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Locating Environmental Protection in International Humanitarian Law Regime:
An Evaluation

LOCATING ENVIRONMENTAL PROTECTION IN INTERNATIONAL HUMANITARIAN LAW
REGIME: AN EVALUATION

by

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ABSTRACT

Wars are one of the worst human made disasters and human beings its direct and prime victim. However, with an almost exponential advancement in technological means of waging war, environment has become war's another helpless victim. This helplessness is compounded by the inadequacy of international legal regime in protecting environment during wartime.

International Humanitarian Law, with prime focus on regulating armed conflicts, may offer some legal basis for protecting environment during the armed conflicts. However, as stated by International Committee of the Red Cross (ICRC), the law of armed conflict has been lukewarm in recognizing environmental consequences of armed conflicts. Further, the direct and indirect protections, if any, offered by International Humanitarian Law (hereinafter referred to as IHL) to environment, are ambiguous and inadequate. In fact, there are some glaring deficiencies in the existing IHL provisions relating to the protection of the environment during armed conflict. For instance, the definition of 'impermissible environmental damage' during armed conflict is both restrictive and unclear. Then, there are legal uncertainties as to the extent to which the protection of



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elements of the environment may be protected as civilian objects. Further, proportionality of harm to the environment referred to as 'collateral damage' is difficult to determine. In addition, treaty law does not contain any specific requirement to protect and preserve the environment during non-international armed conflict. It is within this context that this paper attempts to undertake a critical assessment of existing IHL provisions and attempts to locate environment in the same. The paper then evaluates if the provisions pertaining to the environment few as they are in the IHL regime, adequate for protecting the environment during wartime. And as illustrated above IHL regime is found wanting in many aspect pertaining to both recognition of environmental consequences of armed conflicts and the scope of protection during the same and so the paper, eventually suggests measures that need to be taken to bolster the existing IHL regime so that it may adequately and effectively protect environment during armed conflict.

Keywords: International Humanitarian Law, impermissible environmental damage, armed conflict, International Committee of the Red Cross

I. INTRODUCTION

Right to fight wars is seen as an essential attribute of sovereignty. However, with rapid scientific and concomitant technological advancement, the damage caused by wars increased immeasurably so much so that wars became a threat to human kind

itself. This made nation states, their sovereignty notwithstanding, agree to adhere to stricter rules on the conduct of the warfare. Thus, while initially, wars were regulated by customs and practices, after the horrors of the Second World War, IHL or the law of war became the new grund norm to regulate armed conflicts.¹ The primary aim of IHL is to regulate armed conflict through the principles of proportionality, distinction, military necessity



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and humanity, which together constitute the customary IHL, in order to reduce the sufferings and evils of war. The protection provided by IHL during armed conflict operates in two distinct arenas. While the Hague Conventions limits the choice of means and methods available for the conduct of military operations, the four Geneva Conventions and its Additional Protocols (APs) protect persons who do not participate in armed conflict and hors de combat.

The Geneva Conventions, considered as cornerstone of IHL, comprise of four treaties which regulate armed conflicts on the land and the sea and also provide for the protection of prisoners of war and civilians. Thus, besides putting limitations on the way the warfare may be conducted, IHL also protects those who do not or no longer take part in hostilities.

IHL regime pertaining to Environment Protection

Prima facie IHL regime has a number of provisions that may play a significant role in environment protection. While some provisions directly relate to environmental concerns, many others may be indirectly used to address environmental issues that arise as a result of armed conflict.

Most significant are, AP I and II which were adopted on 8th June, 1977 to supplement the Geneva Conventions of 1949. AP I provides direct protection to the environment during armed conflict through two provisions. The first provision is Article 35(3) which prohibits state parties to use methods or means of warfare causing “widespread, long-term and severe damage to the natural environment”.² This Article covers situations in which “damage to the natural environment is produced by the intentional [use] of method[s] or means of warfare” and where such consequences are foreseeable.³

The second provision is Article 55(1) which provides that:

“Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health and survival of the population”.⁴

It is important to understand, however, that both these articles serve different purposes. Article 55 is for civilian protection while Article 35 is related to



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unnecessary suffering.⁵ In the Protocol, Article 35 appears in part III, section I, which deals with methods and means of warfare. Since this segment of the Protocol is not constrained by the reference in Article 49(3) to warfare having effect on land therefore it applies to the environment as a whole including land, water, air and beyond national jurisdiction.⁶ The AP II was adopted to address issues related to non-international

armed conflicts. Although it does not directly address environmental concerns, some provisions play an important role indirectly.⁷ In addition to AP I and II, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention), which entered into force on 5th October 1978, prohibits the use of environmental modification techniques as a weapon during a conflict.⁸ Article I of the Convention provides that:

“Each State Party to this Convention undertakes not to engage in military or any other hostile use of the environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party”.

