⁵

The ILC Draft Articles apply only to international treaties, but to all armed conflict (international and non-international).¹⁵⁶ The Articles state that the existence of an armed conflict “does not *ipso facto* terminate or suspend the operation of treaties” as between State parties to a conflict or between a State party to a conflict and a neutral state.¹⁵⁷ Thus they neither provide for absolute termination or continuation of a treaty.¹⁵⁸

Instead, the ILC establishes a three-step test. First, the treaty must be examined for any express provisions on its applicability in armed conflict, as per Article 4. However, most international environmental treaties are silent on their applicability. The second step then involves regard for the rules of international law on treaty interpretation.¹⁵⁹ The rules of treaty interpretation are contained mostly within the Vienna Convention on the Law of Treaties.¹⁶⁰ Accordingly, the applicability of a treaty in armed conflict must be determined ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.¹⁶¹

The third step is outlined in Articles 6 and 7. In order to determine whether a treaty will be terminated or suspended in the event of armed conflict, Article 6 gives regard to “all relevant

¹⁵⁵ International Law Commission (ILC), Report on the Work of Its Sixty-third Session (26 April–3 June and 4 July–12 August 2011) (A/66/10, 2011), para. 89 (hereinafter Draft Articles).

¹⁵⁶ Draft Articles, Article 2(a) and (b).

¹⁵⁷ Draft Articles, Article 3.

¹⁵⁸ Loets A ‘An Old Debate Revisited: Applicability of Environmental Treaties in Times of International Armed Conflict Pursuant to the International Law Commission’s “Draft Articles on the Effects of Armed Conflict on Treaties”’ (2012) 12(2) *RECIEL* 131.

¹⁵⁹ Draft Articles, Article 5.

¹⁶⁰ Vienna Convention on the Law of Treaties UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969) (hereinafter Vienna Convention on the Law of Treaties).

¹⁶¹ Vienna Convention on the Law of Treaties, Article 31(1).

factors” including the nature of the treaty (its subject matter, object, purpose, its content and the number of signatories) as well as the characteristics of the armed conflict (its territorial extent, scale, intensity, duration, and the degree of external involvement).¹⁶²

Article 7 provides further guidance by making reference to an annex of treaties whose subject-matter involves an implication that they continue in operation, in whole or in part, during armed conflict. Thus whereas step two involves a textual interpretation of the treaty, step 3 goes further by looking at external circumstances.

It is evident that the Draft Articles integrate some of the theories discussed herein, such as the context and nature of the treaty approach as well as the sliding scale approach. The work of the ILC in this regard serves to consolidate the doctrine and State practice around this controversial issue; and thus provide a useful guide on the effects of armed conflict on international treaties.

States remain reluctant to adopt the Draft Articles into a legally binding agreement and, as such, the effect of armed conflicts on environmental treaties remains uncertain.¹⁶³

3.3 Soft law instruments and customary IEL rules

Certain soft-law instruments of international environmental law refer explicitly to armed conflict, while others may find indirect application. While these instruments are not binding, they reflect a general consensus in IEL that the natural environment ought to be protected during times of armed conflict, and they articulate principles which act as guiding norms for parties when implementing their treaty obligations.¹⁶⁴

¹⁶² Draft Articles, Article 6.

¹⁶³ Loets A (2012) 135-6.

¹⁶⁴ Boyle AE ‘Some Reflections on the Relationship of Treaties and Soft Law’ (1999) 48 *ICLQ* 901 at 902-9.

The 1982 World Charter for Nature states that “nature shall be secured against degradation caused by warfare or other hostile activities” and “military activities damaging to nature shall be avoided.”¹⁶⁵ It has been asserted that as the World Charter for Nature was adopted by a significant number of states, some of its provisions have gained the status of customary international law.¹⁶⁶ The 1992 Rio Declaration addresses the issue of environmental damage in Principle 24:

Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in time of armed conflict and cooperate in its further development, as necessary.¹⁶⁷

The meaning of Principle 24 is imprecise – it could be interpreted as an obligation on states to respect rules of international law which protect the environment, or as a duty to respect international law by providing protection to the environment in times of armed conflict.¹⁶⁸

In its Programme of Action for Sustainable Development (Agenda 21), the Rio Conference employs similar language to the Rio Declaration. It states that “measures in accordance with international law should be considered to address, in times of armed conflict, large-scale destruction of the environment that cannot be justified under international law”.¹⁶⁹

¹⁶⁵ World Charter for Nature G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51 (1982); 22 ILM 455 (1983) para. 5 and 20.

¹⁶⁶ Ross MA ‘Environmental warfare and the Persian Gulf War: possible remedies to combat international destruction of the environment’ (1992) 10 *Dickinson Journal of Environmental Law and Policy* 534.

¹⁶⁷ Rio Declaration on Environment and Development, 13 June 1992, UN Doc. A/CONF.151/26, vol. I; 31 ILM 874 (1992) Principle 24 (hereinafter Rio Declaration).

¹⁶⁸ Sands P & Peel J *Principles of International Environmental Law* 3ed. (2012) 791.

¹⁶⁹ Agenda 21: Programme of Action for Sustainable Development, UN GAOR, 46th Session, Agenda Item 21, UN Doc. A/CONF.151/26, 14 June 1992, Article 39(6).

3.3.1 The *Trail Smelter* principle

In the groundbreaking *Trail Smelter* case (*United States v Canada*),¹⁷⁰ an arbitration panel held that Canada had a responsibility to prevent harmful transboundary air emissions from a Canadian smelter which harmed US crops and forests across the border. It was decided that Canada was liable for the damage caused by the emissions, in a decision based on a fundamental responsibility of a State to use its territory in a way that does not cause harm to another.

The *Trail Smelter* principle is now a fundamental rule of customary international law. Though it does not expressly address armed conflict, it may afford protection to countries which are not party to the conflict (non-belligerent or neutral states) by establishing state responsibility for damage to the environment caused to such neutral states by the activities of a belligerent state.¹⁷¹ It has been argued that the principle might not apply if the interests of the belligerent state outweigh those of the neutral state.¹⁷² However, this assertion is in contradiction with the law of neutrality which states that a neutral state may not be affected by the armed conflict of a belligerent state.

In the *Corfu Channel* case, decided prior to the *Trail Smelter* arbitration, the principle was extended to the action of parties to a conflict, to hold Albania liable for damage caused to British ships resulting from mines laid in Albanian waters.¹⁷³ The Court observed that

¹⁷⁰ *Trail Smelter Case (United States v Canada)*, 16 April 1938 and 11 March 1941, Reports of International Arbitral Awards (RIAA) Vol III at 1905.

¹⁷¹ Bothe M, Bruch C et al 'International Law protecting the environment during armed conflict: gaps and opportunities' (2010) 92 No. 879 *IRRC* 569 at 585.

¹⁷² Schmitt MN (1997) 46-47.

¹⁷³ ICJ, *Corfu Channel Case (United Kingdom v Albania)*, Merits, Judgment of 9 April 1949, ICJ Reports 1949, p.4 (hereinafter *Corfu Channel Case*).

international law places a duty on states “not to allow knowingly its territory to be used for acts contrary to the rights of other states”.¹⁷⁴

The *Trail Smelter* principle has been recognised and applied in a number of decisions by the International Court of Justice (ICJ). It was followed in the ICJ’s *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*,¹⁷⁵ where the Court noted that a state’s obligation to “ensure that activities within their jurisdiction and control respect that environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment”.¹⁷⁶ Although ICJ advisory opinions are not binding on states, they are a confirmation of applicable international law.

The *Trail Smelter* principle was also followed in the *Case Concerning Pulp Mills on the River Uruguay*,¹⁷⁷ in which the ICJ held that the construction and operation of pulp mills in Uruguay required the state to undertake a transboundary environmental impact assessment in order to prevent environmental harm to its neighbours. Bothe and Bruch contend that the frequent reiteration of the *Trail Smelter* principle indicates that a state’s right to environmental protection now forms part of customary IEL which also applies during armed conflict.¹⁷⁸

3.3.2 The principle of permanent sovereignty over natural resources

The principle of permanent sovereignty over natural resources emerged in international law in the 1950s in the wake of decolonisation and the promotion of development in developing

¹⁷⁴ *Corfu Channel Case* at p.22.

¹⁷⁵ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996 (hereinafter *Legality of the Threat or Use of Nuclear Weapons*).

¹⁷⁶ *Legality of the Threat or Use of Nuclear Weapons*, para. 29.

