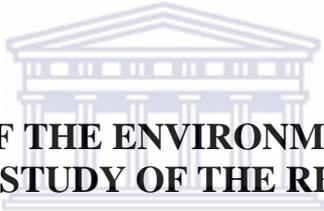




UNIVERSITY of the
WESTERN CAPE

FACULTY OF LAW

LLM STRUCTURED RESEARCH PAPER



**THE PROTECTION OF THE ENVIRONMENT DURING ARMED
CONFLICT: A CASE STUDY OF THE REPUBLIC OF CONGO**

UNIVERSITY of the
WESTERN CAPE

*Research paper submitted in partial fulfilment of the requirements for the LLM degree in the
Faculty of Law of the University of the Western Cape.*

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September 2014

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DECLARATION

I declare that '*The protection of the environment during armed conflict: case study of the Republic of Congo*' is my work that it has not been submitted before for any degree or assessment in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

Frederic Ghislain Bakala M'Banza

Signature:

Date:



ACKNOWLEDGEMENTS

First, I give thanks to the Almighty God for the continuous gift of life He is granting me. I give thanks to my parents, Alphonse Bakala Ngouma and Pauline Tchimbambou Bakala, and especially my wife Siphpkazi A Bakala-Mbanza for all the support they have been giving me. As regards to this research paper, I gratefully give thanks to Prof Letitia van der Poll for supporting me throughout the completion of this work, as well as Mr A Dube for his input as a co-supervisor.



KEYWORDS

- Armed conflict
- Environment
- Environmental rights
- International Environmental Law (IEL)
- International Humanitarian Law (IHL)
- Military activities
- Protection
- Republic of Congo



LIST OF ABBREVIATIONS

ACCNNR	African Convention for the Conservation of Nature and Natural Resources
AP	Additional Protocol
BEA	Bilateral Environmental Agreement
CBD	Convention on Biological Diversity
CCW	Convention on Certain Conventional Weapon
CITES	Convention on the International Trade in Endangered Species
CFC	Chlorofluorocarbon
CHED	Conference on the Human Environment Development
CIL	Customary International Law
DRC	Democratic Republic of Congo
ENMOD	Environmental Modification Convention
ENTRI	Environmental Treaty and Resources Indicators
EU	European Union
GC	Geneva Convention
HCP	High Contracting Parties
HRL	Human Right Law
IAA	Independent Administrative Authority
IAC	International Armed Conflict
IC	International Committee
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Community of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IEA	International Environmental Agreement
IEL	International Environmental Law
IEP	International Environmental Policy
IHL	International Humanitarian Law
IO	International Organisation
IUCN	International Union for Conservation of Nature
MEA	Multi Environmental Agreement
NEAP	National Environmental Action Plan
NGO	Non-Governmental Organisation
NIAC	Non-International Armed Conflict
PCA	Permanent Court of Arbitration
PSO	Peace Support Operation

POW	Prisoner Of War
RC	Republic of Congo
SDGG	Sustainable Development Good Governance
SO	Scientific Organisation
UN	United Nations
UNCCC or FCCC	United Nations Convention on Climate Change or Framework Convention on Climate Change
UNCCD	United Convention to Combat Desertification
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNECE	United Nations Economic Commissions for Europe
UNESCO	United Nations Education, Scientific and Cultural Organisation
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UN	United Nations
USA	United States of America
WHC	World Heritage Convention



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CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

‘The tolling of armed conflict nowadays stretches further than human suffering, dislodgment and destruction to households and infrastructure’.¹ Modern conflicts generate extensive environmental damages. Damages extending beyond the countries in conflict borders and threatening the lives and livelihoods of people in the affected areas and often beyond peace agreements.² Thus it is a fact that armed conflicts result in detrimental impacts on the environment.³ Army actions such as soldiers operations, land mines, artillery, devastation of forestry or common military practice, contamination of river bases, gun firing of animals for training, demolition of buildings, etc., are just some illustrations of the way war and peacetime army operations harm the environment.⁴

Due to the negative impact of these military activities on the environment, attempts were made and are still being considered by the international community on how to mitigate the effects of these activities through continuous regulations. Nevertheless, the warfare regulation is still developing compared to other international law sectors.⁵ This is so because an international institution still has to be established to deal with its development, implementation, or to monitor its observance. Most of the time, the international community relied on the parties in conflict to implement the law of armed conflict while being in turmoil; it is almost impossible because the temptation to breach the legal frameworks is enormous. During armed conflict, the belligerents focus mostly on achieving their goal to neutralise the enemy. In this regard, military restraint becomes theoretical rather than practical and often environmental damages go unpunished for the executives.⁶

¹ Maruma ME, Bruch C, Diamond J Protecting the Environment During Armed Conflict; An Inventory and Analysis of Alternative Practices (2009) DEPR/09/01/01 UNHCR Reports & conflict’ (1992) 2 *International Review ICRC* 608; <http://www.icrc.org/eng/resources/documents/misc/5deesv.htm> (accessed 25 September 2012).

³ Bouvier A A ‘A Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict’ (1996) 2 *International Review CRC*230; <http://www.icrc.org/eng/resources/documents/misc/57jn38.htm> (accessed 25 September 2012).

⁴ Wyatt J ‘Law-making at the intersection of international environmental, humanitarian and criminal law: the issue of damage to the environment in international armed conflict’ (2010) 599 *International Review ICRC*597.

⁵ Bothe M, Bruch C, Diamond J & Jensen D *International law protecting the environment during armed conflict: gaps and opportunities* (2010) 571.

⁶ Cherif Bassouni M ‘Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights’ (2000) 63 *Law & Contemporary Problems* 388.

Currently, several United Nations (UN) treaties in relation to International Environmental Law (IEL) have addressed issues of the protection of the environment. This started as early as 1867 in the Convention between France and Great Britain Relative to Fisheries.⁷ Today, with the current update to the 2013 version of the International Environmental Agreements (IEAs), there are over 1,100 Multilateral Environmental Agreements (MEAs).⁸ MEAs address specific provisions to safeguard the environment,⁹ with provisions applicability capable of ceasing during armed conflict.¹⁰ However, for clarity purpose, it is important to dwell on MEAs that directly or indirectly ensure the protection of the environment during armed conflict such as the 1972 World Heritage Convention (WHC),¹¹ the 1982 United Nations Convention on the Law of the Sea (UNCLOS)¹² and the African Convention on the Conservation of Nature and Natural Resources.¹³

From the International Humanitarian Law (IHL) perspective, there has been an on-going attempt to find solutions to make the law of war more applicable. With the International Armed Conflict (IAC) extensively regulated, Non-International Armed Conflict (NIAC) regulations are to be expanded due to some tactics applied.¹⁴

Regardless of the protection provided by numerous imperative international and national legislations, the environment continues to be the victim of armed conflicts universally. The United Nations Environment Programme (UNEP) has executed about twenty post-conflict evaluations from 1999, using scientific evidence to establish the environmental impacts of war. From Kosovo to Afghanistan, Sudan and the Gaza Strip, UNEP has discovered that armed conflict generates harm to the environment and the communities that rely on the natural resources. Direct and indirect environmental damage, joined with the disintegration of

⁷ Convention between France and Great Britain Relative to Fisheries, (Paris) 1867 (1867) 26 ILM 416.

⁸ International Environmental Agreements (IEA); <http://iea.uoregon.edu/page.php?file=home.htn&query=static> (accessed on 19/02/2013).

⁹ The Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment of 1993 (1993) 32 ILM 1228.

The Convention on Third Party Liability in the Field of Nuclear Energy 1960 (1960) 26 ILM 278, The Vienna Convention on Civil Liability for Nuclear Damage 1963 (1963) 2 ILM 727, The International Convention on Civil Liability for Oil Pollution Damage 1971 (1971) 87 ILM 561.

¹⁰ The Convention on Early Notification of a Nuclear Accident 1986 1439 UNTS 276, The Convention on Biological Diversity (CBD) 1993 168 UN 193, The Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) 1989 (1989) 28 ILM 657.

¹¹ The World Heritage Convention (WHC) 1972 (1972) 57 DSF UNTS 127.

¹² The United Nations Convention on the Law of the Sea (UNCLOS) 1982 (1982) 157 UNCLOSIII 167.

¹³ The ACCNNR 2003 UNTS 1001.

¹⁴ The NIAC is covered by the Article 3 common to the GCs and AP II. And other aspects of the NIAC are matters of interpretation of IHL mechanisms, Customary Law, the jurisprudence and other sources of law and scholars' contributions.

organisations involve in environmental management, increase the environmental risk on the health, livelihoods, security, and eventual weakening of post-conflict peace-building.

The current international legal framework, whether in IEL or IHL, provides for countless requirements that directly or indirectly safeguard the environment or oversee the exploitation of the natural resources during armed conflict. Practically, these requirements have not constantly been efficiently enforced. Where the international community has required individuals and states accountable for environmental harm caused during armed conflict, the outcomes have been poor, with only one exception: holding Iraq responsible for damage caused during the 1990-1991 Gulf War, including huge compensation for environmental damage.¹⁵

The situation in The Republic of Congo (RC) shows several breaches of the provisions in the past few years. This is partly due to the failure to implement the existing mechanisms and the administrative dysfunction, despite ratifying international requirements. No awareness has been created within the State for these provisions. Therefore, when faced with political antagonisms, the administration forgets its obligations toward the international community.

Assessing the war in the RC indicates serious environmental damage to the extent that corpses were dumped into water sources, contaminating natural resources that the rural communities rely on. While in urban areas, the uses of massive explosives had damaging effects on habitations and roads, with the impacts of past conflict still evident to date. Furthermore, the uses of land-mine explosives caused serious problems for agricultural land, making it difficult for farmers who have that as source of revenue. The use of heavy weapons containing chemicals, in the fauna and the flora regions, caused a decrease on rare species in the rich Mayombe forest.¹⁶ The establishment of military camps within the communities continues to generate environmental damage.¹⁷ The effects of uncontrolled military activities without any doubt generated economic chaos.¹⁸

Often, the RC legislation has been soft on environmental regulation. In addition, its military structure has often been founded on a tribal basis, causing persistent chaos within the military

¹⁵ Maruma ME, Bruch C, Diamond J (2009) 4.

¹⁶ Desgagne R 'Assessing the Congolese civil crisis' (2003) 102 *International Review ICRC* 10.

¹⁷ On March, 4, 2012, a military depot built among the community caught fire and caused enormous damage to the habitations. The area, called Mpila, is now declared uninhabitable due to pollution caused by ammunitions; <http://www.aljazeera.com> (accessed 4/03/2012).

¹⁸ Desgagne R (2003) 102.

structure with the risk of turmoil being almost unavoidable. Many countries consider military activities as sacrosanct, authorising devastation of the environment in the name of the country's protection.¹⁹ This has been a constant military tactic applied in the RC during armed conflict. Despite problems in the RC, indications show that other countries are taking responsibility for the environment in relation to military activities. It is perhaps on these national experiences in controlling excesses that future international controls may be better modelled and implemented.²⁰

Furthermore, instruments in the environmental domain, such as the ENMOD of 1977, make explicit reference to the environment. They prohibit the hostile use of environmental modification techniques having widespread, long-lasting or severe effects on the environment.²¹ The Additional Protocols (AP) I and II to the four Geneva Conventions (GCs) also prohibit methods of warfare intended or expected to cause widespread, long-term and severe damage to the environment, or to prejudice the health or survival of the civilian population.²² Yet, the clear statements made by these provisions were never observed during the RC civil wars.

Under AP I, parties must take the precautions to protect the environment. In addition, AP I provides for limits on the use installations that contain dangerous substances as a means of attack. This is aimed mainly at potentially dangerous sites like nuclear power plants, power plants and waterworks.²³ AP II has the same limitations, but in relation only to NIAC. Although both AP I and II have been ratified widely, their implementation is still very limited in the RC.

The 1972 World Heritage Convention (WHC), although not related to armed conflict, established obligations to protect cultural or ecologically significant sites which are useful. However, the WHC does not help to prevent the deliberate destruction of the environment during armed conflict while there are important provisions, especially in relation to military activities during peacetime that may also become relevant during armed conflict to deter direct attacks on such sites. This will partly depend on raising the awareness on soldiers

¹⁹ Henckaeris JM, Doswald-Beck L *Customary International Humanitarian Law* (2005) 145.

²⁰ Van der Poll L, Booley A 'In our Common Interest: Liability and Redress for Damage Caused to the Natural Environment during Armed Conflict' (2011) 2 *Law, Democracy & Development* 15.

²¹ 'The 1976 ENMOD'; <http://www.unep.org> (accessed 12/02/2013).

²² 'War and Environmental Law; Additional Protocol I & Protocol II'; <http://www.unep.org> (accessed 12/02/2013).

²³ Henckaeris JM, Doswald-Beck L (2005) 145.

during both peacetime and war for the existence of important sites that their destruction is absolutely forbidden, based on ethic.²⁴

Despite the pessimism concerning the protection of the environment during armed conflict in the RC, the WHC does play key roles if well promoted.²⁵ Although there are some differences, the fusion of IHL and IEL is consequently evident because these branches of public international law endeavour to protect life through the protection of the environment during armed conflict. The adoption of the international instruments and their subsequent reception into domestic law create specific principles to regulate armed conflict, including the conduct of hostilities, some of which have acquired the status of customary international law.²⁶ Similarly, scholars of IEL have highlighted the importance of principles of global environmental responsibility.²⁷ Therefore, it is the obligations of states to implement these principles domestically.