Explaining the meaning “environmental modification techniques” used in Article I, it was explained that this term refers to any technique for changing - through the deliberate manipulation of natural processes - the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.⁹ However, while it is generally undisputed that the Convention applies to armed conflicts between state parties, it is unclear if it is applicable in a situation in which a state party attacks a non-state party.¹⁰ Beside these, there are various treaties which work under the IHL regime and assist in the protection of environment, directly or indirectly. For instance, *the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons*



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*and on their Destruction (BCW)*¹¹, mandates each State party to never, under any circumstance, develop, produce, stockpile or otherwise acquire or retain to destroy¹², and to divert to peaceful purposes, all agents, toxins, weapons, equipment and means of delivery specified in article I¹³ of the Convention and while doing so they need to observe all necessary safety precautions to protect the environment. A limited form of protection may also be found in *the Convention on Conventional Weapons (CCW)*, which prohibits use of forest or plant to cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.¹⁴ Importantly, CCW applies to NIAC as well. Then there is *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 1993*¹⁵ (CWC) whose purpose is to prohibit the use development and production of chemical weapons. It obliges state parties to destroy existing chemical weapons and production facilities. It provides for a range of environment safeguards that are to be abided by throughout the destruction process.¹⁶ For example, it prohibits the destruction of chemical weapons by “dumping in any body of water, land burial and open pit burning”.¹⁷ The preamble of the Convention prohibits means and methods of warfare which cause damage to the natural environment and specifically prohibits the use of herbicide.¹⁸ In addition to these, the Martens Clause¹⁹ and the fundamental principles of IHL, which includes the principles of distinction, military necessity, proportionality and humanity, may also be relied upon to protect environment



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during armed conflicts when there are no specific treaty provisions to deal with the same.²⁰

II. AREAS OF CONCERN: GAPS IN IHL PROTECTION TO ENVIRONMENT

Despite the extensive framework contained in the IHL regime, a number of inadequacies exist due to which the IHL regime may still not ensure sufficient protection to the environment. For instance, as per the UNEP report the lack of rules pertaining to Non International Armed Conflict (NIAC) is a matter of concern due to the changing nature of conflicts in recent times.²¹ Not only are the obligations pertaining to NIAC less severe, there exists no specific rule related to environmental protection during NIAC in the IHL regime.²² While the ICTY in *Tadic case* recognized that IHL provisions relating to chemical weapons have turned into customary International Law and are thus applicable in NIAC, however, there is no clarity as to which provisions of IHL have assumed the status of customary international law and are consequently applicable to NIAC.²³ The report also raises a plethora of issues such as lack of implementation of IHL, less states being party to IHL conventions which create implementation gaps in the enforcement of IHL regime. Michael Bothe, Carl Bruch, Jordan Diamond, and David Jensen in their article²⁴ have identified three specific deficiencies. Firstly, they state that the threshold of “widespread, long-term and severe” in Articles 35 and 55 of AP I to the 1949 Geneva Convention is excessively restrictive and unclear. The UNEP report too finds that as a starting point some clarification into the meaning of these words would be beneficial.²⁵ In fact the Conference document shows that while duration is understood to be in decades, but it is not clear if there is a minimum requirement.²⁶ The authors say that such a strict interpretation is unacceptable today although the intention to establish a very high threshold is clear.²⁷ Secondly, they point out, civilian objects are not effectively covered. Environmental objects which would qualify as civilian objects can easily be



turned into military objects and thus outside the purview of protection. A common example would be using trees and foliage to take cover. The authors put forward a solution regarding this by drawing parallel with demilitarized zones which have been made immune from attack. And thirdly, the collateral damage that occurs to the environment as a result of proportionality is hard to ascertain. As there are no real criteria to determine proportionality even in cases of simple physical damage and the situation becomes all the more complex for environmental damage as it is extremely difficult to determine pre-existing situation and post-action damage. A relevant solution would be to frame guidelines for assessing environmental damage.²⁸

III. CONCLUSION AND SUGGESTIONS

The nature of conflicts has changed in the contemporary times. However, a majority of IHL instruments were designed for international armed conflicts and thus remain inapplicable to non international or civil wars. Thus, a major necessity is to expand the scope of existing IHL instruments to encompass the internal conflicts as well. Further quite a lot of environmental destruction remain unregulated in the absence of specific legal provisions in the IHL regime and consequently are dependent on Martens Clause or IHL principles for protection. However, there are no internationally accepted standards as to the threshold of these principles and thus it remains unclear where the line between militarily justified destruction and “unnecessary” environmental atrocities should be drawn. Protection of the environment under law of armed conflict thus remains limited to environmental modification techniques or cases of extreme and wanton destruction possibly only achievable in nuclear warfare. In conclusion, it is evident that quite a lot of environmental destruction remains unregulated and that the

laws of war provisions relating to the environment are therefore in urgent need of improvement. Birnie, Boyle and Redgwell have aptly described the law of armed conflict as "one of the least sophisticated parts of contemporary international law."²⁹ Absent stringent and comprehensive regulation, environmental protection will remain at the mercy of the belligerent parties "good faith". In this context, suggestion made in the UNEP report of 2009 becomes relevant. The report recommended that International Law Commission should examine the existing international legal framework for protection of environment during international armed conflict and suggest how it may be clarified, codified and expanded.³⁰ The Commission may, in particular focus on establishing both legal and institutional framework for fixing liability for causing environmental damage during armed conflicts and the liability to pay compensation for the same. Considering, such a



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stipulation is lacking currently in the international IHL instruments, this may go a long way in reducing war time environmental damage. Protecting environment is the most important goal of the 21st century and IHL has an important role in the same. The International Community must recognize this and accordingly work towards creating a suitable IHL regime minus the existing gaps and deficiencies.