¹⁷⁷ ICJ, *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* Merits, Judgment of 20 April 2010.

¹⁷⁸ Bothe M, Bruch C (2010) 585-6.

countries.¹⁷⁹ It was put forward by newly decolonised states seeking to protect their rights of ownership over the natural resources within their territories.

Strictly speaking, the principle of permanent sovereignty is not solely to be found in international environmental law, but rather it has evolved into a general principle of international law which pertains to the protection and management of natural resources, and it is now part of customary international law.¹⁸⁰ Dam de Jong takes an interpretation of this principle as one which affords rights and imposes duties for the sustainable management of a state's natural resources, in times of peace as well as during armed conflict.¹⁸¹

The right to permanent sovereignty consists of the right to freely dispose of natural resources by virtue of a state's sovereignty and right to self-determination. This right has been incorporated into a number of international instruments, including the UN General Assembly Resolution 1803 (XVII), which contains a Declaration on Permanent Sovereignty over Natural Resources.¹⁸² It has also been incorporated into the International Covenants on Economic Social and Cultural Rights and Civil and Political Rights, as the right to "freely dispose of their natural wealth and resources".¹⁸³ The principle is further articulated in Principle 21 of the 1972 Stockholm Declaration as follows:

States have ... the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction

¹⁷⁹ See generally Schrijver N *Sovereignty over Natural Resources: Balancing Rights and Duties* (2008).

¹⁸⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] I.C.J. Rep. at para. 244 [hereinafter *Congo-Uganda* case].

¹⁸¹ Dam de Jong D 'International Law and Resource Plunder: The Protection of Natural Resources During Armed Conflict' (2008) 19 (1) *YIEL* 29.

¹⁸² UN Declaration on Permanent Sovereignty over Natural Resources, UNGA Resolution 1803 (XVII), of 14 December 1962, UN Doc. A/5217 (1962) at 15.

¹⁸³ Article 1(2) of the International Covenant on Economic, Social and Cultural Rights, New York, Annex to UNGA Resolution 2200 (XXI), 16 December 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, New York, Annex 2 to UNGA Resolution 2200 (XXI), 16 December 1966, 999 U.N.T.S. 171. See further Article 25 of the International Covenant on Economic, Social and Cultural Rights and Article 47 of the International Covenant on Civil and Political Rights, which include a right of peoples to utilize fully and freely their natural wealth and resources.'

or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.¹⁸⁴

The 1992 Rio Declaration also articulates the right of states to freely exploit their own natural resources pursuant to their environmental policies.¹⁸⁵ The right to freely dispose of natural resources forms part of several international environmental treaties, including the Convention on Biological Diversity, the UN Framework Convention on Climate Change, and the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa.¹⁸⁶

Dam de Jong asserts that, while it is clear from IEL that states are free to dispose of their natural wealth and resources, this right must be exercised for the “benefit of national development and the well-being of the people”.¹⁸⁷ This condition is evident from the UNGA Resolution 1803 which stated that the principle of permanent sovereignty must be exercised in the interest of their national development and the people’s well-being.¹⁸⁸ The ICJ in the *Congo – Uganda* case also took the view that the obligation to exploit natural resources in the interests of the people’s well-being is part of customary international law and it remains in effect at all times.¹⁸⁹

Dam de Jong takes a people-oriented interpretation of the principle of permanent sovereignty: the exploitation of natural resources must be done for the national development of the state

¹⁸⁴ Stockholm Declaration, Principle 21.

¹⁸⁵ Rio Declaration Principle 2.

¹⁸⁶ Article 3 of the Convention on Biological Diversity, Rio de Janeiro, 31 ILM 818 1992 (CBD); paragraph 8 of the preamble of the UN Framework Convention on Climate Change, Rio de Janeiro, 9 May 1992, 1771 U.N.T.S. 107 [UNFCCC]; and para. 15 of the preamble of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, New York, 17 June 1994, 1954 U.N.T.S. 3.

¹⁸⁷ Dam De Jong D (2008) 31.

¹⁸⁸ UNGA Resolution 1803 (XVII), of 14 December 1962, UN Doc. A/5217 (1962).

¹⁸⁹ *Congo – Uganda* case at para.11.

and the well-being of people. Thus, during armed conflict, where a belligerent government exploits or disposes of natural resources for military ends or for purposes other than the well-being of the people, its act amounts to a violation of the principle of permanent sovereignty.¹⁹⁰ As such this principle reinforces the interpretation of the obligations of parties to armed conflict in international law.

However, the practice of the UN in regard to the principle of permanent sovereignty during armed conflict is unclear. The UNGA has previously declared that the principle is applicable to the natural resources of territories under foreign occupation.¹⁹¹ The UN Security Council (UNSC) reaffirmed this position in regard to the sovereignty of the population of the Democratic Republic of Congo over its natural resources.¹⁹² On the other hand, the ICJ seemed to take a contrary position in the *Congo-Uganda* case. The Court noted with regard to the UNGA Resolutions that there is nothing therein to suggest “that they are applicable to the specific situation of looting, pillage and exploitation of certain natural resources by members of the army of a State militarily intervening in another State.”¹⁹³

An argument to be levelled against Dam de Jong’s interpretation of the principle of permanent sovereignty is that it takes a solely anthropocentric approach to the protection of the environment. In a case where, during the course of armed conflict, the environment suffers damage as a result of the actions of a belligerent government, but the people’s well-being is not affected, the principle of permanent sovereignty – on Dam de Jong’s

¹⁹⁰ Dam de Jong D (2008)34.

¹⁹¹ UN General Assembly Resolution 63/201 on *Permanent Sovereignty of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem, and of the Arab Population in the Occupied Syrian Golan over Their Natural Resources*, adopted on 19 December 2008, A/RES/63/201, available at: <http://www.refworld.org/docid/49a2b6fb2.html> (accessed 8 October 2013).

¹⁹² Security Council Resolutions 1291 (2000), 1304 (2000), 1332 (2000), 1341 (2001), 1355 (2001), 1457 (2003), 1493 (2003), and 1533 (2004).

¹⁹³ *Congo – Uganda case* at para. 244.

interpretation – would not find application. Thus, it fails to protect the environment for its intrinsic value.

3.4 Conclusions

International environmental law is primarily treaty-based law. Peacetime treaties for environmental protection bind a large number of States and protect nearly all components of the environment. They are not limited to indirect protection of the environment, and many environmental MEAs are not restricted by territorial borders. Thus, IEL has the potential to provide a firm pillar for the protection of the environment during armed conflict.

In regard to the applicability of IEL treaties and rules during armed conflict, three categories may be distinguished: 1) agreements which expressly or implicitly provide for their suspension or termination at the onset of military activities; 2) MEAs which expressly provide for their continued application (in whole or in part) during armed conflict; and 3) MEAs which are silent on the issue of applicability.

As most MEAs fall into the third category, a number of approaches have been put forward for determining whether, when and how IEL applies during armed conflict. Clearly, no simple answer has been established yet. The ILC draft articles attempt to regulate the applicability of treaties during armed conflict, but they leave the question open by offering a variety of considerations to determine whether or not a treaty continues to apply in armed conflict.¹⁹⁴ There is no ICJ decision which clarifies the issue, and relatively recent MEAs continue to be silent on their application in armed conflict.

A number of helpful theories have been submitted, and discussed herein, including the intention theory, the sliding-scale system, the context-and-nature approach by Schmitt and

¹⁹⁴ Bothe M, Bruch C et al (2010) 590.

Voneky's classification theory. Voneky goes on to extend, by analogy, the application of existing rules to argue that treaties governing the protection of common goods and the common heritage of mankind should continue to apply in wartime.

Further, the discussion of IEL applicability during armed conflict benefits from a new interpretation of the principle of permanent sovereignty over natural resources. Okowa and Dam de Jong have submitted that this principle can be construed as obliging States to exploit and dispose of natural resources for the well-being of the population, rather than for military ends. However, the practice of the UN in regard to this principle remains unclear.

The above approaches highlight opportunities for international environmental law to complement the international humanitarian law framework protecting the environment during armed conflict, but there is a need for further analysis and clarification of the rules and approaches is necessary to ensure that IEL provides a shield for the environment during armed conflict.