1.2 Aims of the Study

The International Committee of the Red Cross/Crescent (ICRC) has been the only agency promoting the observance of the law of armed conflict.²⁸ It has invested considerably in finding solutions to protecting people and regulates the means and methods of warfare. Throughout the development of the law of armed conflict, the protection of the environment was never the centre of focus. From the early 1868 Declaration of Saint Petersburg to the Hague Regulations of 1907, attention was given to weakening the military forces of the enemy and the right of the belligerents not to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war. Through AP I, the basic principle of IHL was reaffirmed. The concepts of military necessity and proportionality became clearer, permitting only those acts of war which are proportional to the lawful objective of a military operation.²⁹

Considering the cruelty experienced through the crises that occurred in the RC, it is therefore imperative for the administration to enforce their observation.³⁰ In the light of the above

²⁴ Van der Poll L, Booley A (2011) 15.

²⁵ 'The ICRC Achievement so far'; <http://www.icrc.org> (accessed 13/09/2012).

²⁶ Van der Poll L, Booley A (2011) 3.

²⁷ Birnie P, Boyle A, Redgwell C *International Law & the Environment* 3ed (2009) 107

²⁸ Wyatt J (2010) 605.

²⁹ Gasser H-P 'For Better Protection of the Natural Environment in Armed Conflict: A Proposal for Action' (1995) 63 *American Journal of International Law* 637.

³⁰ From 1997 to 2002 wars devastated the RC environment, through the use of weapons that caused widespread, long-term and severe damage.

background the aims of this research paper are to seek to explore the challenges that the current RC administration is facing in implementing IHL and IEL principles. In addition, the research paper will analyse the possibilities to promote the implementation of IHL and IEL instruments within the public domain, mostly the army, to dissipate any ignorance that occur. The International Court of Justice (ICJ) has also made it clear that an obligation rests upon states to take environmental considerations into account during armed conflict in so far as these relate to states' military objectives.³¹

1.3 Research Questions

Considering the facts exposed regarding the RC political realities, there is a manifestation of administrative delinquency. International instruments are not ratified just to decorate the constitution but to strengthen the legislation and enable the State to have a good relationship with others. Meaning that states enter into agreements with others knowingly; therefore, not implementing requirements does not affect the delinquent State only, but also its neighbouring states and the agreeing states as well. Therefore, the primary research questions are:

1. What has been the response of the administration toward international environmental instruments ratified by the RC? How has the RC administration responded to IHL and IEL instruments since their ratification with respect to arm conflicts?
2. When ratifying the legal frameworks protecting the environment, did the RC administration have a complete understanding of its obligations? If not, will that suffice for the protection of the environment to be disregarded?

1.4 Significance of the Study

Since its independence in the 1960s, the RC has developed a strong desire to establish democratic principles.³² It went from the Constitution of 1963 that established its first democratically elected parliament, though was disrupted by various Fundamental Acts that linked the country to a communist policy in the 1970s.³³ However, since the 1990s, the RC

³¹ *Gabcikovo-Nagymaros Case*, ICJ Reports (1997) 196.

³² The Declaration of Independency of the Republic of Congo of 1960; www.servat.unible.ch/icl/cf_indx.html (accessed 19 October 2012).

³³ The Constitution of the RC of 1963, the Fundamental Act of 1968 established by a communist government under Marien Ngouabi presidency, after a Military coup d'état., and the Fundamental Act of 1977, established after the death of Marien Ngouabi through a plot; www.servat.unible.ch/icl/cf_indx.html (accessed 19 October 2012).

has gone through policy transitions, moving from a communism policy to democracy. This brought hope to revive an authentic politic within the country based on democratic principles.³⁴ With the first democratically elected president in 1992,³⁵ the population hoped for a government based on ethic; to live in a country where human rights are observed. However, that was far from reality, because the new democracy was short-lived.³⁶

The RC with its enormous natural resources is attracting more interest from the West, which is almost the cause of its socio-political dilemma.³⁷ This has corrupted the political scene to the detriment of the citizens. The country has experienced political differences, which have exposed its population to various civil wars, consigning the entire nation to living in a social system deemed to be among the poorest of the world. Besides, under these circumstances there have been deliberate intentions to destroy and harm the environment. In such a situation, the need arises to seek solutions to develop consciousness for the protection of the environment during armed conflict in the RC.

As regards to IEL, there are comprehensive instruments addressing environmental concerns to help states to redress their short-comings. Therefore to elaborate on this domain, the work compiled by Birnie, Boyle and Redgwell,³⁸ Kiss and Shelton³⁹ will be of great importance to assist the RC in the path to finding environmental solutions. Birnie, Boyle, Redgwell, Kiss and Shelton take a stand on State responsibility towards established instruments. They support the idea of states obligations regarding Conventions. In the same perspective, Sands has, for example, made pertinent elaboration of the principles and rules relating to the protection of the environment and the conservation of natural resources.⁴⁰ Having dealt with many aspects of the environment, IEL has also seen the contribution of Bowman, who elaborated on the conservation of biological diversity touching on the requirements of the Biodiversity Convention.⁴¹ Authors, such as Boyle and Anderson,⁴² Freestone⁴³ and Chaytor

³⁴ Acts of the National Sovereign Conference of 1991 leading to the first democratic elections of 1992; www.servat.unible.ch/icl/cf_indx.html (accessed 19 October 2012).

³⁵ August 1992: democratic elections. Prof Lissouba P became the first elected President, after the adoption of the Constitution of 15 March 1992; www.servat.unible.ch/icl/cf_indx.html (accessed 19 October 2012).

³⁶ In 1997, the civil war occurred, resulting with President Prof P Lissouba being overturned. The Fundamental Act of 1997 introduced; suspending the 1992 Constitution after General Denis Sassou-Nguesso was re-instated helped by Angola.

³⁷ Tschentscher A 'The Republic of Congo; Political Assessment: From the Independency till the XXIth century' (2011) 155 *African Justice Development Journal* 107; www.servat.unible.ch/icl/cf_indx.html (accessed 19 October 2012).

³⁸ Birnie P, Boyle A and Redgwell C (2009) 20.

³⁹ Kiss A and Shelton D *International Environmental Law* 3 ed (2004) 11.

⁴⁰ Sands P *Principles of International Environmental Law* 2 ed (2003) 10.

⁴¹ Bowman M and Redgwell C *International Law and the Conservation of Biological Diversity* (1996) 30.

⁴² Boyle A and Anderson M *Human Rights Approaches to Environmental Protection* (1996) 55.

and Gray,⁴⁴ have also developed pertinent arguments on the importance of preserving human rights with respect to environmental damage. Taking into consideration the African perspective on environmental affairs, they elaborate on key features motivating African countries to set a high regard on the importance of protecting their natural resources and their environment. Considering the importance of the law of the sea, Churchill and Lowe⁴⁵ have taken a stand on rare species, elaborating on the elements enumerated by the UNCLOS and creating awareness on the conservation of the rare species. Cordonier-Segger and Weeramantry elucidate the notion of sustainable justice, reconciling economic, social and IEL considerations.⁴⁶ Furthermore Dugard,⁴⁷ Gillespie,⁴⁸ Glazewski,⁴⁹ Hunter, Salzman and Zaelke,⁵⁰ Lyster,⁵¹ Schrijver and Weiss,⁵² Verheyen,⁵³ Ruster, Simma and Galizzi,⁵⁴ are among the authors to consider, because they have produced pertinent publications addressing key environmental issues. With regard to the RC environmental issues, there are significant components exposed by these scholars that might help the RC on their path to environmental restoration.

These authors' elaboration on environmental issues will help to understanding the law making process and sources of law, through the comprehension of international governance and the formulation of environmental policy. This may be possible through observing the development of International Environmental Policy (IEP) by the UN, other International Organisations (OI), Scientific Organisations (SO) and Non-Governmental Organisations (NGOs). The assimilation of the principle of sustainable development as a legal implication, and the principle of global environmental responsibility, will make this possible.⁵⁵

As regards to the humanitarian perspective, one has to recognise that the RC's implementation of Conventions is still in progress. When a country is not capable of maintaining its Constitution, it becomes vulnerable to administrative dysfunctions. This

⁴³ Boyle A and Freestone D *International Law and Sustainable Development; Past Achievements and Future Challenges* (1999) 100.

⁴⁴ Chaytor B and Gray KR *International Environmental Law and Policy in Africa* (2003) 150.

⁴⁵ Churchill RR and Lowe AV *The Law of the Sea* 3 ed (1999) 305.

⁴⁶ Cordonier Segger M and Weeramantry CG *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (2005) 209.

⁴⁷ Dugard J *International Law: A South African Perspective* 3 ed (2005) 107.

⁴⁸ Gillespie A *International Environmental Law, Policy and Ethics* (1997) 40.

⁴⁹ Glazewski J *Environmental Law in South Africa* 2 ed (2005) 23.

⁵⁰ Hunter D, Salzman J, and Zaelke D *International Environmental Law* (1998) 102.

⁵¹ Lyster S *International Wildlife Law* (1985) 35.

⁵² Schrijver N and Weiss F *International Law and Sustainable Development: Principles and Practice* (2004) 58.

⁵³ Verheyen R *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (2005) 48.

⁵⁴ Ruster B, Simma B and Brock M *International Protection of the Environment Law* (1983) 165.

⁵⁵ Birnie P, Boyle A and Redgwell C (2009) 86.

unbalance is revealing the fact that political leaders are not proficient to uphold the legislation.⁵⁶ Because of differences in the army, there is a problem with the observation of IHL mechanisms within the country's defence forces.⁵⁷ The IHL principles do not prevail over armed conflicts but they do give belligerents possibilities to choose their war tactics.⁵⁸

However, this must be done in respect to civilian populations, cultural objects and the environment.⁵⁹ According to the established ICRC regulations, the RC has not taken significant implementation steps. The provisions enumerated in the Common Article 3 to the GCs specify the neutralised zones, civilian populations, and agreements between the parties to observe the ICRC regulations in times of conflict, are still a major concern within the RC military structure.

Furthermore, the non-observance of Article 15 of the GC IV that characterises the location and time frame of the conflict, and respect for Red Cross emblem if under the authority of the ICRC⁶⁰ as well as serious cases of medical personnel being threatened during armed conflict, have been reported in the RC crises.⁶¹ The various civil wars that occurred in the RC have exposed the military staff to still have to assimilate the ICRC military guidelines, due to the fact that its formation is ethnically motivated. This came as a motivation to eradicate the opposing ethnic groups, for political dominance. This approach led the belligerents to disregard the IHL mechanisms, pushing the combatants to cause immense atrocities, like mass killing of human, animals and the lack of concern for the environment.⁶² The lack of cooperation between belligerents and ICRC officials in terms of giving support to the wounded, sick, refugees, medical personnel, religious personnel, humanitarian workers, staff of civil defence organisations, mediators, journalists, etc. are among the complaints received during the RC civil wars. Even the direct attacks on protected property, like cultural properties, civilian objects, military medical facilities, ambulances, etc., indicate the pressing need to provide pertinent administrative recommendations capable of helping the RC to view the

⁵⁶ Moudoudou P *Congolese Administrative Law* (2003) 105.

⁵⁷ Desgagnes R 'Congolese Defence Forces and the IHL: ICRC Survey' (2003) 85 *International Review ICRC* 94.

⁵⁸ Gill TD and Fleck D *The Handbook of International Law of Military Operations* (2010) 107.

⁵⁹ Bouvier AA 'The Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict' (1996) 5 *International Review ICRC* 230; <http://www.icrc.org/eng/resources/documents/misc/57jn38.htm> (accessed 19 November 2012).

⁶⁰ Article 15 of GC IV August 1949.

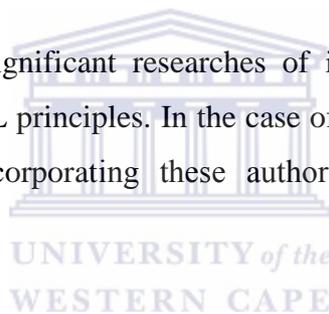
⁶¹ Desgagne R (2003) 70.

⁶² Mampouya P 'Civil Wars in Congo; Ethnical Eradication' *La Voix du Peuple* 22 February 2005; http://www.patrick_mampouya.org (accessed 04 April 2012).

matter in terms of their legal obligations.⁶³ It is significant to undertake research of this magnitude to create awareness in relation to these factors.

It is also important in the context of this research paper to consider the views of pioneers of IHL who have elaborated the values to be considered as doctrine. Among these authors are Sassoli, Bouvier and Quintin, who have cemented pertinent principles, very useful for humanitarian purpose and military sphere.⁶⁴ Quenivet and Shah-Davis have also compiled important information on IHL challenges in the 21st century.⁶⁵ Authors such as Bugnion a pioneer of the protection of war victims⁶⁶ as well as Gill and Fleck are of great help,⁶⁷ because of their elaboration on proper military activities to be displayed within a country. Dormann has put together pertinent research on the Rome statute of the International Criminal Court (ICC) which is very useful for understanding the ICC procedures dealing with war crimes⁶⁸; and Cryer, Friman, Robinson and Wilmshurst contribution that might help us get the understanding of international criminal law and procedure.⁶⁹

These authors have produced significant researches of international standard, to help to understand the importance of IHL principles. In the case of the RC, there is a real possibility to redress the situation by incorporating these authors' contribution to enlighten the administration.