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¹ Armed conflict here covers both international and non-international armed conflict. The IHL relating to international armed conflicts applies "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Common Art. 2(1) to Geneva Conventions, 1949. Unlike violence between the armed forces of States, not every act of violence within a State (even if directed at security forces) constitutes an armed conflict. The threshold of violence needed for the IHL of non-international armed conflicts to apply is therefore higher than for international armed conflicts. This was done through the adoption of Common Art. 3 of Geneva Conventions, 1949.

² Additional Protocol I, (n 1), at Art. 35(3).

³ *Ibid.*

⁴ *Ibid.*

⁵ Reasoning given by Biotope the group formed by the Diplomatic Conference to draft Art. 35(3). The countries which participated in the Group were: Australia, Czechoslovakia, Finland, German Democratic Republic, Hungary, Ireland, the Netherlands, Spain, Sweden, Yugoslavia. See Protocol Commentary, (n 29), at Para 1449.

⁶ Karen Hulme, "Taking Care to Protect the Environment against damage: a meaningless obligation?" International Review of the Red Cross, September 2010, at 676.

⁷ Art. 14 prohibits attacks on objects indispensable to civilian populations, including foodstuffs, agricultural land, crops, livestock, drinking water installations and irrigation works.

⁸ The Vietnam War coupled with the rise in environmentalism was the twin catalysts which triggered the introduction of this Convention. See Peter Hough, "Trying to End the War on the World: the Campaign to Proscribe Military Ecocide", Global Security: Health, Science and Policy, 2016, at 16.

⁹ ENMOD Convention, (n 1), Art. 2.

¹⁰ United Nation General Assembly, Second Report on the protection of environment in relation to armed conflicts by Special Rapporteur, 2015, at 44 available at http://repository.un.org/bitstream/handle/11176/311876/A_CN.4_685-EN.pdf?sequence=3&isAllowed=y (last accessed on 30th December, 2017).

¹¹ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Biological Weapons Convention), 10 April 1972, 1015 UNTS 163; 11 ILM 309 (1972).

¹² *Ibid*, Art. 1.

¹³ As per Art. 1 these include: "(1) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; (2) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict".

¹⁴ *Ibid*, Art. 2(4).

¹⁵ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention), 3 September 1992, 1974 UNTS 45; 32 ILM 800 (1993).

¹⁶ *Ibid*, Arts. IV, Para 10, V and VII, Para 3, and Annex on implementation and verification, specifically Parts IV (A), Para 32 VI, Para 7, and X, Para 50.

¹⁷ *Ibid*, Verification Annex Part IV (A).

¹⁸ *Ibid*, Para 4 and 7 of the Preamble.

¹⁹ The Martens Clause broadens the range of applicable norms governing conduct during armed conflict beyond those that are laid out in the treaty instruments, by stating: "Until a more complete code of the laws of war has been issued, the high contracting Parties 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 and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience".

²⁰ UNEP, "Protecting the Environment during Armed Conflict", at 28th November, 2009, available at http://www.un.org/zh/events/environmentconflictday/pdfs/int_law.pdf.

²¹ UNEP, (n 53), at 51.

²² *Ibid*.

²³ UNEP, "Protecting the Environment during Armed Conflict", at 28, November, 2009, available at http://www.un.org/zh/events/environmentconflictday/pdfs/int_law.pdf.

²⁴ Michael Bothe, Carl Bruch, Jordan Diamond, and David Jensen. "International Law Protecting the Environment during Armed Conflict: Gaps and Opportunities" *Intl R Red Cross* (2010), Vol. 92, No. 879, 569.

²⁵ UNEP, (n 53), at 52.

²⁶ Conference document, *CDDH/215/Rev. 1*, Para 27.

²⁷ In this context, it is worthwhile to look at UNEP report which recommends that long term may be construed to mean a period of months or approximately a season. See UNEP, "Protecting the environment during armed conflict", at 52, November, 2009, available at http://www.un.org/zh/events/environmentconflictday/pdfs/int_law.pdf.

²⁸ Michael Bothe, et al., (n 123), 578.

²⁹ Patricia Birnie, et al., *International Law and the Environment*, 207 (3rd edn., Oxford University Press, 2009)

³⁰ UNEP, "Protecting the environment during armed conflict", at 53, November, 2009, available at http://www.un.org/zh/events/environmentconflictday/pdfs/int_law.pdf.

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