Chapter 4: African Union Law

4.1 Introduction

Africa is a continent of paradoxes – endowed with a wealth of natural resources; it is simultaneously plagued by poor governance and underdevelopment, a phenomenon which has come to be known as the ‘resource curse’. This lack of capacity also places Africa in a position of vulnerability with regard to adaption and mitigation of the impacts of climate change. It has been predicted that climate change is the newest threat to security in Africa as it may increase migration and conflicts over scarce natural resources.¹⁹⁵

The African continent is also particularly vulnerable to armed conflicts, usually internal in nature. The post-independence period in Africa was characterised by major civil wars that pitted strong fighting forces against each other, usually in the form of insurgents against ruling governments.¹⁹⁶ However, in the last decade, a decline in civil war as a form of warfare has been noted on the continent.¹⁹⁷

Today, there are half as many civil wars in Africa as they were in the 1990s, with an emerging trend of prolonged low-level insurgencies such as in Casamance, Senegal, the Ogaden in Ethiopia, the Caprivi strip in Namibia, the Lord’s Resistance Army in northern Uganda, Democratic Republic of Congo and Central African Republic, Cabinda in Angola, Nigeria (Boko Haram), Chad (various armed groups in the east), Sudan (Darfur), and South

¹⁹⁵ Intergovernmental Panel on Climate Change IPCC Fourth Assessment Report Working Group I Report (2007) 866 <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1-chapter11.pdf> [accessed 05 October 2013]. See also Scholtz W ‘The promotion of regional environmental security and Africa’s common position on climate change’ (2010) 10 *African Human Rights Law Journal* 2-4.

¹⁹⁶ For instance, the Biafra secessionists in Nigeria, UNITA in Angola, RENAMO in Mozambique, the TPLF in Ethiopia, the EPLF in Eritrea, the SPLM in Sudan, the NRM in Uganda and the RPF in Rwanda.

¹⁹⁷ Williams P *War and Conflict in Africa* (2011) 4.

Sudan, as well as the insurgent-bandits in eastern Congo (a variety of armed actors, including Rwandan insurgents) and in northern Mali (al-Qaeda in the Maghreb).¹⁹⁸

Notwithstanding these current trends in the nature of armed conflict on the continent, several areas of the continent remain prone to conflict, particularly Somalia, Democratic Republic of Congo, Sudan, northern Mali and Niger.¹⁹⁹ The environment continues to suffer from the effects of wars and insurgencies alike: millions of refugees and internally displaced people place a strain on existing resources; armed conflict affects conservation mechanisms as game reserves and wildlife become a target for belligerents;²⁰⁰ and the extraction of minerals is often undertaken without regard to sustainable use, environmental impact assessments or plans for rehabilitation.

The African Union (AU) was established in 2002 as a continental organisation aimed at accelerating the progress of political and socio-economic integration in Africa.²⁰¹ It is the continental regional organisation, which was established to promote *inter alia* peace, security, and stability on the continent as well as sustainable development.²⁰² Its predecessor, the Organisation of African Unity (OAU), provided a forum to enable newly-independent African states to address common issues of sovereignty, territorial integrity, economic and social development and cooperation within the States and with the UN framework. The AU is perceived as a culmination of the piecemeal work of the OAU, with more expansive

¹⁹⁸ Straus S 'Wars Do End! Changing Patterns of Political Violence in Sub-Saharan Africa' (2012) *African Affairs* 179 at 181.

¹⁹⁹ Straus S (2012) 201.

²⁰⁰ It was reported in June 2013 that the Lord's Resistance Army was engaged in elephant poaching and illegal ivory trade to sustain the group's activities in Democratic Republic of Congo. See Agger K & Huston J 'Kony's Ivory: How Elephant Poaching in Congo Helps Support the Lord's Resistance Army' (2013) Enough Project. See also UNEP, CITES, IUCN, TRAFFIC "Elephants in the Dust – The African Elephant Crisis," A Rapid Response Assessment. United Nations Environment Programme (2013), available at http://www.cites.org/common/resources/pub/Elephants_in_the_dust.pdf [accessed 10 October 2013].

²⁰¹ The decision to establish the African Union was taken in 1999 at the Fourth Extraordinary Session in Libya. It was launched in 2002 and convened the First Assembly of the Heads of States of the African Union in Durban, South Africa. See <http://www.au.int/en/about/nutshell> (accessed on 22 October 2013).

²⁰² Article 3(f) and (j).

objectives aimed at improving Africa's position on the international economic and political plane.²⁰³

It is against this background that this chapter considers how African Union law has developed in dealing with the protection of the environment in armed conflict. This chapter further analyses the contribution of AU law to the international discourse on this subject. It will be argued that the regional framework indeed goes further than its international counterparts in addressing some of the key deficiencies which exist in international humanitarian law and international environmental law.

4.2 The development of regional environmental legislation

Africa's contribution to the development of international law is rather unique. For the better part of the twentieth century, a majority of the states on the African continent were colonies and dependent territories of European countries. This lack of sovereignty rendered them objects, rather than subjects, of international law, whose policies were designed by European powers with little or no contribution from the people of the continent themselves.²⁰⁴ It was not until the 1960s that once decolonised, new and independent states emerged in Africa as legal subjects in international law.

This does not mean, however, that there were not any agreements regulating the management of the environment in Africa prior to 1960. In 1900, the European colonial powers signed the first legal instrument dealing specifically with the African environment – the Convention for the Preservation of Wild Animals, Birds and Fish in Africa.²⁰⁵ The objective of the Convention was to “prevent the uncontrolled massacre and to ensure the conservation of

²⁰³ Magliveras KD & Naldi GJ ‘The African Union – A New Dawn for Africa?’ (2002) 51 (2) *International and Comparative Law Quarterly* 416.

²⁰⁴ Situma FDP ‘Africa's Potential Contribution to the Implementation of International Environmental Law’ (2000) 10 *Transnational Law & Contemporary Problems* 385 at 395.

²⁰⁵ Convention for the Preservation of Wild Animals, Birds and Fish in Africa, May 19 1900, 94 *British and Foreign State Papers: 1900-1901* at 715.

diverse wild animal species in their African possession”.²⁰⁶ In 1933, the Convention Relative to the Preservation of Fauna and Flora in the Natural State was adopted; with Egypt, South Africa and Sudan as original non-colonial signatories.²⁰⁷ The Convention introduced the conservation of flora and fauna in protected zones labelled “national parks”, “strict natural reserves” and “reserves”.²⁰⁸

The 1933 Convention was replaced by the African Convention on the Conservation of Nature and Natural Resources.²⁰⁹ This Convention, signed at Algiers in 1968, was the first environmental treaty signed under the auspices of the Organisation of African Unity and the first multilateral treaty regulating the African environment signed by independent African states.²¹⁰ The original 1968 Convention has since been revised in 2003 and this revision will be discussed in greater detail herein.

A number of significant regional initiatives to protect the environment are also worth highlighting here. In 1985, the African Ministerial Conference on the Environment adopted a Programme of Action for Regional Cooperation on the Environment in Cairo, aimed at mobilisation of human, scientific, and technical resources in order to address the destruction and rehabilitation of environmental resources on the continent.²¹¹ The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movements and

²⁰⁶ Preamble, Convention for the Preservation of Wild Animals, Birds and Fish in Africa.

²⁰⁷ Convention Relative to the Preservation of Fauna and Flora in their Natural State, Nov 8 1933, 172 LNTS 241.

²⁰⁸ Article 3, Convention Relative to the Preservation of Fauna and Flora in their Natural State.

²⁰⁹ African Convention on the Conservation of Nature and Natural Resources, adopted 11 July 2003. Available at <http://www.africa-union.org/root/au/documents/treaties/treaties.htm> (accessed 01 November 2013) (hereinafter the “revised African Convention”).

²¹⁰ Situma FDP (2000) 400.

²¹¹ See generally van der Linde M ‘African Responses to Environmental Protection’ (2002) 35 (1) *CILSA* 99 at 101.

Management of Hazardous Waste within Africa was adopted in 1991 as a strong complementary treaty to the Basel Convention.²¹²

Another important development for regional environmental protection is the Treaty Establishing the African Economic Community:²¹³ Article 58 requires State parties to promote a healthy environment by adopting national, regional and continental policies and strategies to protect and enhance the environment.