History has demonstrated that countries that have enforced humanitarian principles within their legislation and governance have also experienced economic growth.⁷⁰ The contributions of these authors will definitely help the RC to better understand the objective, the origin, the focus, and the application of IHL and the areas covered effectively by IHL, which are the mechanism of protection, the restrictive measures relating to weapons and tactics of war, the mechanism of compliance, as well as the implementation measures.⁷¹

⁶³ Desgagnes R (2003) 91.

⁶⁴ Sassoli M, Bouvier AA and Quintin A *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* Volume I (Part I – Outline of International Humanitarian Law) 3 ed (2011) 95

⁶⁵ Quenivet N and Shah-Davis S *International Law and Armed Conflict: Challenges in the 21st Century* (2010) 30.

⁶⁶ Bugnion F *The International Committee of the Red Cross and the Protection of War Victims* (2003) 28

⁶⁷ Gill TD and Fleck D (2010) 325.

⁶⁸ Dormann K *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2003) 25.

⁶⁹ Cryer R, Friman H, Robinson D and Wilmshurst E 2 ed *An Introduction to International Criminal Law and Procedure* (2010) 25.

⁷⁰ Boyle A *Human Rights or Environmental Rights? A Reassessment* (2008) 40.

⁷¹ 'What is International Humanitarian Law'; <http://www.icrc.org> (accessed 25/03/2011).

The significance of this research paper is also based on the consideration of the international instruments having a direct and an indirect link with the armed conflicts, and portraying key features very meaningful to protecting the environment, and the RC shortcomings observed in the process regarding the pertinence of the legal frameworks. Among those provisions, we have the requirements aimed at guarding the environment during armed conflict⁷² and few of key IHL features that indirectly protect the environment during armed conflict.

1.5 Research Methodology

This research paper is based on desktop research. It will focus on the administrative decisions taken by the RC administration in conjunction with Conventions. As this research paper focus on the protection of the environment during armed conflict, decrees issued by the Departments of Foreign and Environmental Affairs to ensure the implementation of Conventions addressing environmental matters will be examined.⁷³ Further, it will be important to see how the RC is promoting environmental consciousness.⁷⁴ Furthermore, the RC approach toward IHL and IEL mechanisms must be given attention.⁷⁵

As the RC has ratified the GCs and the APs I and II, the IHL perspectives will be very important to explore in conjunction with the RC position during the civil crises.⁷⁶ Therefore, to clarify the delinquency of the RC with regard to IHL, an examination of the IHL mechanisms is vital.⁷⁷ To succeed in highlighting key features of this research, pertinent primary and secondary sources will be used.⁷⁸

1.6 Chapter Outline

Chapter 1 which is the introduction, consist of the background of the study, the aims of the study, the research question, as well as the significance of the study, the research methodology and the chapter outline.

⁷² Article 1(1) of the 1976 ENMOD.

⁷³ Environmental Law Decree 1987-512 1987 regulating activities affecting the environment. Forest Control Law Decree 1984-233 of 1984 regulating hunting activities in the forest determining the closing and the opening of hunting.

⁷⁴ Air pollution, the dumping of raw sewage, none-potable water, deforestation, etc.

⁷⁵ After ratifying the GCs of 1949 and their APs, the RC did not fully commit to the legal frameworks in IHL. Knowing the pertinence of the ENMOD, the WHC, the 1981 Banjul African Charter, the RC population deserve an enjoyable environment.

⁷⁶ Dr Gill B 'SIPIRI Yearbook 2012; Armaments, Disarmament and International Security' (2012) *Stockholm International Peace Research Institute* 20.

⁷⁷ Buch C 'Protecting the Environment During Armed Conflict' (2009) 50 *International Environmental Law Institute* 10.

⁷⁸ Hoskins Mark J *Incapacity, Disability and Dismissal: the implications for South African Labour Jurisprudence* (Unpublished LLM research paper, University of the Western Cape, 2010) 19.

Chapter 2 deals with the IHL legal framework, specifically provisions addressing the protection of the environment during armed conflict. It will elaborate in on the mechanisms of direct and indirect protection of the environment during armed conflict.

Chapter 3 analyses the IEL requirements for the protection of the environment. This chapter will focus on the MEAs and principles of IEL protecting the environment directly or indirectly during armed conflict.

Chapter 4 elaborates on the RC legislation, and how well the IHL and IEL mechanisms protecting the environment during armed conflict are implemented domestically; as well as the RC and the consequences of their constant short-comings.

Chapter 5 contains the conclusion and recommendations.



CHAPTER TWO

INTERNATIONAL HUMANITARIAN LAW AND THE PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT

2.1 Introduction

IHL came into existence as a result of an increase in humanitarian crises. Thus it became the first body of law to examining the protection of the environment during armed conflict.⁷⁹ IHL is a branch of law that regulates of armed conflicts.⁸⁰ It emphasizes on two issues: the protection of persons who are not or are no longer taking part in the hostilities, the limitations on the means and methods of warfare, including weapons and military tactics.⁸¹

In understanding the objective of IHL, it is important to assimilate its application to armed conflicts. It does not cover internal turbulences, like isolated aggressions. Moreover, IHL mechanisms apply only after a conflict has begun. It is always based on the principle of equitability, irrespective of who first engaged in the hostilities. IHL makes a difference between IAC⁸²; wherein as a minimum two states are involved, and the NIAC, which is limited within the territory of one State. Linking whichever regular forces and a non-governmental party, non-governmental or private militia armed groups fighting each other. IAC is extensively regulated in the main treaties of IHL, whereas NIAC is restrictively regulated.⁸³ This distinction presents challenges concerning the implementation of IHL mechanisms with regard to the protection of the environment. Although IHL was essentially established in a period of interstate wars, currently there is an increase in NIAC. Therefore, countless provisions such as The Hague regulations of 1899/1907 and the GCs are now unsuitable when applied to NIAC. However NIACs are the most linked to environmental damage. With recent study revealing that for six decades almost 40% of all NIACs have a link to natural resources.

⁷⁹ Maruma ME, Bruch C, Diamond J (2009) 10-11.

⁸⁰ GC I, GC II, GC III & GC IV of August 1949; and AP I & AP II of June 1977.

⁸¹ Bothe M, Bruch C, Diamond J & Jensen D, 'International law protecting the environment during armed conflict: gaps and opportunities' (2010) 78 *ICRC International Review* 34-36.

⁸² Meron T *The protection of the human person under human rights law and humanitarian law* (1985) 33-45.

⁸³ Meron T *Human Rights and Humanitarian Law: Applicability in Human Rights in internal strife: Their International Protection* (1987) 49-69.

With regard to the protection of the environment, limited requirement of IHL addresses environmental issues directly. The protection assured by IHL is therefore consequently anecdotal from provisions governing the means and methods of warfare.⁸⁴

During NIAC, the effects of armed conflict on civilian objects and properties are unavoidable. It is due to the participation of the militia with no specific military training. This factor complicates the applicability of IHL, making it to rely on non-binding or soft law, including the UN resolutions because of the restricted requirements protecting the environment during armed conflicts.⁸⁵

In IHL, the protection of the environment is paramount. However, that protection seems difficult due to different interpretations of the regulations. That is why this chapter, analyses key features clarifying the importance to observe IHL mechanisms protecting the environment.

2.2 General Principles of IHL

The general principles of IHL are considered as a source of law on their own.⁸⁶ They supplement and strengthen numerous mechanisms applicable to all countries.⁸⁷ Before examining these principles, it is imperative to consider the prominence of the Martens Clause, an understandable requirement that was first agreed upon at the 1899 Hague Conference and subsequently enclosed in the Preamble of the 1907 Hague Convention IV.

The Martens Clause expands the variety of norms controlling the conduct during armed conflict in a larger perspective than those exposed in the treaty instruments, by asserting issues until the establishment of a more complete code of the laws of war. The High Contracting Parties (HCP) deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection of the principles of the law of nations, as they result from the usages established among civilised people, from the laws of humanity and of public conscience.⁸⁸

⁸⁴ Doswald-Beck L, Vite S 'International Humanitarian Law and Human Rights Law' (1993) 293 *International Review of the Red Cross* 1-20.

⁸⁵ ICRC Advisory Service on IHL The International Humanitarian Fact-Finding Commission (2001) *ICRC (Geneva) International Review*.

⁸⁶ McCormack TLH 'Yearbook of International Humanitarian Law' (2009) 108 *International Review of the Red Cross* 35-82.

⁸⁷ ICRC Advisory Service on IHL What is international humanitarian law? (2001).

⁸⁸ IUCN, A Martens Clause for Environmental Protection, World Conservation Congress Resolution (2000) 2-97; <http://www.iucn.org> (accessed 29 November 2012).

Fundamentally, where loopholes exist in the international framework addressing specific circumstances like the liaison between armed conflict and the environment, the Martens Clause specifies that states have the obligation to observe a minimum standard as elaborated by the standards of humanity and public conscience.⁸⁹

The core principles underpinning IHL comprise the principles of distinction, military necessity, proportionality, and humanity; these principles are considered to have an effect on the protection of the environment during warfare, as elaborated below.

2.2.1 The principle of Military Necessity

This principle entails that the practice of military force is advisable to attain a definite military objective.⁹⁰ Moreover, it pursues to proscribe military actions not revealing any apparent military purpose.⁹¹ Reflected in the 1907 Hague Convention IV, in Article 23(g) on enemy property, this principle specifies that it is prohibited to destroy or seize the enemy's property, unless it is demanded by the necessities of war. This provision has an environmental significance by means of the enemy property incorporating high-value natural resources and protected areas, allowing an indirect protection of the environment.⁹²

2.2.2 The Principle of Humanity

This principle forbids imposing pointless sorrow, injury and devastation.⁹³ Consequently a party to the conflict may not practice malnourishment as a tactic of war or attack, destroy; eradicate objects essential to the subsistence of the civilian to an unusable state.⁹⁴ As per this principle, the destruction of agricultural land, timber resources and the poisoning of water wells vital element to sustain people, like in the Darfur conflict, may be considered inhumane means of warfare.⁹⁵

⁸⁹ Maruma ME, Bruch, Diamond J (2009) 12-13.

⁹⁰ Sassoli M, Bouvier AA and Quintin A (2011) 92-147.

⁹¹ Solis GD *The Law of Armed Conflict: International Humanitarian Law in War* (2010) 35-109.

⁹² The Hague Regulations 1907, Article 23(e).

⁹³ Meron T *The Protection of the Human Person under Human Rights Law and Humanitarian Law* (1985) 33-45.

⁹⁴ Hague Convention IV, Preamble; see also GCs AP I, Article 1(2)

⁹⁵ IUCN A Martens Clause for Environmental Protection, World Conservation Congress Resolution (2000) 2-97; <http://www.iucn.org> (accessed on the 29 November 2012).

2.2.3 The Principle of Proportionality

Grounded on the elements enumerated in Article 57 of AP I, the principle of proportionality elaborates that disproportionate military activities do generate collateral damages considered as extreme to the foreseen direct military improvement gained. For instance, the demolition of villages, burning of forests to reach a single target would be seen as a disproportionate tactic to the military gain.⁹⁶ Considering the burning of oil fields and the millions of gallons of oil deliberately spilled into the Gulf Sea during the 1990-1991 Gulf War, most experts shared the opinion that the massive pollution resulting from such behaviour was disproportionate.⁹⁷

2.3 Requirements Aimed at Protecting the Environment during Armed Conflicts

The international community through treaties, protocols discussed and endorsed by the HCP addressing aspects of warfare, as prohibiting biological, chemical or nuclear weapons, have addressed environmental concerns.⁹⁸ Customary law has also contributed to the sharing of international guidelines recognised through extensive State practice, in which case the universal credence has made it binding.⁹⁹ Contrary to treaty law, it is applicable to states signatories to the respective treaties. In this framework, customary law comprises the norms of *jus cogens* from which no derogation is permitted and serious breaches of IHL have been defined in the GCs and AP I.¹⁰⁰

The incorporation of jurisprudence in international law clarifies the interpretation of treaties. In conjunction with the protection of the environment, the treaty law does provide an understanding of the relevance for IHL requirements protecting the environment during armed conflict.¹⁰¹ These provisions can be divided among those directly protecting the environmental issues, the general principles of IHL and those indirectly protection to the environment during armed conflict.¹⁰²

⁹⁶ AP I of June 1977 to the GCs of 1949, Article 57.

⁹⁷ Bouvier AA 'A Number of Scholars observed that Iraq's actions during the 1990-1991 Gulf War violated Article 23(e) of the Hague Regulations of 1907' (1999) 678 *ICRC International Review* 33.

⁹⁸ Maruma ME, Bruch C, Diamond J (2009) 12-13.

⁹⁹ Sassoli M, Bouvier AA and Quintin A (2011) 1739.

¹⁰⁰ Bouchet-Saulnier F *The Practical Guide to Humanitarian Law* (2002) 266-277

¹⁰¹ UNESCO Declaration Concerning the International Destruction of Cultural Heritage (Paris, 17 October 2003) June 2004 No 854 *International Review of the Red Cross* 447-451.

¹⁰² Maruma ME, Bruch C, Diamond J (2009) 12-13.

2.3.1 Additional Protocol I: Article 35(3) and Article 55(1)

The Geneva Conventions (GCs) well-defined plainly, Prisoners of War (POW) (civil and military); recognised the safeguard of the wounded; and assured the protection of the civilians during armed conflicts. Ratified by 196 countries, the 1949 GCs with time began to present some gaps, which led to the elaboration of the AP I and II.