The Constitutive Act of the African Union, adopted in 2000 at the Lome Summit, transformed the AU into an operational legal entity. The Preamble to the Act recognises that “the scourge of conflicts” in Africa poses a challenge for socio-economic development.²¹⁴ Article 13 of the Constitutive Act states that the Executive Council of the AU (established under Article 10) shall coordinate and take decisions on policies in areas of common interest to the Member States, including “environmental protection, humanitarian action and disaster response and relief”.²¹⁵

Article 14 of the Act establishes Specialised Technical Committees, among which is the Committee on Industry, Science and Technology, Energy, Natural Resources and the Environment. These committees are tasked with, *inter alia*, ensuring the supervision, follow-up and evaluation of the implementation of decisions taken by organs of the AU.²¹⁶

Furthermore, in 2001, African leaders pledged, under the auspices of the New Partnership for Africa’s Development (NEPAD) to set an agenda for the “renewal of the continent”.²¹⁷ In the founding document, it was recognised that peace and security are necessary conditions for

²¹² Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movements and Management of Hazardous Waste within Africa, Jan 29 1991, 30 ILM 775 (hereinafter “Bamako Convention”).

²¹³ Treaty Establishing the African Economic Community (Abuja Treaty), June 3 1991, 30 ILM 1241.

²¹⁴ Organization of African Unity (OAU), *Constitutive Act of the African Union*, 1 July 2000, available at: <http://www.refworld.org/docid/4937e0142.html> (accessed 23 October 2013).

²¹⁵ *Constitutive Act of the African Union* Article 13(1) (e).

²¹⁶ *Constitutive Act of the African Union* Article 15(b).

²¹⁷ Strategic Framework of the New Partnership for African Development, 37th session of the Assembly of Heads of State and Government, July 2001 (hereinafter NEPAD Strategic Framework).

sustainable development.²¹⁸ To this end, it was stated that African states must build their capacity to prevent, manage and resolve conflict; and to undertake post-conflict rehabilitation.²¹⁹ Although the protection of natural resources from the effects of such conflict is not expressly mentioned, it must be remembered that sustainable development includes sustainable ecological use and development.

NEPAD also established an environmental initiative. In its Action Plan of the Environment Initiative, it is recognised that armed conflict on the continent has led to significant ecological damage and loss in biodiversity.²²⁰ Armed conflict is also recognised as a threat to Africa's invaluable forest resources.²²¹

In addition to these regional initiatives, the African Charter on Human and Peoples' Rights (the Banjul Charter) recognises the "right to a generally satisfactory environment favourable to development" in Article 24.²²² The content and justiciability of this distinctive environmental right has been the subject of much debate. The content of Article 24 was considered by the African Commission for Human and Peoples' Rights in its communication in the *Social and Economic Rights Action Centre v Nigeria (SERAC)* case.²²³ Article 24, and its interpretation by the African Commission, will be discussed in greater detail herein.

4.3 The African Convention on the Conservation of Nature and Natural Resources

The African Convention on the Conservation of Nature and Natural Resources (the African Convention) will now be analysed with a particular emphasis on environmental protection

²¹⁸ NEPAD Strategic Framework para 71.

²¹⁹ NEPAD Strategic Framework para 74.

²²⁰ NEPAD Action Plan of the Environment Initiative October 2003 para. 125 available at <http://unep.org/roa/Amcen/docs/publications/ActionNepad.pdf> (accessed 03 October 2013) (hereinafter NEPAD Action Plan).

²²¹ NEPAD Action Plan para. 133.

²²² African Charter on Human and Peoples' Rights CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 24 (hereinafter referred to as the "Banjul Charter").

²²³ Summary of the facts in Communication 155/96, *The Social and Economic Rights Action Centre and another v Nigeria (SERAC case)*, Fifteenth Annual Activity Report; this report is available at <http://www.achpr.org/communications/decision/155.96/> (accessed 02 October 2013).

during armed conflict. The African Convention was revised in Maputo, Mozambique in 2003, on the premise of expanding the elements related to sustainable development,²²⁴ and to bring it in line with current environmental principles, policies and contemporary developments at the international and regional level. The revision of the African Convention has been in the making since the 1980s when the governments of Nigeria and Cameroon called on the OAU to revise and update the 1968 Algiers Convention.²²⁵

With the cooperation of the World Conservation Union (IUCN), UNEP and the United Nations Economic Union for Africa (UNECA), the OAU initiated a revision process to produce a draft Convention which reflected the current environmental law and policy as well as scientific advancements. The draft was then submitted to the African Ministerial Conference on the Environment which aimed to adopt it during the World Summit on Sustainable Development. Instead, the revised African Convention was adopted on 11 July 2003 at the second Summit of the African Union in Maputo, Mozambique.

Article XXXVIII (2) of the revised Convention provides that it shall come into force on the thirtieth day after the deposit by each State party of its 15th instrument of ratification, acceptance, approval or accession.²²⁶ As at 16 May 2013, only 9 States had ratified and deposited to the Convention.²²⁷

4.3.1 Article XV of the revised African Convention

The revised African Convention reflects a consolidation of international developments relating to the environment – legal, scientific and political – of the last 30 years. These developments include the 1977 Additional Protocols to the Geneva Convention protecting

²²⁴ Preamble to the revised African Convention.

²²⁵ IUCN *An Introduction to the African Convention on the Conservation of Nature and Natural Resources* (2004) IUCN Environmental Policy and Law Paper No. 56 at p. 5.

²²⁶ The revised African Convention, Article XXXVIII (2).

²²⁷ Status List for the African Convention for Conservation of Nature and Natural Resources (Revised) available at <http://www.africa-union.org/root/au/documents/treaties/treaties.htm>. (accessed on 22 October 2013).

civilians and their property (including natural resources) during armed conflict.²²⁸ The revised African Convention is novel in addressing the issue of the protection of the environment from the adverse effects of military and armed conflicts. It introduces Article XV on ‘Military and Hostile Activities’ in recognition of this development. Article XV is worth reproducing in full:

1. The Parties shall:

a) take every practical measure, during periods of armed conflict, to protect the environment against harm;

b) refrain from employing or threatening to employ methods or means of combat which are intended or may be expected to cause widespread, long-term, or severe harm to the environment and ensure that such means and methods of warfare are not developed, produced, tested or transferred;

c) refrain from using the destruction or modification of the environment as a means of combat or reprisal;

d) undertake to restore and rehabilitate areas damaged in the course of armed conflicts.

2. The Parties shall cooperate to establish and further develop and implement rules and measures to protect the environment during armed conflicts.²²⁹

First, it is important to note about Article XV that it does not make a distinction between international armed conflict and internal armed conflict. On a continent where a majority of the military conflicts are civil (internal) in nature, this is significant. It has been shown in Chapter 2 of this thesis that international humanitarian law has failed to adequately protect the environment during internal armed conflict.

The obligation to protect the environment against harm in armed conflict is expressed as an imperative. Parties are obliged to take “every practical measure” to protect the environment

²²⁸ Additional Protocols I and II to the 1949 Geneva Conventions.

²²⁹ The revised African Convention, Article XV.

against harm during armed conflict. It is not clear what the standard for practicality is, but it is clear that it implies the need to undertake mechanisms which will protect the environment. It is submitted that the obligation in Article XV (1)(a) is comparable to the obligation found in Article 55 of the Additional Protocol I to the Geneva Conventions which stipulates that “care shall be taken in warfare to protect the environment against widespread, long-term and severe damage.”²³⁰ Similarly, Article 55 does not expound on the content of this obligation of care.

Hulme, in discussing the observance of the obligation in Article 55 (1) proposes that it ought to entail measures such as incorporating the provision within the States’ military manuals; and establishing mechanisms for compliance including environmental impact assessments.²³¹

Article XV (1)(b) is almost identical in its language to Article 35(3) of the Additional Protocol I to the Geneva Conventions. Where the latter “prohibits” parties from employing “methods or means of warfare which are intended, or may be expected to cause widespread, long-term and severe damage to the environment”; Article XV obliges parties to refrain from such activity. For both Articles, the use of the means and methods must be intended or expected to have the stated effect on the environment.

Article XV requires belligerent states and/or parties to armed conflict to address the possibility of environmental damage resulting from their actions. It has been stated, with regard to Article 35(3) that the prohibition, so phrased, may not require the damage to the environment to actually manifest, as long as it was intended or expected.²³² It is submitted that by analogy, this interpretation suits Article XV (1)(b) and it produces a higher standard of protection for the environment.

²³⁰ Additional Protocol I to the Geneva Convention, Article 55.

²³¹ Hulme K *War Torn Environment: Interpreting the Legal Threshold* (2004) 81-85.

²³² Hulme K (2004) 77.

The revised African Convention adopted the threshold of “widespread, long-term or severe damage” from international law. Specifically, the ENMOD Convention in Article I prohibits the use of environmental modification techniques having widespread, long-lasting *or* severe effects. As noted in Chapter 2 of this thesis, the three criteria in ENMOD are disjunctive, meaning that only one of them need be fulfilled in order for the Convention to be breached. Similarly, the use of the disjunctive “or” implies that Article XV of the African Convention will be breached where a party to armed conflict causes widespread *or* long-term *or* severe damage to the environment.