The discussions of AP I and II to the GCs took place following the emergence of numerous wars of national liberation that generated serious concerns regarding the safeguard of civilian populations and the environment.¹⁰³ The mounting environmental consciousness over military tactics displayed throughout these armed conflicts, led to the insertion of two provisions in AP I that address environmental harm, Article 35(3) and 55.¹⁰⁴

Article 35(3), reads as follows:

‘It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment’.¹⁰⁵

Article 35 concerns the basic rules regarding the means and methods of warfare. It specifies in its Paragraph 3 that it is forbidden to practice methods or means of warfare that have the intentions, or may be expected, to cause widespread, long-term and severe damage to the environment.¹⁰⁶ The requirements of this article safeguard the environment at a level that it was not done before. It is applicable to international and collateral damages and the indispensability of the definite intent.

The provisions of Article 55 provide protection to the environment within the framework of the safeguard measures granted to civilian objects. It prohibits assaults on the environment by reprisals.¹⁰⁷

Fundamental these two Articles prohibit warfare capable of causing widespread, long-term and serious destruction to the environment.¹⁰⁸ These provisions extensively guarantee the

¹⁰³ Bassiouni Cherif M ‘Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights’ (2006) 63 *Law & Contemporary Problems* 384-385.

¹⁰⁴ Maruma ME, Bruch, Diamond J (2009) 11-12.

¹⁰⁵ Article 35 (3) of the Additional Protocol I of June 1977 to the Four Geneva Conventions of 1949.

¹⁰⁶ *Bosnian Genocide Case* ICJ Report (2007), *West South Africa Cases* ICJ Reports (1950) ICJ Reports (1966).

¹⁰⁷ Hladik J ‘Marking of cultural property with the distinctive emblem of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict’ (2004) 854 *International Review of the Red Cross* 401-413.

primarily protection of the environment. However, imperative requests continue with regard to the harmful activities that violate international law.¹⁰⁹ Certainly, this treble standard is an accumulative obligation, meaning that to qualify as prohibited damage the impact must be widespread, long-term and severe. AP I fail to describe these terminologies, effecting inaccurately.¹¹⁰

Boyle¹¹¹ has thus noted that no significant limitation would be imposed on combatants waging conventional warfare.¹¹² This principle appears predominantly guided instead to elite decision-makers and would disturb an unusual means of combat as per the substantial use of herbicides chemical causes which could yield widespread, long-term and severe damage to the environment.¹¹³ The significance of these two requirements and the safeguard they provide in practice, hereafter, seem inadequate.

2.3.2 The 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques

The reaction to the military tactics displayed by the United States of America (USA) during the Viet Nam war, led to the establishment of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, also called the 1976 ENMOD Convention.¹¹⁴ These involved strategies for across-the-board environmental modification techniques that had the capability to transform the environment into a weapon. By illustration, the provoking of tsunamis, changes in weather patterns, geophysical warfare or earthquakes are sufficient to prove just that.¹¹⁵ Many factors led to the ENMOD Convention. The use of chemical defoliants was among the reaction which brought about a far-reaching human suffering and long-term environmental contamination, along with momentous destruction of forests and wildlife.¹¹⁶

¹⁰⁸ Maruma ME, Bruch C, Diamond J (2009) 12.

¹⁰⁹ Boyle A 'The Environmental Jurisprudence of the International Tribunal for the Law of the Sea' (2007) 22 *The International Journal of Marine and Coastal Law* 369-381.

¹¹⁰ Chapman PF 'Ensuring Respect: United Nations Compliance with International Humanitarian Law' (2009) 17 *Washington College of Law Journals & Law Review* 3-11.

¹¹¹ Boyle A (2008) 98.

¹¹² Boisson de Chazounes L & Condorelli L 'Common Article 1 of the Geneva Conventions revisited: Protecting collective interests' (2000) 837 *International Review of the Red Cross* 67-87.

¹¹³ Gasser H-P 'For Better Protection of the Natural Environment in Armed Conflict: A Proposal for Action' (1995) 89 *The American Journal of International Law* 637-643.

¹¹⁴ Maruma ME, Bruch, Diamond J (2009) 12.

¹¹⁵ Reyhani R 'The Protection of the Environment During Armed Conflict' (2007) 1-9 *IIES International Environmental Law Journal*; http://www.works.bepress.com/roman_rehani/1 (accessed 25 October 2012).

¹¹⁶ Maruma ME, Bruch C, Diamond J (2009) 12 (Birth defects, mutations, death, cancer and other illnesses).

In Article 1, the ENMOD necessitates that HCP not to take part in hostile use of environmental modification techniques causing widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.¹¹⁷ However, though Article 35(3) of AP I have as objective to safeguard the environment per se, ENMOD disallows the usage of methods that transform the environment into a weapon.¹¹⁸ Even though the UNEP facilitated the discussions that led to the ENMOD, in terms of its implementation, a lot of components still have to be considered.¹¹⁹

Comparing AP I to the ENMOD entail a considerable inferior verge of damage, as per the threefold accumulative standard being replaced by an alternative one: widespread, long-lasting or severe. Furthermore, it seems that the terms were understood contrarily. For example, the term long-lasting within the ENMOD is described as lasting for a period of months or a season, whereas under AP I, long term is construed as a decade.¹²⁰ It may well be established that ENMOD has been effective, as no other Viet Nam scenarios have been reported since 1976.

2.4 The IHL Requirements and the Indirect Protection of the Environment during Armed Conflicts

The Indirect protection of the environment during armed conflict may be grouped into five categories: rules limiting or prohibiting certain weapons and methods of warfare; clauses protecting civilian objects and property; clauses protecting cultural heritage sites; rules regarding the installations containing dangerous forces; and limitations on certain specifically defined areas. The assimilation of these rules will help understand how IHL indirectly protects the environment.

2.4.1 The Protection of Civilian Objects and Property

Under IHL, the requirements that directly safeguard the civilian objects and property may well offer a supplementary legal basis protecting the environment during armed conflict, comparing to those protecting the environment per se.

Among those, the relevant provisions are:

¹¹⁷ Reyhani R (2007) 88.

¹¹⁸ The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) 1976 (1976) UN 303.

¹¹⁹ Preparatory meetings prior to the adoption of the ENMOD Convention; United Nations Environment Programme (UNEP); <http://www.unep.org> (accessed 18 October 2012).

¹²⁰ Maruma ME, Bruch, Diamond J (2009) 12.

The 1907 Hague Convention IV in which is enclosed The Hague Regulations regarding the customs and laws of war on land specifying the prohibition to destroy or seize the enemy's property, unless it fulfils the necessities of warfare. This enemy property comprises protected areas, environmental and natural resources as expressed above, which may receive indirect protection by the Hague Regulations.

GC IV elaborates on the treatment of civilians and property during armed conflict and occupation, stating non-combatants as protected persons whose lives and livelihoods have to be out of reach of military targets.¹²¹ In Article 47, GC IV has elaborated on the large demolition; expropriation of property unjustified by military necessity and declares it as grave breaches to GC IV and The Hague Regulations on enemy property.¹²² By uttering that as a reverence for the protection of the civilian population and civilian objects, the belligerents must at all times be distinguished between civilian objects and military objectives.¹²³ And thus, they shall direct their military manoeuvres only against military objectives.¹²⁴ Within this rule, the general principle of distinction has been affirmed.

AP I in Article 54(2) also indirectly safeguards the environment by disallowing attacks against objects vital to the subsistence of civilian population; objects that are of great significance to the population's livelihood. Natural resources like agricultural land, cattle, and drinking water sources are significant components for mankind's survival. This requirement has been seen as the reflection of customary international law; as its defilement constitutes a serious breach of IHL if actions prevailing out of it disregard the elements enumerated within Article 147 of GC IV. Furthermore, Article 54(3) (b) applies even when farmlands and crops are used in direct support of military action, if their destruction were to cause starvation or forced relocation of the civilian population.¹²⁵ Lastly, the cautionary processes confined within Article 57, which does relate to the proportionality principle as well, enhance the environmental safeguard by discouraging acts possible of leading to impact the environment.¹²⁶

¹²¹ Article 23 GC I, Article 14 GC IV, Article 15 GC IV, Article 59 AP I, Article 60 AP I, and Article 3(3) Common to the GCs.

¹²² Article 47 of GC IV of 1949; see also *DRC v. Uganda*, ICJ (2005); *Darfur Case*, ICC (2008)-02/05-157-AnxA.

¹²³ Article 48 of the AP I; Article 59 of the AP I.

¹²⁴ Bouvier AA 'Protection of the environment in time of armed conflict' ICRC, 47th session of the UNGA' (1992) 609 *ICRC International Review* 70.

¹²⁵ Article 52, 147 and 53(b) of GC IV of 1949.

¹²⁶ *Tadic Case*, ICTY (1999) Paragraphs 119-126.

2.4.2 Restrictions on Means and Method of Warfare

Various weapons have the power to generate severe and long-term damage to the environment. Restricting the improvement and usage of these weapons may indirectly safeguard the environment during armed conflict. Three of these sources are analysed below.

2.4.2.1. The Hague Convention IV 1907

As noted above, IHL treaty law before the agreement of AP I and II never addressed explicitly the protection of the environment. Nevertheless, two requirements of the Hague Convention IV governing the means and methods of warfare are pertinent to the environment. Firstly, Article 22 deliberate that no limitation is given to the belligerents to adopt means of injuring the enemy. These provisions have been seen as one of the most substantial in so far as a preventive authority to be used in the absence of explicit provisions.¹²⁷ This first provision does illuminate the second provision; the Martens Clause, contained in the preamble of the 1907 Hague Convention IV.

So far in terms of enforcing The Hague Law on the means and methods of warfare, very little has been achieved, and that most judicial cases conducted to date have instead focused on violations of the Geneva Law protecting persons and civilian objects.¹²⁸

2.4.2.2 Convention on Certain Conventional Weapons 1980

The Preamble to the 1980 Convention on Certain Conventional Weapon (CCW) and its Protocol III particularly make reference to the protection of the environment. Since its amendment in 2001, spelling out the necessity to protect the environment has now confirm its applicability into NIAC.¹²⁹

Besides elements enumerated in Protocol II and Protocol III to the CCW trying to restrict the harmful consequence of landmines by demanding states to establish protective measures like registering the location of targets, to allow the collection of the unexploded devices, to enable considerable restoration of the environmental conditions. Finally, Protocol V on Explosive Remnants of War, adopted in the problem of unexploded and abandoned ordinance, offers

¹²⁷ The Hague Regulations of 1907, reiterated in Article 37(1) of AP I 1977.

¹²⁸ Tarasofsky RG 'Protecting especially important areas during international armed conflict: A critique of the IUCN Draft Convention on the Prohibition of Hostile Military Activities in Internationally Protected Areas' (2000) 24 *Netherlands Yearbook of International Law* 61.

¹²⁹ Maruma ME, Bruch C, Diamond J (2009) 15.

similar guidelines that can serve to indirectly protect the environment from post-conflict threats.¹³⁰

2.4.2.3 Landmines and Cluster Bombs

Protocol II to the CCW has as goal the limitation to the on-going threat of landmines, while Protocol V acts to eradicate the issue of unexploded and abandoned artillery.¹³¹ Also, the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction forbids the possession and use of anti-personnel mines.¹³² In Article 5, it is stipulated that each State Party have to ensure that all anti-personnel mines under its jurisdiction have to be destroyed as soon as possible, by no later than ten years after the entry into force of the Convention. Nonetheless, if a Party cannot meet all these requirements within the time frame, it could submit an application to Meeting of the States Parties or a Review Conference for an extension of its deadline. Each request must contain, among other requirements, the humanitarian, social, economic and environmental implications of the extension.¹³³

Further, Articles 51(4) and 51(5) of AP I to the GCs, which disallow indiscriminate attacks, may be of specific significance when encouraging states to abstain from using landmines in warfare that pose long-term risk to both humans and animals.¹³⁴

The Convention on Cluster Munitions, in Article 1 stipulates that HCP commits to never under any circumstances use, produce, and transfer and stockpile cluster munitions.¹³⁵ Article 4(6) (h), which relates to the clearance of cluster remnants, makes clear reference to the consideration of the environment.¹³⁶ The treaty however, is still being opposed by nations that are producers of cluster munitions. The concluding facts of IHL treaty addressing the means and methods of warfare are compelling states to give attention to the absence of treaties explicitly addressing the use of depleted weapons causing unnecessary suffering or having indiscriminating effects.¹³⁷

¹³⁰ CCW 1980 (1980) 245 UN 196.

¹³¹ CCW, adopted on the 10 October 1980, UN Document A/CONF.95/15.

¹³² The 1997 Ottawa Convention is covering a significant amount of elements set to create awareness regarding the use of landmines explosives. During the crises that the RC (1993-1997) encountered, the landmines explosives were used in a much uncontrolled manner making some agricultural fields impracticable.

¹³³ Wyatt J (2010) 92.

¹³⁴ Maruma ME, Bruch C, Diamond J (2009) 16.

¹³⁵ The Convention on Cluster Munitions May 2008 UNTS 11-R.

¹³⁶ Article 4(6) (h) of the Convention on Cluster Munitions. Angola is still struggling to eradicate the cluster bombs threat.

¹³⁷ Article 36 of AP I of 1977, binding in 168 states.