Fortunately, the drafters of the revised African Convention avoided the incredibly high threshold employed by the cumulative requirement of the two Additional Protocols to the Geneva Convention as well as the Rome Statute, which require all three criteria to be fulfilled in order for liability for environmental damage to ensue. Nevertheless, the problem of ambiguity is still present. None of the terms in the threshold are defined in Article V of the African Convention. Article V does state that “whenever a specific term not defined in this Convention has been defined in global conventions it can be construed as defined in those conventions.”²³³

It is submitted that since the drafters of Article XV intended to borrow from the ENMOD Convention, as evidenced primarily by the disjunctive requirement, it is to ENMOD that one must look for the definitions of widespread, long-term and severe. State parties to ENMOD drafted a set of Understandings in which widespread means “an area of several hundred square kilometres”; long-lasting means “several months or more, approximately a season”;

²³³ The revised African Convention, Article V.

and severe means “severe or significant disruption or harm to human life, natural or economic resources, or other assets”.²³⁴

However, while ENMOD clearly set out “to prohibit military modifications of the environment entailing ‘widespread, long-lasting or severe effects in enemy territory’” it is not clear whether the drafters of the African Convention intended to prohibit damage of a lesser or greater magnitude than that envisaged by the ENMOD Convention. Indeed, Article XV seems to apply to damage above and beyond the scope of ENMOD, since “destruction or modification of the environment” is included as a part of the greater whole of the Article.²³⁵ This would mean that the definitions provided for in the ENMOD Convention are insufficient for the purposes of Article XV.

Further, states are obliged to refrain from the destruction or modification of the environment as a means of combat or reprisal. This sub-article specifically prohibits the targeting of natural resources as military objectives through tactics such as scorched earth policies, poisoning of groundwater, defoliation and the like. Unlike Article 1 of the ENMOD Convention, Article XV (1) (c) makes no reference to the threshold of widespread, long-term or severe effects on the environment. It is arguable that any form of destruction or modification to the environment as a means of combat or reprisal is prohibited.

Furthermore, the reference to “combat or reprisal” implies that the prohibition in Article XV (1) (c) applies to both offensive and defensive actions of belligerent states or parties to armed conflict.

As opposed to Additional Protocols I and II, Article XV does not protect natural resources as part of civilian property, but rather provides direct protection for the environment in armed

²³⁴ Hulme K *War Torn Environment* (2004) 90-91; see generally Fauteux P ‘The Gulf War, the ENMOD Convention and the Review Conference’ (1992) 18 *UNIDIR Newsletter* 6.

²³⁵ The revised African Convention, Article XV (1)(c).

conflict. The eco-centric approach taken by the African Convention in recognising the intrinsic value of environment is preferable because it protects elements of the environment from military attack, regardless of whether they are civilian objects or not.²³⁶

Article XV borrows heavily from the law of armed conflict, particularly the ENMOD Convention and the 1977 Additional Protocols I and II. It does not include any references to international environmental law principles nor does it address the questions of applicability of MEAs to armed conflict on the continent. The African Convention does not clearly state whether other regional peacetime MEAs continue to apply during armed conflict, alongside the obligations of Article XV.

With regard to international treaties, Article XXXV states that the provisions of the revised African Convention “do not affect the rights and obligations of any Party deriving from existing international treaties, conventions or agreements”.²³⁷ However, the relationship or *lex specialis* between the law of armed conflict (which has influenced Article XV) and international environmental treaties remains to be answered.²³⁸

Notwithstanding, Article XV places far-reaching obligations on African states to protect the environment in armed conflict. It includes liability for the restoration and rehabilitation of areas damaged by armed conflict. Article XV must also be construed in light of the broader context and objectives of the African Convention.

²³⁶ Bothe M, Bruch C et al criticise Articles 35 and 55 of Additional Protocol I for failing to adequately protect elements of the environment in instances where they constitute military objectives. See Bothe M, Bruch C et al ‘International law protecting the environment during armed conflict: gaps and opportunities’ (2010) 92 (879) *IRRC* 569 at 576-7.

²³⁷ The revised African Convention, Article XXXV.

²³⁸ In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ indicated that for questions related to the conduct of belligerent activities, the law of armed conflict operates as *lex specialis* with respect to multilateral environmental treaties. However, authors such as Voneky argue that the laws of war no longer prevail over peacetime environmental laws as *lex specialis*. See Voneky S (2000) 20-21; Boeleart-Suominen SAJ (2000) 102.

4.3.2 Obligations related to Article XV

The Preamble to the Convention recognises a number of international environmental law principles which add a further dimension to the operation of Article XV. In the Preamble, the parties affirm that “the conservation of the global environment is a common concern of human kind as a whole, and the conservation of the African environment a primary concern of all Africans”, they re-affirm that “States have, in accordance with the Charter of the United Nations and the principles of international law, a sovereign right to exploit their own resources pursuant to their environmental and developmental policies”.²³⁹

They further recognise their responsibility for “protecting and conserving their environment and natural resources and for using them in a sustainable manner with the aim to satisfy human needs according to the carrying capacity of the environment” and are conscious of the dangers which threaten irreplaceable environmental assets.²⁴⁰

4.3.3 Article XV and the common concern of humankind

In affirming that the conservation of the global environment is a common concern of humankind, the revised African Convention takes note of the recent development of the notion of the common concern of mankind’ (CCM).²⁴¹ The CCM has been endorsed by two treaties of near-universal application; namely the United Nations Framework Convention on Climate Change (UNFCCC)²⁴² and the Convention on Biological Diversity (CBD)²⁴³ – both adopted in 1992.

²³⁹ The revised African Convention, Preamble paras 5-6.

²⁴⁰ The revised African Convention, Preamble paras 7-8.

²⁴¹ The terms ‘common concern of mankind’ and ‘common concern of humankind’ may be used interchangeably.

²⁴² The Preamble to the UNFCCC affirms the acknowledgement of the Parties to the Convention that ‘change in the Earth’s climate and its adverse effects are a common concern of humankind’.

²⁴³ The Preamble to the CBD affirms that the conservation of biological diversity is a ‘common concern of humankind’.

Although neither of these treaties defines the CCM, it has been described as a notion which “implies the cooperation of states on matters of importance to the international community” while recognising that environmental use and degradation has implications for future generations.²⁴⁴ The traditional concept of the sovereignty of States, i.e. their independence over the persons, property and affairs within their territorial boundaries to the exclusion of other states, has been limited by the notion of CCM. It requires an interdependent effort from States to achieve protection of the global environment.²⁴⁵

Although the notion of CCM was first used in the Framework Convention on Climate Change and the CBD, most international environment treaties reflect “a growing acceptance that protecting the environment and achieving sustainable development are common concerns of humanity”.²⁴⁶ The African Convention is no different. In affirming that conservation of the global environment is a common concern of humankind, it applies the notion of CCM to the obligations of the Convention, including the obligation to protect the environment from harm during armed conflict.

4.3.4 Article XV and the principle of permanent sovereignty over natural resources

The Preamble to the African Convention re-affirms that states have a sovereign right to exploit their own resources pursuant to their environmental and developmental policies. In effect, this is a restatement of Principle 21 of the Stockholm Declaration, which provides that “States have... the sovereign right to exploit their own resources pursuant to their own environmental policies”.²⁴⁷

The principle of permanent sovereignty at international law has been discussed in Chapter 3 of this thesis. It is clear from IEL that states are free to dispose of their natural wealth and

²⁴⁴ Scholtz W (2008) 283.

²⁴⁵ Horn L ‘Globalisation, Sustainable Development and the Common Concern of Humankind’ (2007) 7 (53) *Macquarie Law Journal* 53 at 56.

²⁴⁶ Hunter D, Salzman J & Zaelke D *International Environmental Law and Policy* 3ed (2002) 490.

²⁴⁷ Stockholm Declaration, Principle 21.

resources and this right has been interpreted as one which must be exercised in a manner which benefits national development and the people's well-being.²⁴⁸ Thus, this people-oriented approach to the principle of permanent sovereignty informs Article XV such that it requires States to act to protect the environment during armed conflict in a manner which benefits national development.