2.4.3 Protection of Cultural Objects

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its 1999 Protocols do safeguard environmental resources, to the extent that such resources fall within the definition of cultural property under Article 1.¹³⁸ This convention proscribes the use of cultural property for any military objective capable of exposing it to damage in the event of armed conflict, and forbids any act of hostility directed against such property.¹³⁹

With the introduction of a new system enhancing the protection of the environment by clarifying the precautionary measures, the 1999 Second Protocol defines clearly the serious violations. It therefore requests states to establish their jurisdiction over those violations. This provision is relevant to the current 176 natural sites on the UN Education, Scientific and Cultural Organisation (UNESCO) World Heritage List. And the sites to be registered under the UNESCO 2003 Convention for the Safeguarding of Intangible Cultural Heritage, provided that they fall within the definition of cultural property under Article 1 of The Hague Convention. In addition, the Second Protocol extends the Hague Convention's protection to NIAC.¹⁴⁰

2.4.4 Additional Protocols I and II of 1977 to the 1949 Geneva Conventions

The adoption of AP I and II reinforced the safeguarding of the cultural property. With Articles 38, 53, 85 of AP I and Article 16 of AP II, the protection of cultural property was assured.¹⁴¹ Nevertheless there is no clarification of the protection of the environment per se.

2.4.5 Protection of Industrial Installation Containing Dangerous Forces

With the adoption of the GCs, there were key aspects to the armed conflicts that were not fully covered. Therefore, the introduction of the AP I and II assured that areas like industrial installation containing dangerous forces be protected.

¹³⁸ The Hague Convention Protecting Cultural Property in the Event of Armed Conflict and its two Protocols (1954 and 1999), Article 1.

¹³⁹ Article 14 & 15 of GC IV of 1949.

¹⁴⁰ The 1999 Second Protocol to the Hague Convention Protecting Cultural Property in the Event of Armed Conflict.

¹⁴¹ Articles 38, 53 & 85 of AP I and Article 16 of AP I of 1977.

2.4.5.1 Additional Protocol I Article 56

Article 56 proscribes attacks on works and installations containing dangerous forces, like dams, dykes and nuclear electrical stations. This article makes no mention of Oil fields and petrochemical plants. However, with the expansion the general principle of distinction comprised within the rule under Article 52 oil fields and petrochemical plants can be protected.¹⁴²

As it is the case under Article 54(2), the prohibition set forth in Article 56 applies even when the target constitutes a military objective, except in the restricted cases referred to under Paragraph 2.¹⁴³

2.4.5.2 Additional Protocol II Article 15

Article 15 of AP II extends the protections contained in Article 56 of Protocol I to NIAC, thereby protecting dams, dykes and nuclear electrical generating stations from being targeted in NIAC as well.¹⁴⁴

2.4.6 Restrictions Based on Targeted Areas

Considering the restrictions that IHL imposes on the means and methods of warfare, we will also elaborate on the territories under occupation, neutral territories and the demilitarized zones. The objective here is to highlight by illustration on the restricted areas the importance of the protection of the environment during armed conflict be it indirect.

2.4.6.1 Territories under Occupation

The Hague 1907 was the first to launch regulations for occupied territories. Some characteristics were settled more by the GC IV. Article 55 of the 1907 Hague Convention IV arrays the rules of usufruct for the occupying power, explaining that the occupying power may use the occupied property, but has not the right to damage or destroy it, except in case of military necessity. Likewise, Article 53 of the 1949 GC IV proscribes the destruction by the

¹⁴² Article 52 and 56 of the AP I of 1977.

¹⁴³ Article 54(2) of AP I clarifies the limitation of protection as prescribe in Article 56. (Dams, dykes and nuclear electrical generating stations).

¹⁴⁴ Article 15 of AP II.

occupying power of property individually or collectively owned by inhabitants of the occupied territories, except in the circumstances of absolute military necessity.¹⁴⁵

The exceptional standing of occupied territories' regulations is such that the provisions qualifying the occupants as useful, could suggest guiding principles to deal with similar cases in the perspective of NIAC.¹⁴⁶ The increasing exhaustion of valued natural resources has become a common feature of NIACs, mostly caused by illegal exploitation serving to finance armed forces and their weaponry. In the last two decades, studies have shown that more or less eighteen NIACs have been caused by natural resources such as diamonds, timber, minerals, oil and cocoa, being exploited by armed groups in Liberia, Angola, the Democratic Republic of Congo (DRC) and the RC.¹⁴⁷

2.4.6.2 Neutral Territories

The law of neutrality is based on a customary principle. Codified in the 1907 Hague Conventions V and XIII, recently this codification has not been added to any treaty. The dominant obligation of the law of neutrality is the responsibility of abstention and impartiality. Based on principle, the dealings between belligerents and neutrals are definite by the appropriate law in times of peace.

With reverence to the environment, this customary principle is enunciated in the ICRC Guidelines for Military and Instructions on the Protection of the Environment in Times of Armed Conflict, where it is specified that responsibilities relating to the protection of the environment to states not party to an armed conflict are not affected by the existence of the armed conflict to the extent that they are not inconsistent with the applicable law of armed conflict.¹⁴⁸

2.4.6.3 Demilitarised Zones

Formally identified demilitarized zones between belligerents fall under the protection of Article 15 of GC IV and Article 60 of AP I. Defilement of this requirement constitute a grave breach of IHL if it does fall under the provisions set forth by Article 85 of AP I.¹⁴⁹

¹⁴⁵ Article 55 of the Hague Convention IV of 1907, repeated in Article 53 of GC IV of 1949.

¹⁴⁶ Maruma ME, Bruch C, Diamond J (2009) 19.

¹⁴⁷ The misuse of natural resources is being a major cause of NIACs. Often rebels are seizing minerals extraction sites and exchanging it with weapons for their supplies.

¹⁴⁸ Fifth ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, 1996.

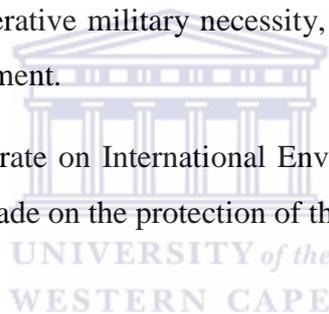
¹⁴⁹ Article 15 of GC IV, Article 60 and 85 of AP I. With the Antarctic Treaty of 1959 and the Outer Space Treaty of 1967, protecting the Antarctic and Outer Space.

Most importantly, the one option to improve the protection of valued protected areas or dangerous environmental hotspots would be to classify them as demilitarized zones.¹⁵⁰ IUCN has supported the adoption of a Draft Convention on the Prohibition of Hostile Military Activities in Protected Areas,¹⁵¹ established based on the 1990-1991 Gulf War in reaction to the escalating environmental damages during armed conflict. The Draft Convention would necessitate the UN Security Council to indicate protected areas to be marked demilitarized areas during conflicts, whereas the listing process would establish the criteria to define an international protected area. Thus far, the UN Security Council has not yet given its support to the Draft Convention. The same applies to the rest of the members of the international community, their support still lacking for its adoption.

2.5 Conclusion

Whether directly or indirectly, IHL mechanisms have enumerated the pertinence to protect the environment during armed conflict, some sources of law contain requirements that may cease to apply based on the imperative military necessity, the fact is the impacts of warfare are always visible on the environment.

The following chapter will elaborate on International Environment Law (IEL) mechanisms, regarding the direct expression made on the protection of the environment.



¹⁵⁰ Article 56(&) of AP I advise visually marking industrial hotspots as non-target zones.

¹⁵¹ Draft Convention on the Prohibition of Hostile Military Activities in Protected Areas, International Council of Environmental Law, IUCN, 1995.

CHAPTER THREE

THE PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT AND THE INTERNATIONAL ENVIRONMENT LAW MECHANISMS

3.1 Introduction

Frequent cases of environmental damage that contribute to the escalation of the responsibility during peacetime are governed by IEL.¹⁵² However, the liability is determined by the degree of damage stemming from armed conflict. In IEL, it is always a matter of assessing the applicable legal framework.¹⁵³ Entrenched in IEL are several MEAs.¹⁵⁴ In case of environmental damage it becomes incumbent on the parties to find the applicable MEAs.¹⁵⁵ During NIAC, the environmental damage caused by non-state armed groups, the *Trail Smelter* Principle will apply.¹⁵⁶

In the same perspective, the World Heritage Convention (WHC)¹⁵⁷ safeguards locations of cultural and natural heritage which with regard to the protection of the environment does give some important elements. There are still interrogations if the WHC will disallow the scorching of national parks comprising a World Heritage site through military activities.

As per the unauthorised trading of endangered species that some non-state armed groups are exchanging for weaponry and provisions, as reported in some cases,¹⁵⁸ the Convention on the International Trade of Endangered Species Fauna and Flora (CITES)¹⁵⁹ that proscribes unauthorised trading of endangered species, does clarify requirements firmly standing against such practices. The establishment of the liability regime between regular military forces and rebellion forces will always be based on the degree of the damage caused.¹⁶⁰ The question of

¹⁵² Birnie P, Boyle A, Redgwell C (2009) 211-266.

¹⁵³ International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL) (1954).

¹⁵⁴ Barcelona Convention Protecting the Marine Environment and the Coastal Region of the Mediterranean and its Protocols (1976/1995).

¹⁵⁵ Bernasconi C 'Civil Liability Resulting from Trans-frontier Environmental Damage: A case for the Hague Conference?' (2009) 678 *International Review of the Red Cross* 123-205.

¹⁵⁶ Birnie P, Boyle A, Redgwell C (2009) 268.

¹⁵⁷ The WHC of 1972.

¹⁵⁸ Maruma ME, Bruch, Diamond J *Protecting the Environment during armed conflict: An inventory and analysis of International Law* (2009) 34.

¹⁵⁹ The Convention on the International Trade of Endangered Species Fauna and Flora (CITES) (1973).

¹⁶⁰ Segger CM and Weeramantry CG *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (2005) 167.

applicability of IEL during armed conflict is still maturing domestically and internationally. States are still in the process of determining how IEL relates to IHL and other bodies of law, such as International Trade Law.¹⁶¹

The perspective of applicability of IEL during warfare has transpired through scholarly contributions.¹⁶² Since the establishment of war regulations, armed conflicts have always been governed by IHL. However, it is imperative to recognise that it has taken time to eradicate all ambiguities in the application of IEL and IHL during warfare. At times, the two intersect during peacetime or war.¹⁶³ Therefore, this chapter will elaborate on IEL applicability during warfare. And to clarify on the ethics of IEL and MEAs, the customary law approach of protecting the environment and the scholars' illuminations on some points of divergence concerning the applicability of IEL during warfare.

3.2 The Ethics of IEL and MEAs

In IEL there is much difference comparing to IHL where the characteristics are clearly established concerning the combatants, civilian population, cultural objects, means and methods of warfare. In IEL, it is mostly about elaborating the evidence based on its relevance during warfare. Therefore, the pertinence of the solution in IEL will result to the applicable MEAs. MEAs in IEL influence directly or indirectly the conflicts, whether by intrusion or by declaration.¹⁶⁴

Other MEAs cease to apply as per the start of the armed conflict. Regarding the MEAs examined here, only a few evidently declare their suspension during warfare. All the remaining MEAs are divided among those that directly or indirectly continue during NIAC.

3.2.1 The Direct or Indirect MEAs Assuring the Protection of the Environment during Armed Conflicts

MEAs are binding international instruments between more than two states. The breaches of these MEAs increase State responsibilities. This section categorises the MEAs that may be

¹⁶¹ Gillespie A *International Environmental Law, Policy and Ethics* (1997) 235-305.

¹⁶² Dinstein Y *Protection of the Environment in International Armed Conflict* (2004) 523-549.

¹⁶³ Maruma ME, Bruch, Diamond J (2009) 34.

¹⁶⁴ Reyhani R (2007) 1-19.

pertinent to armed conflict, along with those that directly or indirectly remain in force after the conflict has begun.¹⁶⁵

3.2.2 The 1972 World Heritage Convention

The 1972 WHC give HCP the awareness to identify and protect natural resources sites being part of mankind inheritance. The WHC stipulates that any form of danger of warfare is enough to register a site on the World Heritage Danger list. As from 2007, attention was given to a site under threat of losing its inscription¹⁶⁶ on World Heritage List.¹⁶⁷ The inclusion of this provision specifies that the WHC continues during warfare.¹⁶⁸ The main purpose of the WHC is preventing environmental damage during warfare by calling warring factions to their senses.

In this context, Article 6.3 of the WHC requires that HCP undertakes not to take deliberate measures which might damage directly or indirectly the cultural and natural heritage of another party; through this prerogative it continues indirectly during warfare.¹⁶⁹

According to scholars, only the Ramsar wetlands and the WHC contain clear requirements to compel belligerents to a certain liability after the hostilities.¹⁷⁰

3.2.3 The 1982 United Nations Convention on the Law of the Sea

Signed in 1982 and effective in 1994, the United Nations Convention on the Law of the Sea (UNCLOS) introduces a framework governing the marine spheres intended to cultivate peace and security. UNCLOS serves as the Oceans' Constitution and offers high seas peaceful activities.¹⁷¹ In terms of Articles 192 and 194, states must safeguard the marine environment to preventing marine pollution. Conscious of the pollution from land-based sources, seabed activities and through the atmosphere, Articles 207, 208 and 212 enforce the requirement in the same regard as Article 194, calling for states responsibility regarding all military activities in the maritime zone. However, these extensive requirements are narrowed by Article 236.¹⁷²

¹⁶⁵ Birnie P, Boyle A, Redgwell C (2009) 535-580.

¹⁶⁶ UN Security Council Resolution 1856 UN Mission in the DRC December 2008.

¹⁶⁷ Rose G *International Environmental Law* (1994) 637.

¹⁶⁸ Maruma ME, Bruch, Diamond J (2009) 37.

¹⁶⁹ Article 6.3 of the WHC.

¹⁷⁰ Maruma ME, Bruch, Diamond J (2009) 37-38.

¹⁷¹ Fleck D *The Handbook of the Law of Visiting Forces* (2001) 268.

¹⁷² Article 236 of the UNCLOS.

Article 88 does call states to have a paramount regard to reserve the high seas for peaceful purposes.¹⁷³ However, based on the fact that the UNCLOS is *lex generalis*, this restriction is assumed to be moderated, yielding to the *lex specialis* law of war.¹⁷⁴ Also, Articles 192 and 194 prohibiting pollution outside State jurisdiction are considered as principle of general international law capable of continuing during wartime.¹⁷⁵

Altogether, UNCLOS provisions advocate that the environmental safeguarding requirements may cease during warfare. Article 236 exonerates warships; the Preamble suggests that the observation of these mechanisms was considered during peacetime, therefore allows UNCLOS from applying during warfare.¹⁷⁶ Another pertinent fact is that pollution could come from other causes than vessels, for instance, from an oil spill.¹⁷⁷ Be it unclear as to what level the UNCLOS protects the environment during warfare, it is imperative to contemplate its mechanisms regarding the protection of the environment.¹⁷⁸ The destruction of an oil platform by military activities for instance, causing collateral damage with neighbouring states needs to be covered. Therefore, the UNCLOS provisions will be of great importance.¹⁷⁹

3.2.4 The African Approach of the Protection of the Environment: The African Convention on the Conservation of Nature and Natural Resources 2003

The African Convention on the Conservation of Nature and Natural Resources (ACCNNR) enunciates the necessity for parties to guarantee that Africa's natural resources are well-looked-after, utilised and developed according to the scientific ethics and in the best welfares of the people.¹⁸⁰ It encompasses distinct requirements involving fauna, flora, soil, water, protected species and trade of specimen and conservation areas.

The 1968 and the 2003 ACCNNR describe some exemptions. In the 1968 version, there are three types of variances of activities: (a) in circumstances involving the paramount interest of the State, the defence of human life; (b) in times of famine, to protect public health; or (c) in defence of property.¹⁸¹ The exemption for conditions relating to the paramount interest of the

¹⁷³ Sands P (2003) 231-289.

¹⁷⁴ Boyle A (2007) 369-381.

¹⁷⁵ Kiss A and Shelton D (2007) 733-755.

¹⁷⁶ Maruma ME, Bruch C, Diamond J (2009) 35-36.

¹⁷⁷ Dinstein Y (2004) 523-549.

¹⁷⁸ Reyhani R (2007) 1-19.

¹⁷⁹ Maruma ME, Bruch, Diamond J (2009) 35-36.

¹⁸⁰ Article 2 of ACCNNR, 2003, 1001 UNTS. Signed in 1968, became effective in 1969 and revised in 2003.

¹⁸¹ Article 17 of the 1968 ACCNNR, 1001 UNTS 3.

State seems to express derogation part that might be applicable during warfare.¹⁸² Nevertheless, the exemption of the paramount interest was erased in the 2003 version, and excluded the exemptions for actions in defence of property and in times of famine. Instead, the amended ACCNNR mentions an exception for actions in time of disasters' emergencies. The 2003 version has an extra requirement that implements guidelines to regulate military and hostile activities in Article XV (1). These go upon the initial IHL safeguards and HCP are also mandated to cooperate in the enactment of further guidelines protecting the environment during warfare.¹⁸³

3.2.5 MEAs Addressing Specific Provisions Safeguarding the Environment, with Applicability Capable of Ceasing during Armed Conflicts

The MEAs discussed here comprise requirements that seem to appeal for the interruption of the settlement amongst belligerents during warfare. Though not incorporated in MEAs, these exemptions are shared feature of truces, along with private law agreements involving private law accountability.¹⁸⁴

Though MEAs have a clear language, yet, its requirements might still disrupt the protection of the environment during warfare. For instance, in quest of accountability for harms caused to the environment by a military operation, MEAs might offer direction about the scope and nature of such decisions even if it does apply indirectly.¹⁸⁵

3.2.5.1 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment 1993

This Convention specifically exempts liability for harm caused during armed conflict, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character.¹⁸⁶

3.2.5.2 Convention on Third Party Liability in the Field of Nuclear Energy

This Convention relieves operators for damage that generates straight from armed conflict or military activity.¹⁸⁷ Conversely, on this provision, there are reservations made by Austria and

¹⁸² Voneky S 'Peacetime environmental law as a basis of state responsibility for environmental damage caused by war.' (2000) *Cambridge University Press* 35-58.

¹⁸³ Article 25, 15 (1) and (2) ACCNNR 2003.

¹⁸⁴ Bernasconi C (2009) 48.

¹⁸⁵ Bothe M 'The Protection of the Environment in Times of Armed Conflicts (1991) 34 *German YB International Law* 54.

¹⁸⁶ Article 8(a) Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 1993, 32 I.L.M. 1228.

Germany, openly stating their right to apply liability principle to an operator for such damage.¹⁸⁸

3.2.5.3 Vienna Convention on Civil Liability for Nuclear Damage 1963

This Convention releases operators from responsibility for nuclear damage as a result of an armed conflict.¹⁸⁹

3.2.5.4 International Convention on Civil Liability for Oil Pollution Damage 1971

This Convention elaborates that accountability duties will not apply to owners capable of proving that the damages transpired as outcome of warfare. Moreover, the provisions of the Convention are not applicable to warships or other non-commercial government vessels. Likewise, the International Fund for Oil Pollution Compensation, established in 1992, will not give compensation for damages generating from an armed conflict.¹⁹⁰ This restriction prohibited the expenditure of the Fund in answering to the oil spill at Jiyeh, Lebanon in 2006.

3.2.6 MEAs Safeguarding the Environment Making no Reference to Armed conflicts

Several MEAs make no allusion to the request of their applicability during armed conflict. Among them are:

3.2.6.1 Convention on Early Notification of a Nuclear Accident 1986

This Convention does not plainly embrace any action correlated to armed conflicts.¹⁹¹ Nonetheless, India endorsed the treaty in 1988 and made reservation precisely addressing this issue: the reservation stated that India belief that the scope of the convention should include mode of applicability with respect to nuclear weapons or any nuclear devices used for military purposes. Mauritius and Saudi Arabia endorsed similar reservations.¹⁹²

¹⁸⁷ Article 9 Convention on Third Party Liability in the Field of Nuclear Energy, July 1960, amended January 1964, 956 UNTS 264.

¹⁸⁸ Annex I, Paragraph 4 of the Convention on Third Party Liability in the Field of Nuclear Energy, July 1960.

¹⁸⁹ Article 4(3) (a) of the Vienna Convention on Civil Liability for Nuclear Damage, 21 May 1963, 1063 UNTS 266.

¹⁹⁰ Article 3, 9 and 4(2) International Convention on the Establishment of an International Fund for Compensation for Oil Pollution, December 1971, amended November 1969, 973 UNTS 4.

¹⁹¹ Article 1 of the Convention on the Early Notification of a Nuclear Accident, September 1986, 1439 UNTS 276.

¹⁹² Mauritius (1992) and Saudi Arabia (1989) made Reservations.

3.2.6.2 Convention on Biological Diversity 1992

In the Convention on Biological Diversity (CBD), there is no response to the interrogation of whether it carries on its application during warfare. Scholars have debated that the CBD should carry on its application to the belligerents as it is adequately corresponding to a human rights treaty and therefore should not spontaneously cease when hostilities begin.¹⁹³

3.2.6.3 Control of Trans-Boundary Movements of Hazardous Wastes and their Disposal 1989

This Convention encloses a universal requirement asserting that it is not envisioned to supersede other international instruments governing the ocean.¹⁹⁴

3.2.6.4 UN Convention to Combat Desertification 1994

This Convention asserts that it does not disturb the obligations confined in any previous international settlement.¹⁹⁵ The subsequent MEAs also do not express the request of their application in times of war: the Convention on the Conservation of Migratory Species of Wild Animals (CMS) (1979), the Vienna Convention for the Protection of the Ozone Layer (1985), the UN Framework Convention on Climate Change (1992), the Chemicals and Pesticides in International Trade (1998) and the Stockholm Convention on Persistent Organic Pollutants (2001).

3.2.7 The Environment Protection: Customary Approach

In this section, a number of IEL principles highlight warfare comparing to the MEAs discussed above. Definitely, customary law encloses values that directly report State action and protect the environment during warfare. Despite these frameworks, unless interpreted as customary international law, they are not legally binding even in times of peace. However, as to the scope of customary IEL, countless arguments about precautionary principle of IEL as principles of customary international law are being made.

Looking at the *Trail Smelter* case about trans-boundary air pollution in 1941, in which an iron zinc smelter company in the town of Trail in the north of the USA and Canada polluted the

¹⁹³ Voneky S 'A new shield for the environment: Peacetime treaties as legal restraints of wartime damage' (2009) 9 *International Environmental Law Receuil* 213.

¹⁹⁴ Article 4(12) of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 22 March 1989, 1673 UNTS 126.

¹⁹⁵ Article 8 of UN Convention to Combat Desertification, June 1994, 1954 UNTS 3.

crops of farmers of the Smelter in Washington. The settlement determined that Canada should preclude trans-boundary pollution from the Trail smelter and was accountable for damages if the emissions may persist. In this case the *sic utere tuo ut alienum non laedas* principle was used. A fundamental property right was interpreted that one must use one's property in such a way as not to cause harm to that of another.¹⁹⁶ The pertinence of this principle made it to be reiterated and merged in frequent jurisdictional outcomes, regulations, in Conventions like UNCLOS¹⁹⁷ the Stockholm and Rio Declarations.

In the *Corfu Channel* case where two British ships were damaged by sea mines while crossing Albania's coast, the *Trail Smelter* applied. Albania was held liable for the damages caused to the British ships, recognising State's responsibility to disallow the use of its territory for actions incompatible to the rights of other states.¹⁹⁸

Based on the good neighbourliness obligation making the *Trail Smelter* Principle inappropriate to warfare, the principle may still protect the non-combat zones assigning State accountability for environmental harm except if the objective has the State's interests.¹⁹⁹

3.2.7.1 The Stockholm Declaration 1972

The Stockholm conference of 1972 was marked by the debate on the Human Environment, in which 26 principles were concluded concerning environmental needs of mankind.²⁰⁰ Among these principles, at least two may perhaps not be applicable in IEL during armed conflict.

Analysing those principles, Principle 21 offers the introductory standard of the symposium, that: 'Countries have, in conformity with the UN Charter and the ethics of international law, the independent entitlement to assure the exploitation of their own resources based on countries environmental legislations, and the onus to certify that operations inside their dominion must not generate destruction to the environment of neighbouring countries or of zones outside the country's jurisdiction'.²⁰¹

¹⁹⁶ *Trail Smelter Case* 3 R.I.A.A. 1905 (1938/1941).

¹⁹⁷ Schmitt Michael N 'Green war: An assessment of the environmental law of international armed conflict.' (1997) 22 *Yale Journal of International Law* 44-45.

¹⁹⁸ *Corfu Chanel Case* Merits, ICJ. 4, 22, (1949).

¹⁹⁹ Okorodudu-Fubara, Margaret T 'Oil in the Persian Gulf War: Legal appraisal of an environmental warfare.' (1992) 123 *St. Mary's Law Journal* 204-206.

²⁰⁰ Stockholm Declaration of UN Conference on the Human Environment, June 1972, UN Document A/CONF. 48/14/Rev. 1 (1973).

²⁰¹ Principle 21 of the Stockholm Declaration.

The Stockholm Conference also released Principle 26 which directly addresses armed conflict. Principle 26 creates awareness against the use of nuclear weapons and other means of mass destruction.²⁰² It reassures states to grasp prompt agreement, in the relevant international organs, on the eradication of such weapons. As per the belligerent acts and limitations during armed conflict there is no indication.²⁰³

3.2.7.2 World Charter Nature, UNGA Resolution 37/7 1982

Established by the International Union for the Conservation of Nature (IUCN),²⁰⁴ the World Charter for Nature was adopted through a UNGA Resolution in 1982.²⁰⁵ The resolution prohibits environmental harm generated by warfare. In the same process, Principle 5 dictates that the security of the nature against degradation generated by warfare is paramount. Principle 11 elaborates that activities having an effect on nature shall be controlled and the perfect technologies to reduce the risks to nature shall be applied, with the possibility to rehabilitate degraded areas.²⁰⁶

Lastly, Principle 20 states that military activities harming the environment shall be avoided.²⁰⁷ The intention behind these provisions is to proscribe environmental harm during warfare. However, the interrogation here is if the resolution can offer argumentations of universal applicability. This resolution seeks to reach a normative expression, even though non-binding.²⁰⁸

3.2.7.3 UNGA Resolution 47/37 Protection of the Environment during Armed Conflicts 1993 and 49/50 UN Decade of International Law 1995

Resolution 47/37 adopted by the UNGA in 1993, directly makes mention of the protection of the environment during warfare.²⁰⁹ In its Preamble, the Resolution recognises the requirements of international law suitable to safeguard of the environment during armed conflicts. Paragraph 1 raises the need for states to take precautions to conform to these mechanisms. Moreover, Paragraph 3 elaborates on states' efforts to insert the provisions

²⁰² Tarasofsky RG 'Legal protection of the environment during international armed conflict.' (1993) 24 *Netherlands Yearbook of International Law* 61.