From the perspective of African regional law, the African Charter on Human and Peoples' Rights elaborates on the content of the principle of permanent sovereignty over natural resources as:

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.²⁴⁹

Okowa proposes that the principle of permanent sovereignty can be construed as imposing a set of limitations on what a government of a territory may do with the resources of that territory.²⁵⁰ She argues that the provisions in Article 21 above create a framework of accountability to hold belligerents liable for actions which have adverse effects on the territory.²⁵¹ Where, in the course of armed conflict, the environmental quality is altered or parties engage in resource exploitation in an unsustainable way, this has adverse consequences on the natural resources of the territory.

²⁴⁸ UNGA Resolution 1803 (XVII) of 14 December 1962, UN Doc. A/5217 (1962); *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda); Request for the Indication of Provisional Measures*, International Court of Justice (ICJ), 1 July 2000 at para.11; *Dam de Jong* (2008) 31.

²⁴⁹ The Banjul Charter, Article 21.

²⁵⁰ Okowa P N "Natural Resources in Situations of Armed Conflict: Is there a coherent framework for protection?" (2007) 9 *International Community Law Review* 237 at 257-258.

²⁵¹ Okowa PN (2007) 257.

Therefore, on the basis of the Banjul Charter and, by extension, the preamble to the African Convention, governments or belligerents who act contrary to the interests of the people by causing intentional or collateral damage to the environment, are in violation of the principle of permanent sovereignty.

Okowa recognises that this inclusive interpretation does not solve the enforcement hurdles – most international tribunals are limited in their jurisdiction to States, which means that non-State actors in armed conflict cannot be held accountable by them.²⁵²

4.3.5 Article XV and the right to the environment

Article III of the African Convention contains Principles by which parties shall be guided in achieving the objectives of the treaty and implementing its provisions. The foremost guiding principle is “the right of all peoples to a satisfactory environment favourable to their development”.²⁵³ The right to a satisfactory environment is enshrined in Article 24 of the African Charter on Human and Peoples’ Rights.²⁵⁴ Although it is very briefly worded in the Banjul Charter, this Article has been interpreted and expounded upon by the African Commission for Human and Peoples’ Rights in its communication in the *Social and Economic Rights Action Centre and another v Nigeria* (the *SERAC* case).²⁵⁵

The *SERAC* case involved a communication brought jointly by two NGOs, SERAC and the Centre for Economic and Social Rights (CESR) against the government of Nigeria, alleging that it had committed gross violations of the rights of the Ogoniland people, through its involvement in the exploitation of oil in the Niger Delta. Among the rights allegedly

²⁵² Okowa PN (2007) 258-9.

²⁵³ African Convention on Conservation of Nature and Natural Resources, Article III.

²⁵⁴ Article 24 of the Banjul Charter states: “All peoples shall have the right to a general satisfactory environment favourable to their development.” The right to a healthy environment is also included in a number of African national constitutions, such as Benin (27), Burkina Faso (14 & 29), Congo (46-48), Ethiopia (44), Ghana (chapter 21), Lesotho (Art 36), Madagascar (art 39), Malawi (13(4)), Mozambique (Art 72), Niger (Art 27), South Africa (Art 24), and Uganda (Arts 13, 21-23 & 27).

²⁵⁵ *SERAC* case.

infringed was the Article 24 right to a healthy or satisfactory environment. The complainants argued that the government of Nigeria had condoned and facilitated operations by an oil consortium which exploited oil reserves in Ogoniland with no regard for the health or environment of local communities. It disposed toxic wastes in the environment, resulting in grave contamination of water, soil and air.

In its decision the Commission rightly stated that Article 16 (the right to health) and Article 24 of the Banjul Charter recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.²⁵⁶

While acknowledging the right of the Nigerian state to produce oil, the Commission pointed out that the right to a satisfactory environment in Article 24 required the state to take “reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.”²⁵⁷ Compliance with Article 24 must include measures such as “ordering or at least permitting independent scientific monitoring of threatened environments, requiring environmental impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for [public participation]”.²⁵⁸

The government had failed in this obligation to take any such measures.²⁵⁹ Accordingly, the Commission found the Nigerian state to be in violation of the right to a clean environment under Articles 16 and 24 of the Banjul Charter.

²⁵⁶ *SERAC* case para 51.

²⁵⁷ *SERAC* case para 52.

²⁵⁸ *SERAC* case para 53.

²⁵⁹ *SERAC* case para 54.

The *SERAC* case is a landmark decision which brings some clarity to the much-debated content of the right to a satisfactory environment. It is particularly laudable for its interpretation of the right as imposing a widely-framed duty on States to take specific measures to prevent pollution and degradation of the environment and to promote conservation. These obligations reflect both procedural aspects of the Article 24 right (such as a right to access environmental information and public participation) as well as a substantive aspect (the government's duty to prevent ecological degradation). The obligations as expounded by the African Commission also reflect international environmental law principles such as the preventive principle and the duty of care principle.²⁶⁰

However, the Commission's decision has been criticised for failing to give a better understanding of the core content and minimum obligation contained in Article 24.²⁶¹ Van der Linde argues that the decision would have been of more value if the Commission had explained how it arrived at the governmental obligations in terms of Article 24.²⁶²

Nonetheless, for present purposes, the wide interpretation of Article 24 can inform Article XV of the African Convention by requiring African governments to take reasonable measures to prevent environmental degradation and promote conservation of natural resources, even in times of armed conflict. It is further submitted that a failure by governments to take "every practical measure" to protect the environment against harm during armed conflict will potentially constitute not only a violation of Article XV of the African Convention, but also a violation of the right to a satisfactory environment.

²⁶⁰ Van der Linde M 'Regional Environmental Law under the Auspices of the AU' in Strydom HA & King ND (eds) *Environmental Management in South Africa* 2ed (2009) 179.

²⁶¹ Van der Linde M 'Regional Environmental Law under the Auspices of the AU' in Strydom HA & King ND (eds) *Environmental Management in South Africa* 2ed (2009) 179-180.

²⁶² Van der Linde M 'Considering the interpretation and implementation of Article 24 of the African Charter on Human and People's Rights in light of the SERAC communication' (2003) 3 *African Human Rights Law Journal* 167.

Article III affirms the right to a satisfactory environment which must be followed when implementing the provisions of Article XV. Given the wide interpretation of this right in the *SERAC* case, it can be argued that, during armed conflict, States must take reasonable measures to protect the environment which uphold ecologically sustainable use of natural resources.

4.4 Sub-regional Mechanisms

4.4.1 Pact on Security, Stability and Development in the Great Lakes Region

In 2006, the eleven core Member states of the International Conference on the Great Lakes region adopted a pact to foster security, stability and development in the region.²⁶³ The Pact governs legal relations between States who have ratified it, and is therefore a binding document.²⁶⁴

Under the auspices of this Pact, member states adopted a Protocol against the Illegal Exploitation of Natural Resources.²⁶⁵ In accordance with this Protocol, States are obligated to develop and implement regional mechanisms to combat the illegal exploitation of natural resources which constitutes a violation of the States' right of permanent sovereignty over their natural resources.

In Article 9, the principle of permanent sovereignty is formulated in terms of states' rights and duties, rather than a right of peoples which can be asserted against their own government.²⁶⁶ Okowa submits that this is a reticent approach to the principle and agreeably argues for a more inclusive approach.²⁶⁷ Nonetheless, the Protocol is a significant stamp of

²⁶³ International Conference on the Great Lakes Region, Pact on Security, Stability and Development, December 2006, available at <http://www.securitycouncilreport.org/un-documents/great-lakes-region/> [accessed on 04 October 2013]. The 11 member states are Angola, Burundi, Central African Republic, Congo, DRC, Kenya, Rwanda, Sudan, Tanzania, Uganda and Zambia. (hereinafter Pact on Security, Stability and Development).

²⁶⁴ Pact on Security, Stability and Development, Article 4.

²⁶⁵ Pact on Security, Stability and Development, Article 9.

²⁶⁶ Okowa PN (2007) 256.

²⁶⁷ Okowa PN (2007) 256.

approval of the application of the concept of permanent sovereignty over the use of natural resources in the context of armed conflict.²⁶⁸

4.4.2 East African Community Protocol on Environment and Natural Resources Management

The East African Community (EAC) is a regional intergovernmental organisation established in 1999 under the Treaty for the Establishment of the East African Community.²⁶⁹ It comprises the Republics of Burundi, Kenya, Rwanda, Uganda and the United Republic of Tanzania.