²⁰³ Stockholm Declaration, supra note 214, Principle 26.

²⁰⁴ Formerly known as the World Conservation Union.

²⁰⁵ World Charter for Nature, UNGA Resolution 37/7, UN Document A/RES/37/7, October 1982.

²⁰⁶ Principle 5 and 11 of the World Charter for Nature.

²⁰⁷ Principle 20 of the World Charter for Nature.

²⁰⁸ Birnie P and Boyle A *International Law and the Environment* (1992) 362-381.

²⁰⁹ UNGA Resolution 47/37, UN Document A/RES/47/37, 1993.

protecting the environment within their military regulations. If these provisions do clarify their continuous applicability during armed conflict, it would be fully embraced by states.²¹⁰

Conscious of the loop holes in Paragraph 3, the UNGA in 1995 revised this paragraph through Resolution 49/50, marking the UN decade of International Law.²¹¹ In this significant decade the UN aimed to encourage the education of international law, promoting peaceful dispute resolution between states. With the necessity to educate military structures, in Paragraph 11, HCP were called to circulate and envisage including into their military manuals the revised ICRC guidelines drafted to protect of the environment during warfare.²¹²

3.3 The Pertinence of IEL Mechanisms during Armed Conflicts and Scholars' Contributions

With respect to the question of when and how some IEL mechanisms may remain effective during warfare, two preliminary features are imperative to this study.

First, the application of IEL has to be assimilated in case of a crisis within a State. Undeniably, a State undergoing an armed conflict remains bound by IEL.²¹³ In case of non-observance of the obligations during crisis, the State has to justify. Based on IHL guidelines, non-state parties are protected; nevertheless they are not concerned in IEL principles. Though the applicability of IEL does protect the belligerents, but concerning NIACs it is uncertain.²¹⁴

The second relate to the difference in observing international law between belligerents and a neutral party. In the 1990s, Bothe highlighted this difference, suggesting that the effect of IEL was affected by whether the environmental damage caused by belligerents was imposed upon another belligerent or a neutral party. Bothe suggested that the relationship between a belligerent State and a neutral State concerning the neutral State's environment is directed by standard peacetime rules.²¹⁵ Coming to the applicability of MEAs during warfare, it is all

²¹⁰ Austin JE and Bruch CE eds *The environmental consequences of war: Legal, Economic, and Scientific perspectives* (2000) 270-281.

²¹¹ UN Decade of international law, UNGRA Resolution 49/50, UN Document A/RES/49/50, 1995.

²¹² Westing AH *In furtherance of environmental guidelines for armed forces during peace and war* (2000) 189-206.

²¹³ Hourcle LR 'Environmental law of war' (2000) 25 *Vermont Law Review* 653-681.

²¹⁴ Gasser HP 'For better protection of the natural environment in armed conflict: A proposal for action' (1995) 89 *American Journal of International Law* 637-640.

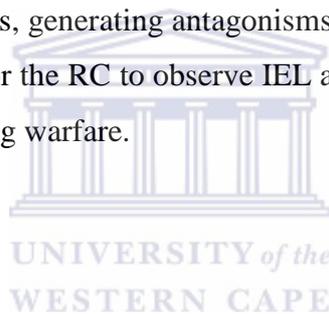
²¹⁵ Bothe M 'The Protection of the Environment in Times of Armed Conflict' (1991), 34 *German YB International Law*, 54.

about understanding the context of the MEA to determine when and how a MEA carries on its application during warfare.²¹⁶

Alternatively, the continuous applicability of customary IEL during armed conflict should be contemplated. Though the difference in the application of IEL and IHL, this could fall from the difficulty define by customary international law. Idem, scholars elaborated on IEL principles constituting hypothetical *jus cogens*. Nonetheless the application of customary IEL during warfare, it is still debatable. Most of them, postulate that customary IEL remains applicable in warfare same to MEAs.²¹⁷

3.4 Conclusion

The protection of the environment according to IEL mechanisms may seem complex, but it establishes principles. Therefore, the responsibility rests upon the State to provide proper implementation. In that perspective, the case study of the RC civil crises has revealed the misunderstanding of the principles, generating antagonisms. Therefore, the elaborations made here will serve as an indication for the RC to observe IEL and IHL mechanisms to help better the administrative decisions during warfare.



²¹⁶ Maruma ME, Bruch C, Diamond J (2009) 43.

²¹⁷ Voneky S 'A new shield for the environment: Peacetime treaties as legal restraints of wartime damage' (2000) 9 *International Environment Law Recueil* 20-22.

CHAPTER FOUR

LEGISLATIVE APPROACH OF THE REPUBLIC OF CONGO TOWARDS THE INTERNATIONAL ENVIRONMENTAL LEGAL FRAMEWORK

4.1 Introduction

This chapter seeks to show the legislative approaches adopted by the Republic of Congo (RC) in response to the International Environmental Legal Framework. It examines the judicial processes in Congo in terms of the implementation or enforcement of IEL and IHL within the military. The chapter concludes that the RC faces a challenge in enforcing or implementing the MEAs.

Like many other developing states, the RC is a victim of poor environmental management. Air and water pollution, and deforestation are amongst the environmental issues that plague the country. Beside human and economic activities, the various civil wars from 1993 to 1997 have contributed to the negative impact on the environment in the RC.²¹⁸

International Law standards require countries to observe and implement conventions signed with other states. These conventions have been designed to help resolve issues of global interest that some states cannot resolve on their own. As a signatory of the GCs, the RC is obliged to enforce IHL mechanisms such as the Multi-Environmental Agreements (MEAs). To achieve this objective, the RC has the duty to create awareness on matters outlined by the MEAs.

4.2 The RC's Approach toward IHL Mechanisms

Article 184 of the Constitution stipulates that all ratified Treaties take precedence over national laws when promulgation nationally.²¹⁹ This requirement clarifies the approach the RC may have towards international conventions. Since IHL aims at protecting and preserving the international community during armed conflicts, its mechanisms are helpful during such crises. However, despite the importance of its requirements, the RC has continuously suffered

²¹⁸ Geography of the RC; https://www.cia.gov/library/publications/the_world/goes/cf.html (accessed on the 12 January 2013).

²¹⁹ Article 184 of the Constitution of the RC of 2002.

from various civil wars. The evidence of wars in the RC is indicative of the failure of the government to implement IHL requirements. It is expected that becoming a signatory to the GCs, countries would undertake key legislative measures to ensure their implementation. However, this has not been done with the armed conflicts in the RC. Even though the legislature has passed ratified and promulgated into law in Congo the above international law, it is yet to be enforced. The implementation of IHL mechanisms domestically requires an understanding among the national executives, realising the importance of enforcing international laws. Despite these realities, the RC has shown a poor understanding of IHL mechanisms.

4.2.1 Implementation and Enforcement within Military Structure

This section seeks to demonstrate the relevance of IHL mechanisms within the military structure of the RC. According to the ICTY, armed conflict is resorting to a military action between states and non-state organisations or amongst such organisations in a state with no official declaration requested in most cases.²²⁰ IHL observation is not dependent on the ethical position of the parties to the conflict.²²¹ Anyone involve or planning to be involved in an armed conflict is bound to respect IHL especially with respect to the observation of human rights and IEL. Thus IHL differentiates between the legality of the eruption of conflict (*jus ad bellum*) and the conduct of hostilities (*jus in bello*)²²² and binds belligerents alike. IHL requirements motivate a strong morality within the military structure. Having specified civilians, combatants, civilian objects, cultural objects, etc.; it restricts military operations to military targets.

For the RC, the various civil crises that occurred were politically motivated. They generated situations leading belligerents to overlook the ratified IHL requirements, which may allow the pursuit of conflict without looking at human and environmental impacts.²²³ The RC has demonstrated a disappointing attitude toward the GCs. In terms of military activities, the country was often entangled in civil wars because the military structure was formed on ethnic basis, with the executive that could not motivate patriotism, inciting soldiers to the extreme inhuman behaviours during civil wars. With Article 3 common to the GCs and Customary

²²⁰ *The Prosecutor v. Tadic*, IT-94-1T, § 70 (02 October 1995).

²²¹ Bouchet-Saulnier F *International Humanitarian Law, Crimes of War* (2007) 55-59; <http://www.crimesofwar.org/thebook/intro-ihl.html> (accessed 10 January 2013).

²²² Sassoli M and Bouvier A Quentin A (2006) 102.

²²³ API to the GCs of August 1949, relating to the Protection of Victims of IACs, Article 1(2), June 1977, 1125 UNTS 3.

International Law (CIL) governing NIAC,²²⁴ these bodies of laws generate principles for all NIACs including the prohibition against torture, the principles of proportionality, necessity, and distinction. As per the mechanisms to reduce the violations of IHL principles, the onus rests on the state to train their forces with respect to the IHL requirements.²²⁵

4.2.2 The RC Judicial System Position toward the Non-Observance of IHL Regulations

Based on the standards set out by the IHL legal framework, the RC judicial system is experiencing problems to hold alleged perpetrators accountable for the violations of IHL and HRL that occurred during the civil crises.²²⁶

The response is that the impartiality is regularly changed for political settlements.²²⁷ In NIAC, the exemption from prosecution became a political price paid to secure an end to the on-going violence and repression. These settlements make liability a diplomatic compromise and the justice system in this position develops as a victim of realpolitik.²²⁸ Changing out justice for political results, although in the quest of peace, has been the old-fashioned scheme of settlement applied by political leaders striving to end wars in tyrannical governments.²²⁹

IHL always seeks to restore human dignity by enforcing justice based on the delinquency occurring during civil wars. However, the RC judicial system often opts for political settlement, leaving the alleged perpetrators unpunished. Searching for peace does request answers to the breaches occurring during the crises in order to establish justice. But if disregarded, the well-being of the people is compromised. During armed conflicts, environmental harm is unavoidable, but if sanctions are not taken after breaches, it weakens any possibility to initiate an environmental consciousness. Therefore, the RC judicial system position toward the non-observance of IHL regulations is very critical.

²²⁴ Article 3 Common to the 4 GCs.

²²⁵ Robert KG, Tittlemore BD 'Unprivileged Combatants and the Hostilities in Afghanistan' (2002) *American Society of International Law* 68-72.

²²⁶ During the civil wars that occurred in the RC, no arrest was made till to date.

²²⁷ Chapman PF 'Ensuring Respect: United Nations Compliance with International Humanitarian Law' (2009) *17 Human Rights Brief* 1-10.

²²⁸ The realpolitik here stands as a practice that disregards the breaches of the regulations and allows a political settlement to establish peace after a crisis. Often it does motivate impunity to end a crisis.

²²⁹ Bassouni Cherif M (1996) 383-422.

4.2.3 The RC's Judicial System and the Legal Framework

The legal framework applicable to NIACs and the oppressive regime systems comprises of some gaps. NIACs are not enclosed sufficiently by common Article 3 of the GCs and the AP II. Moreover, dictatorial regime practices are not covered by these mechanisms, including CIL.²³⁰

Despite these flaws, torture, genocide, crimes against humanity are applicable in all these laws,²³¹ regardless of the conflict classification.²³² Crimes against humanity still need an insertion within a specific convention to eradicate obscurities relative to its previous formulation.²³³

Though the Genocide Convention of 1948,²³⁴ the GCs and AP I contain the obligation to prosecute or extradite, it is almost inexistent in conventional perspective in reference to crimes against humanity. In conjunction with NIACs, the common Article 3 to the GCs and AP II do not make full mention of these obligations.²³⁵

However, a specific requirement still has to be approved on the matter²³⁶ and thus the onus to prosecute or extradite, although promoted by academics, requires the establishment of CIL.²³⁷ Obviously, the prosecution or extradition obligation may not be operated if restrictions are applied.²³⁸ It is alarming to see countries like the RC not giving much attention to the prescriptions to these crimes, therefore jeopardizing the judicial system to pursue its course.²³⁹

²³⁰ Bassouni Cherif M (1996) 386-388.

²³¹ Germany and Italy have included genocide as part of their criminal codes. France, Canada, the United Kingdom and Australia have specialised legislation, including retrospective application to World War II, although no success for Australia. There have been three cases, all of which resulted in acquittal before trial: *DPP v. Polyukhovich*; *Malone v. Berezowsky*; *Heinrich Wagner*.

²³² Randal K *Universal Jurisdiction Under International Law* (1988) 785-834.

²³³ Article 6(c) of the 1945 International Military Tribunal to Prosecute the Major War Criminals of the European Theatre 59 Stat. 1544, 1546, 82 UNTS 279, 284.

²³⁴ Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260 (III) A of the UNGA Dec 1948; amended August 1994.

²³⁵ Bassouni Cherif M 'Crimes against Humanity: The Need for a Specialised Convention' (1994) 31 *Columbia Journal of Transnational Law* 94-457. The UNGA Resolution on the Principles of International Co-operation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity. UNGA Resolution 2840, (XXVI) 26 UN GAOR Supp. No. 29, at 88, UN Doc A/8429 (1971).

²³⁶ European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (Inter-European), opened for signature at Strasbourg the 25 January 1974, Europe. TS No. 82, 13 ILM 540.

²³⁷ Bassouni Cherif M *Crimes Against Humanity in International Law* (1992) 499-527.

²³⁸ Van den Wyngaert C 'War Crimes, Genocide and Crimes Against Humanity: Are States Taking National Prosecutions Seriously?' (1999) *International Criminal Law Review* 37.

²³⁹ Bassouni Cherif M *International Criminal Law Conventions and Their Penal Provisions* (1997) 451-454.