The EAC Protocol on Environment and Natural Resources Management is established under Article 151 of the Treaty in which States parties undertook to conclude such Protocols as may be necessary in each areas of cooperation.²⁷⁰ The Protocols form an integral part of the EAC Treaty.²⁷¹ This particular Protocol governs the EAC in regard to cooperation between the States in managing the environment and natural resources.

Article 33 of the EAC Protocol restates in very similar terms the obligations in Article XV of the African Convention to take measures to protect the environment and natural resources during armed conflict. Article 33(1) obliges the partner states to “adopt a common policy and take measures to protect the environment and natural resources during periods of armed conflict”. The Partner States must further take practical measures to protect the environment against harm during periods of armed conflict; desist from employing or threatening to employ methods or means of combat which are intended or may be expected to cause widespread, long-term, or severe harm to the environment; and ensure that such means and methods of warfare are not developed, produced, tested or transferred.

²⁶⁸ Okowa PN (2007) 259.

²⁶⁹ Treaty for the Establishment of the East African Community, signed 30 November 1999, in force 07 July 2000 available at <http://www.eac.int/treaty/> (accessed 31 October 2013) (hereinafter EAC Treaty).

²⁷⁰ EAC Treaty, Article 151.

²⁷¹ EAC Treaty, Article 151 (4).

The Protocol also obliges EAC Partner States to “desist” from using destruction or modification of the environment as a means of combat or reprisal; and to undertake to restore and rehabilitate areas damaged in the course of armed conflicts; and put in place mechanisms to address environmental degradation arising out of human activities in periods of conflict.

4.5 The Contribution of AU Law to the International Discourse

The most significant provision on environmental protection in armed conflict in African Union law is Article XV of the revised African Convention. Despite the fact that the wording of Article XV is drawn from international law instruments, it arguably goes further in providing protection for the environment during armed conflict than the provisions in IHL or IEL.

Article XV does not distinguish between international and internal armed conflict. This distinction at international law has resulted in two separate Additional Protocols to the Geneva Conventions and has been disadvantageous for internal armed conflict, as Additional Protocol II is much less sophisticated in its provisions relating to the environment. Hulme proposes that a new instrument is needed to bring civil conflict more in line with international armed conflict.²⁷² Article XV addresses this gap by applying the provisions of Additional Protocol I to internal and international armed conflicts alike.

Articles 35 (5) and 55 of Additional Protocol I (which directly protect the natural environment in international armed conflict) as well as Article 8(2)(b)(iv) of the Rome Statute of the ICC (which establishes environmental destruction as a war crime) are rendered largely irrelevant to conventional warfare because of an incredibly high threshold for their operation. The cumulative requirement that the damage must be “widespread, long-term and

²⁷² Hulme K ‘Environmental Protection in Armed Conflict’ in Fitzmaurice M et al (eds) *Research Handbook on International Environmental Law* 596.

severe” in order for it to be prohibited has proven to be too restrictive to be of much relevance in protecting the environment during armed conflict.

However, the drafters of the revised African Convention avoided this problem by stipulating that the prohibited damage must be “widespread, long-term or severe”. This is certainly a lower threshold as it does not require a complainant to prove that all 3 criteria were met. It is enough that the damage met any one of the three requirements in order for Article XV to be breached.

What remains unclear is the precise meaning that the drafters of the revised African Convention intended for these terms. Article V states that where a specific term not defined in the Convention has been defined in global conventions, it may be construed as defined in those conventions.²⁷³ It is submitted herein that the drafters intended to use the definitions contained in ENMOD. However, this submission may be criticised on the basis that Article XV applies to damage above and beyond environmental modification for military purposes. Thus, both international law and regional law require further clarification on the meaning of the terms “widespread, long-term and severe”.

Article XV still goes further than international law in its protection of the environment in armed conflict. There is no mention of civilian property – rather, the environment is directly protected for its intrinsic value instead of as part of civilian property. It makes no distinction between civilian and military objects. States must take measures to protect natural resources during armed conflict, including refraining from targeting elements of the environment as military objects.

Article XV further imposes a novel obligation on States to restore and rehabilitate areas damaged during the course of armed conflict.

²⁷³ The revised African Convention, Article V.

The larger context in which Article XV operates and the objectives of the African Convention play a significant role in setting it apart in its scope and reach of environmental protection in armed conflict. The implementation of Article XV is guided by the principle of an environmental right in Article 24 of the Banjul Charter. The right to a satisfactory environment has not found much approval in international law and, as a result, there is no independent right to the environment recognised in customary international law as yet.²⁷⁴

And yet, the provisions of Article XV benefit from the existence and recognition of this environmental right in AU law.

Implementing Article XV in light of the African Commission's interpretation of the right to a satisfactory environment would require African governments to take reasonable measures to prevent environmental degradation and promote conservation of natural resources, even in times of armed conflict. Where States fail to take "every practical measure" to protect the environment against harm during armed conflict, this may potentially constitute not only a violation of Article XV of the African Convention, but also a violation of Article 24.

International environmental law is yet to provide a conclusive and clear answer as to which MEAs continue to apply during armed conflict. Most environmental treaties are silent on the issue of their applicability. Scholarly writing and commentary have provided several perspectives on whether IEL operates during armed conflict – not least of which are the ILC Draft Articles attempting to regulate the applicability of treaties during armed conflict.²⁷⁵ Although the Draft Articles provide a useful guide to determining when a treaty is susceptible

²⁷⁴ Bosselmann K 'Human rights and the Environment: Redefining fundamental principles' (2003) *Yearbook of Human Rights and Environment* 11.

²⁷⁵ International Law Commission (ILC), Report on the Work of Its Sixty-third Session (26 April–3 June and 4 July–12 August 2011) (A/66/10, 2011), para. 89.

to suspension, withdrawal or termination, they are neither conclusive nor binding. In practice, the matter must still be decided on a case-by-case basis.²⁷⁶

The revised African Convention is an umbrella treaty that attempts to bridge peacetime environmental law with the law of armed conflict through Article XV. The inclusion of a clause on ‘Military and Hostile Activities’ in a MEA on environmental conservation goes some way towards ensuring that States establish and further develop and implement rules and measures to protect the environment during armed conflicts.

The African Convention does not provide a clear answer as to whether other regional peacetime MEAs continue to apply during armed conflict, alongside the obligations of Article XV. The relationship between the Convention and regional MEAs and other environmental protection initiatives has not been defined. Article XXXV clarifies the relationship between the African Convention and international treaties. It states that the provisions of the revised African Convention “do not affect the rights and obligations of any Party deriving from existing international treaties, conventions or agreements”.²⁷⁷ However, the *lex specialis* between Article XV (which borrows largely from the law of armed conflict) and international environmental treaties remains to be answered.

4.6 Conclusions

The revised African Convention particularly makes provision for protection of the environment during armed conflict. Borrowing from established rules of the law of armed conflict, Article XV provides wide protection for the environment in this regard. The threshold for applicability borrowed from IHL provisions is arguably high, particularly for environmental damage during non-international armed conflict.

²⁷⁶ Bothe M, Bruch C et al (2010) 580.

²⁷⁷ The revised African Convention, Article XXXV.

Nevertheless, Article XV benefits from other provisions in the Convention, which read together, may ensure that the environment is protected as a common concern of mankind, in accordance with the principles of sustainable development and the right of permanent sovereignty over natural resources.

Protection for the environment is also to be found in additional regional mechanisms such as the Protocol against the Illegal Exploitation of Natural Resources in the Great Lakes region, the EAC Protocol on Environment and Natural Resources Management and the NEPAD Action Plan of the Environment Initiative. However, where African governments have not shied away from the adoption and ratification of legal instruments and the creation of institutions, the capacity and commitment to effectively implement this legal framework is lacking. Africa's debt burden and poverty place constraints on its ability to implement these legal instruments.

The preceding argument has also highlighted the potential contribution of AU law to international discourse on environmental protection in armed conflict. In the regional context, the environment is afforded direct protection during armed conflict rather than as civilian property; AU law does not distinguish between civilian and military objects; it requires a lower threshold for application than that found in the 1977 Additional Protocol I; and no distinction is made between environmental protection during international and non-international armed conflicts. These approaches avoid some of the deficiencies present in the law of armed conflict.

The inclusion of the right to a satisfactory environment as a guiding principle for the objectives of the revised African Convention also benefits environmental protection during armed conflict on the continent as it widens the obligations on States to take specific

measures to prevent pollution and degradation of the environment and to promote conservation, even in times of armed conflict.