4.2.4 Principles of Accountability with a Purpose of Redressing and Preventing IHL Regulations Breaches

Prosecution is not the only approach of accountability for protecting the environment and to redress and prevent breaches of IHL. Three measures of accountability have to be considered: truth, justice, and redress. Accountability must be recognised as an indispensable component of peace and reconciliation. In fact, this process is in contrast to the exemption that permits the exonerations of the perpetrators, which contributes in weakening that legal structure, thus leading to the failure of states to implement its legal framework.²⁴⁰

With respect to accountability, the accomplishment of truth, justice, and redress, increases a multitude of problems addressed by other studies.²⁴¹ The accountability options include: international prosecutions; international and national investigatory commissions; truth commissions, national prosecutions; national lustration mechanisms; civil remedies; and mechanisms for the reparation of victims or damages caused.²⁴² They have a clear purpose to seek justice and redress damages caused during armed conflicts. However, the RC judicial system did not exploit these possibilities, making the lack of observance of the international legal framework very obvious. If well exploited, these procedures will help ensure the observation of IHL regulations and protection of the environment.

4.3 The RC Behaviour with Regard to the MEAs

Natural resources issues have become central to human co-existence nowadays needing urgent attention in the RC. This is due to its politico-ecologic history, its variety of species and its current socio-economic advantages.²⁴³

The RC natural resources have suffered extreme mistreatment from the effect of war in the past. The colonisation period was marked by progressive environmental degradation, accompanied by interior-political insecurity and deprived socio-economic values. Though the imperialists took decrees to weaken the destruction of nature, these decrees addressed

²⁴⁰ Cohen S 'State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past' (1995) 20 *Law & Society Inquiry* 7.

²⁴¹ Bassouni Cherif M & McCormick M 'Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia' (1996) *International Human Rights Law Institute, DePaul University* 72-78.

²⁴² Bassouni Cherif M 'Accountability For International Crimes and Serious Violations of Fundamental Human Rights' (1996) *Law & Contemporary Problems* 59.

²⁴³ AU Commission, Report on the Sudanese civil war; Accent on the RC realities. March 2004. AU/58/97.

obvious natural resource zones and were customarily used-oriented and rule-oriented.²⁴⁴ Their focus was commonly on the distribution and misappropriation of natural resources rather than managing it. After independence, the RC customarily acceded to the same colonial legislation. Between the 1950s and the 1970s conversely, the legislature became more resource oriented, focusing on long term management and sustainable use of natural resources.²⁴⁵

Since the 1970s, the RC has extensively developed and improved on its environmental legislation which has also been enhanced by MEAs, including the 1968 ACCNNR.²⁴⁶ To a certain extent, the RC came to comprehend the negative effects of persistent degradation of the environment. National preservation guidelines were instigated in the 1980s engaged by the World Conservation Strategy and was followed by National Environmental Action Plans (NEAPs) during the Rio Conference.²⁴⁷

This led to the birth of environmental policy-making institutions.²⁴⁸ An innovative legitimate technique was considered to be appropriate, having envisaged a far-reaching tolerant environmental management.²⁴⁹ Instances of these type includes, *Loi sur la protection de l'environnement* (Congolese Environmental Protection Law).²⁵⁰ Legitimate instruments were elaborated also to incorporate environmental issues into socio-economic improvement strategies.²⁵¹ Existing legislation concentrate on deterrence and administration, instead of suppression and penalty due to lacking of *erga omnes* prerogatives.

The importance accorded to sustainable environmental development led to the amendment of the Algiers Convention and the revision of the ACCNNR during the AU Summit.²⁵² Qualified as the newest and the most modern, global environmental Convention, the ACCNNR brings a different tenancy to environmental law. This inclusive mechanism is in harmony with the existing IEL principles and the latest techno-scientific developments. These ethics became conventional in Africa, according to the precise necessities of the continent

²⁴⁴ Bondi Ogalla D 'Environmental Law in Africa: Status and Trends' (1995) *International Business Lawyer* 38-42.

²⁴⁵ Bondi Ogalla D (1995) 413.

²⁴⁶ The ACCNNR of 1968 (the Algiers Convention) 1968 (1968) 1001 UNTS 4.

²⁴⁷ Burhenne-Guilmin F 'Revision of the 1968 ACCNNR: A Summary of the Background and Process' (2003) *IUCN Environmental Law Programme Newsletter* 1-23.

²⁴⁸ 'An Introduction to the ACCNNR' (2006) 2 *IUCN Environmental Law Centre* 1-58.

²⁴⁹ Kamto M *Environmental Law in Africa* (1996) 28-156.

²⁵⁰ The 1996 Congolese Environmental Legislation.

²⁵¹ The RC established Environmental Agency: *Conseil Supérieur de l'Environnement*. (Congolese High Council of Environment).

²⁵² Revised ACCNNR 2003 (2003) UNTS 1001.

and disclose a strong assertion to sustainable development, as a mutual objective to be reached by the AU.²⁵³

4.4. The Constant Shortcomings of the RC Administration

Throughout the observation made on the urgent degradation of the environment, the RC engaged in various conventions, with a purpose to better its environmental legislation.²⁵⁴ With its post-colonial ambiguous environmental legislation, the RC considered the pertinence of the conventions. Consideration was made, showing a significant interest to demarcate from the weak environmental legislation to ascertain the environmental sustainability.

The challenges faced by the administration were mostly due to egocentric policies designed to benefit a lobby, generating corruption, leading to key conventions being disregarded, a factor contributing to the ineffectiveness of compliance to the conventions.²⁵⁵

Internationally, the RC is always willing to comply with the requirements. But the lack of administrative ethics constantly suppressed the mechanisms.²⁵⁶ Ratifying Conventions are important, but implementing them, is the most required. If a nation is not able to uphold its Constitution, the promotion of conventions will indeed be problematic.

4.5 Conclusion

The paramount interest of the protection of the environment is the concern of all states. However, implementing the MEAs protecting the environment, socio-political unbalances do not make it easy for the RC. This is due to administrative hiccups and not giving reverence to the country's legislation as stipulated in Article 184 of the Constitution. Despite some persisting political turmoil, the RC should strive to enforce instruments assuring the protection of the environment and the observation of IHL requirements. In the RC, there is a serious need of the elite, therefore making use of scholars' contribution to illuminate the country towards environmental dilemma in IEL and in IHL should be welcomed. Significantly, based on the elements set out in this research, some key recommendations toward the RC's administration should help the State to shift the focus in a positive direction.

²⁵³ Mekouar MA 'The African Convention: a small story of big renovation' (2004) 34 *Environmental Policy and Law* 43.

²⁵⁴ The RC is signatory of the CBD, Climate Change Convention, Desertification Convention, the CITES, Tropical Timber 83 and 94, the ACCNNR, etc.

²⁵⁵ Basically, it is the scarcity of competent administrators; also the quasi-inexistence of Independent Administrative Authorities to oversee instruments' implementations.

²⁵⁶ This is an issue in the RC particularly and in Africa generally; the main cause of persisting poverty.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The protection of the environment has always been of great importance. Throughout the various military crises happening worldwide, concerns were shown on mankind and the environment. Since the establishment of the International Community of the Red Cross (ICRC) and Non-Governmental Organisations (NGOs) affiliated to the United Nations (UN) operating as humanitarians and environmentalists; awareness is being raised to advocate the need to protect the environment, despite the challenges.

IHL, despite not having an international agency affiliated to the UN to co-ordinate its evolution, has documented several humanitarian concerns emerging from warfare. It has covered key features in conjunction with warfare, and has given direction as per the conduct to consider with regard to the protection of the environment.

The IEL on the other hand, has elaborated studies raising awareness on environmental crises such as deforestation, climate change, air pollution, the harm to the environmental, etc. Through IEL, various scholars have published key materials to educate humanity about environmental realities. Based on the elements set out, the RC executive has an obligation to manifest a positive interest on the protection of the environment.

Therefore, the environmental damage that occurred in the RC during the various civil wars could have been avoided if the regulations were not disregarded. The RC having ratified the requirements in IHL and IEL has the onus to ensure their implementation. The obligation of the High Contracting Parties (HCP) to insert the requirements in the domestic legislation establishes the subsistence of the Conventions. Therefore HCP has to guarantee the implementation of its requirements. However, in the RC, it is not what is transpiring. The country experienced crises for its passivity towards international requirements.

The well-being of the population is paramount despite calamities. Reasonably, that is the key factor countries enter into agreement with others, to develop relations with other and acquire the experience to advance its socio-economic and environmental perspectives. Multi-

Environmental Agreements (MEAs) can be binding or non-binding, but its requirements are very vital for the sustainability of mankind. Therefore, the lack of implementing requirements is indicative governments' indifference to the population needs.

5.2 Recommendations

5.2.1 The Establishment of the Independent Administrative Authority in the Republic of Congo

The RC, just as other members of the international community do have an understanding of environmental issues. Besides, there is greater understanding today than two decades ago on how susceptible the environment has become towards armed conflicts. That is why the RC ought to ratify key Conventions in IHL and IEL. However, the real concern is their implementation.

Therefore, knowing the RC utmost desire towards international instruments, it will be important to establish Independent Administrative Authority (IAA) according to the ratified instruments, in order to monitor their implementation. To assure a proper observation, the IAA has to work in partnership with the judicial system, to manage the investigation of breaches and motivate a prosecution. In that perspective, the RC may respect the agreements entered into with other states.

5.2.2 Proper Military Structure

Knowing that the RC challenges regarding the various civil wars that occurred in the country was mainly on the military structure, based on the need to patriotism, a proper military structure is needed. A military structure set on national defence ethic and trained as per the IHL military guidelines.

5.2.3 The Need of an Executive that Uphold the Constitution

The RC civil wars were politically motivated. Based on this study, it will be very important if the country's executive can observe the Constitution. Despite being confronted with realities that may make them to choose side, but they have constantly remember that they are leading a nation, not an ethnic group. In any country, the Constitution does contain the needed elements to help the executive to lead the country. If there is a need to amend the Constitution, it has to be done according to the law principles.

5.2.3 The Review of the Regulation of the NIAC

The NIAC, not being fully regulated is resulting from some acts of atrocity not being prosecuted. Being covered only by Article 3 Common to the GCs and the AP II, in terms of the protection of the environment, it is only Article 15 of the AP II, which has to be interpreted in correlation with Article 56 of the AP I, to find out the prominence protection being accorded to the environment. Therefore, there is a need to put in place understandable regulation to help reduce impunity and assure the protection of the environment during NIAC.

5.2.4 Request to Update the ICRC Guidelines on the Protection of the Environment during Armed Conflicts 1994

The assessing of the alterations regarding warfare, along with the rise in NIAC, there is a need to upgrade the 1994 ICRC Guidelines. Considering these facts, the UNGA has to put in place an improved regulation. Hence, states have to strive to implement it, especially within military structures. Definitely, the reviewed ICRC guidelines have to clarify the painful consequences mankind safety, health, and livelihoods, due to the environmental damage. The ICRC guidelines should simplify the terminology like widespread, long-lasting and severe, which is essential in elaborating on evidences on environmental damage. Moreover, the ICRC guidelines should educate, based on the International Criminal Law mechanisms the criminal offense emanating from the environmental damages, to be prosecuted even at national level.

5.2.5 States Obligation towards the Legal Framework and Judicial System

Observing the mechanisms does guarantee the protection the environment domestically be it during warfare. It is certain through the establishment of legal campaigns addressing matters in setting a gathering of legal practitioners, to assess the importance of Conventions and create an awareness of the pertinence of the requirements. To opt for better measures to apply requirements to protect the environment during warfare; and the possibility to establish accountability measures for perpetrators endangering the environment. It is importantly therefore for the judicial system to follow the due processes when it matters.

5.2.6 The Continuous Possibility to Revise Environmental Settlements

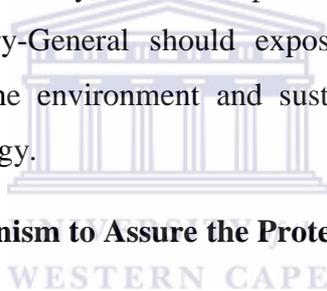
Often during warfare parties are making deals of natural resources in exchange of weapons to help them resist during the war. Settlements of that nature are often illegitimate and do not attract public interest in developing the economy. Therefore, not responding to such a deal may hinder the restoration of peace in the post-conflict. In this case, states have to encourage deals being made with respect of State sovereignty. In the African perspective, settlements of this nature have to be established fairly, to help states recover economically from ambiguous civil wars and discourage western predominance over African natural resources.

5.2.7 The UNGA to Have Full Control over Armed Conflicts Reports

Based on the rise of warfare worldwide the UNGA may appeal to the UN Secretary-General on a set date, to elaborate on the effects of environmental damage due to the escalating NIACs. The Secretary-General should compel states to realise the environmental risks threatening human life, health and safety, because of persisting NIACs. In establishing such a report per annum, the Secretary-General should expose the military mal-practice and encourage states to safeguard the environment and sustain mankind through a recovery process in peace restoration strategy.

5.2.8 Need of New Legal Mechanism to Assure the Protection of More Sensitive Natural Resources

Based on the IHL mechanisms that clarify the means and method of warfare, and the requirements enumerated by the WHC regarding armed conflicts, there is a need of a more expressive instruments. A new legal mechanism that will protect critical natural resources zones of ecological prominence, due to the role they play in the ecosystem and mankind sustainability. The new legal mechanism should set the natural resource zones out of reach of military activities during NIACs.



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