Unfortunately, the AU legal framework does not satisfactorily answer questions about the applicability of regional peacetime MEAs during armed conflict; the relationship between such MEAs and the obligations of Article XV; or that between international peacetime environmental treaties and the African Convention.

Chapter 5: Conclusion

For as long as armed conflicts are fought within the natural environment, it will undoubtedly suffer the effects of military activity. However, in the interests of protecting the environment from significant damage, realistic and reasonable measures should exist in international law to ensure such protection. Military and hostile activities have long been regulated by international humanitarian law, particularly *jus in bello*. International environmental law provides protection for nearly all components of the environment, and in certain instances, continues this protection in times of military activity. However, scholars have indicated that it is not adequate. It is therefore that this dissertation assesses international humanitarian law and environmental law and highlights their deficiencies in the protection of the environment during armed conflict. It also discusses the regional efforts under the African Union to protect the environment in armed conflict and argues that AU law goes further in this regard than international law.

Therefore chapter 2 presents an analysis of international humanitarian law relating to environmental protection during armed conflict. The key provisions in this regard are to be found in the ENMOD Convention, the 1977 Additional Protocols I and II to the 1949 Geneva Conventions, the Rome Statute of the International Criminal Court, customary international humanitarian law as well as soft law principles of IHL.

The ENMOD Convention protects the environment from “geophysical warfare” through environmental modification techniques. It prohibits military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects. ENMOD is criticised as being limited in its value as it protects the environment from a highly unlikely category of military actions.

Additional Protocol I to the Geneva Conventions distinguishes between civilian objects and military objects; and allows for hostilities to be directed at military objects. This distinction leaves room for the destruction or degradation of elements of the environment, so long as they offer a definite military advantage. This problem only emphasises the need for clearer and more appropriate definitions for those laws which directly and indirectly protect the environment.

The two Articles within Additional Protocol I which directly protect the natural environment are rendered largely irrelevant to conventional warfare because of an incredibly high threshold for their operation. The cumulative requirement that the damage must be “widespread, long-term and severe” in order for it to be prohibited has proven to be too restrictive to be of much relevance in protecting the environment during armed conflict.

Further, the terms widespread, long-term and severe have not been conclusively defined in the Protocol or its *travaux préparatoires*. As such, it is not clear what the precise extent of the prohibited damage is. Even where the terms have been defined, the scale of damage required is rather high – long-term has been defined as a scale of decades; severe has been defined as damage having a prejudicial effect on the civilian population. Seemingly, these definitions fail to protect the natural environment in itself; only when environmental damage prejudices civilians in armed combat would the damage be considered severe. The criteria of “widespread, long-term and severe damage” is ambiguous and difficult to meet - and consequently to enforce.

In regard to environmental damage in non-international armed conflict, Additional Protocol II is not very substantive in detailing the means and methods of warfare applicable to internal armed conflicts. It provides some indirect protection for the environment by prohibiting starvation of the population caused by any attack, destruction, removal, or rendering useless

of objects indispensable to the survival of the population. These indispensable objects include elements of the environment such as crops, water installations and livestock.

However, it makes no mention of protecting the environment from exploitative activities such as the extraction of minerals, logging of timber or poaching of wildlife, which are common military activities in recent internal armed conflicts, particularly in Africa.

The Customary International Humanitarian Law Study undertaken by the International Committee of the Red Cross asserts that the customary law rules on the conduct of hostilities applicable to the natural environment relating to international and non-international armed conflict equally. Similarly ICJ and ICTY case law also suggests that where that a provision of law can be said to have assumed the status of customary international law, it is applicable equally to international and non-international armed conflict.

However, it remains unclear which provisions of IHL protecting the environment (directly or indirectly) have entered into customary law through State practice and may, therefore, be applicable to non-international armed conflicts.

Thus, the protection afforded by IHL is deficient in four important aspects: an incredibly high threshold for environmental damage, an ambiguous definition of the provisions which expressly address environmental damage; inadequate protection of elements of the environment as civilian objects; and the unsophisticated development of rules concerning non-international armed conflicts.

Chapter 3 of this thesis discussed the protection of the environment in armed conflict provided by international environmental law. IEL is largely treaty-based law and three categories can be discerned regarding the applicability of peacetime IEL during armed conflict: MEAs which directly or indirectly provide for continued application during

hostilities; those which expressly provide for their termination or suspension at the onset of military activity; and those which are silent on this issue.

The majority of MEAs fall into the third category. A number of scholarly approaches have been put advanced for determining whether, when and how IEL applies during armed conflict. The approaches discussed in Chapter 3 include classification theory, intention theory, nature and context of the MEA, and the sliding-scale system. Voneky also proposes the application by analogy of the existing rules to argue that treaties governing the protection of common goods and the common heritage of mankind should continue to apply in wartime. Although these approaches are helpful, no conclusive answer has been established yet.

The ILC Draft Articles attempt to regulate the applicability of treaties during armed conflict, but they leave the question open by offering a variety of considerations to determine whether or not a treaty continues to apply in armed conflict. There is no ICJ decision which clarifies the issue, and relatively recent MEAs continue to be silent on their application in armed conflict.

Chapter 3 also analysed customary IEL principles, particularly the principle of permanent sovereignty over natural resources. It was submitted that the discussion of IEL applicability during armed conflict benefits from a new interpretation of the principle of permanent sovereignty over natural resources. Okowa and Dam de Jong have proposed that this principle can be construed as obliging States to exploit and dispose of natural resources for the well-being of the population, rather than for military ends. However, the practice of the UN in regard to this principle remains unclear.

Having discussed the existing deficiencies in IHL and IEL in regard to environmental protection during armed conflict, this thesis investigated how African Union has addressed this issue. Hence, chapter 4 analysed the unique position of Africa in international law, as a

continent prone to armed conflict – particularly internal armed conflict – and plagued by poor governance and underdevelopment. Nonetheless, the African Union as a regional organisation has made strides in implementing institutional and legal frameworks to foster regional integration.

For the purpose of this thesis, special attention was given to regional mechanisms protection the environment during armed conflict, chiefly the revised African Convention for the Conservation of Nature and Natural Resources. Article XV of this Convention governs environmental protection during ‘military and hostile activities’. The language of Article XV is largely borrowed from IHL provisions protecting the environment during international armed conflict. Thus, it inherits some of the normative problems of a significantly high threshold and ambiguity.

Nevertheless, Article XV manages to avoid the distinction between international and internal armed conflicts, which gives significantly greater protection for the environment in civil conflict on the continent. It also does not distinguish between civilian objects and military objectives, thus providing satisfactory protection for the environment than IHL.

The environmental protection afforded in Article XV benefits from guiding principles within the Convention such as the right to a satisfactory environment. The inclusion of the right to a satisfactory environment as a guide for the objectives of the revised African Convention also benefits environmental protection during armed conflict on the continent as it widens the obligations on States to take specific measures to prevent pollution and degradation of the environment and to promote conservation, even in times of armed conflict.

Further, Article XV must be interpreted in light of other provisions in the Convention which, read together, may ensure that the environment is protected as a common concern of mankind, in accordance with the principles of sustainable development and the right of

permanent sovereignty over natural resources. These provisions further oblige States to protect the environment during armed conflict.

Protection for the environment is also to be found in additional regional mechanisms such as the Protocol against the Illegal Exploitation of Natural Resources in the Great Lakes Region and the EAC Protocol on Environment and Natural Resources Management.

Chapter 4 also noted that the AU legal framework does not satisfactorily answer questions about the applicability of regional peacetime MEAs during armed conflict; the relationship between such MEAs and the obligations of Article XV; or that between international peacetime environmental treaties and the African Convention.

It is evident that regional (AU) law may complement existing international law in relation to the protection of the environment in armed conflict. AU law may also contribute to the discourse on the deficiencies and opportunities in international humanitarian law and environmental law, especially with regard to protection of the environment in non-international armed conflict. It may further provide lessons on how international law could better protect the environment in armed conflict through a wider interpretation of the existing rules.

Unfortunately, the revised African Convention has been ratified by only 9 States on the continent. It is hoped that, being a rather recent revision, more States are yet to join this number.

Even where African governments have not shied away from the adoption and ratification of legal instruments and the creation of institutions, the capacity and political commitment to effectively implement this legal framework is lacking. Africa's problems of poor governance and poverty place constraints on its ability to implement these legal instruments. It is pivotal

for African states to urgently ratify and implement the revised African convention and other sub-regional mechanisms pursuant to realising the African Union's objectives of peace and sustainable development in order to ensure that the environment escapes the scourge of war.

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