

ZOOM IN

The question:

The work of the ILC on the environment and armed conflicts: Enhancing protection for the ‘silent victim of warfare’?

Introduced by Giulio Bartolini and Marco Pertile

In both the academic and the popular debate on the causes and the consequences of armed conflicts the environment is often described as ‘the silent victim of warfare’.¹ This phrase metaphorically alludes not only to the – rather obvious – detrimental effects of armed conflicts on the scene where hostilities take place, but also to how such effects have been generally neglected. In the literature reference is made to the fact that belligerents would disregard the environmental consequences of their conduct, would make the environment a direct object of attack and, in number of cases, would turn it into a weapon. Of relevance are a plethora of historical examples ranging from the poisoning of wells in ancient times, to the dubious episode² of the salting of Carthage by Scipio Aemilianus and, again, to the scorched earth policies adopted in different epochs by retreating armies. More recent cases that are generally quoted include, *inter alia*, the use of nuclear weapons on Hiroshima and Nagasaki, the use of Agent Orange for defoliation purposes during the Viet Nam war, the igniting of hundreds of oil wells in Kuwait by the retreating Iraqi armed forces in 1991, and the use of depleted uranium ammunition in Kosovo by the North Atlantic Organization in 1999.³ In addition to these ‘classical’ examples, the United Nations Environmen-

¹ See R Rayfuse, ‘Rethinking International Law and the Protection of the Environment’, in R Rayfuse (ed), *War and the Environment – New Approaches to Protecting the Environment in relation to Armed Conflict* (Brill 2014) 1; see also, for instance, the 2014 UN Secretary General message for the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict, available at <www.un.org/en/events/environmentconflictday/2014/sgmessage.shtml>.

² Showing that there are no direct historical sources substantiating the episode, see RT Ridley, ‘To be Taken with a Pinch of Salt’ (1986) 81 *Classical Philology* 140-146.

³ See, for instance, K Hulme, *War-Torn Environment: Interpreting the Legal Threshold* (Brill 2004) 161-279.

tal Programme (UNEP) has detailed in more than twenty post-conflicts reports the effects on the environment of both international and non-international armed conflicts.⁴

At the same time, the current academic debate has moved beyond the traditional topic of the effects of conflicts on the environment to investigate, also in legal terms, two cognate issues, such as, on the one hand, the relationship between natural resources and armed conflicts and, on the other, the effects of climate change on conflicts.⁵ Legal studies on these subjects generally build upon a wider political science debate and aim at understanding all of the possible interactions between such debate and the applicable legal rules. Under this wider perspective, it has been now clearly established that the study of the linkage between the environment and armed conflicts must encompass, also in legal terms, not only a strictly environmentalist perspective aimed at protecting the environment itself, but also a wider understanding of the genesis of conflicts and of their prospects for a stable solution.

Throughout the years, this growing awareness of the complexities of the interrelation between armed conflicts and the environment has prompted the attention of inter-governmental and non-governmental actors. Faithful to its mandate, the International Committee of the Red Cross (ICRC) has played a leading role since the International Conference for the Protection of War Victims of 1993. At least in a first phase, the approach of the ICRC was naturally focussed on International Humanitarian Law (IHL) and was mainly rooted in the idea that the legal framework was substantially adequate (or perhaps that there were no meaningful prospects for amending it)⁶. Focussed on devising ways and means to enhance the effectiveness of the existing rules, in the mid-Nineties, the work of the ICRC led to the adoption of the Guidelines for Military Manuals and Instructions on the Protection of the Envi-

⁴ UNEP, *Protecting the Environment during Armed Conflict – An inventory and analysis of international law* (2009) 4, available at <www.un.org/zh/events/environmentconflictday/pdfs/int_law.pdf>.

⁵ See, for instance, D Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (CUP 2015); M Pertile, 'The Changing Environment and Emerging Resource Conflicts' in M Weller (ed), *The Oxford Handbook on the Use of Force* (OUP 2015) 1077-1094; J Viñuales, 'The Resource Curse: A Legal Perspective' (2011) 17 *Global Governance* 197-212.

⁶ A Bouvier, 'Protection of the Natural Environment in Time of Armed Conflict' (1991) *Intl Rev of the Red Cross* 567-578.



ronment in Times of Armed Conflict, which were later acknowledged by the UN General Assembly.⁷ Contributions to the study of these issues and advocacy reports also came from the International Union for the Conservation of Nature (IUCN), Greenpeace international, and – with a more specific perspective on the causes of conflicts – by Global Witness. The growing attention for the subject in the international society was naturally mirrored in the work of the UN General Assembly and the Security Council. The former encouraged States to disseminate the Guidelines produced by the ICRC,⁸ it established the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict⁹ and considered issues such as nuclear disarmament¹⁰ and the use of depleted uranium ammunitions.¹¹ The latter held open debates on topics such as the linkage between natural resources and conflicts,¹² briefings on the root causes of conflicts in Africa¹³ and, in several cases, adopted economic sanctions tailored on the natural resources that contributed to the continuation of the conflict and to the financing of insurgencies.¹⁴

With respect to the applicable legal framework, it is generally taken for granted that the main body of rules addressing these problems must be found in IHL. The starting point for the debate is that IHL provides for, on the one hand, a form of general protection through its principles of distinction, proportionality and precaution and, on the other, specific rules on the environment. It is also generally acknowledged that several problems remain in the legal framework. Summarising a complex debate, one might identify the following issues as the most pressing ones:

- the threshold for environmental damage under Articles 35 and 55 of Additional Protocol I ('widespread, long-term and se-

⁷ 'Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict' available at <www.icrc.org/eng/resources/documents/article/other/57jn38.htm>.

⁸ UN Doc A/RES/49/50 (1994).

⁹ UN Doc A/RES/56/4 (2001).

¹⁰ UN Doc A/RES/50/7(M) (1995).

¹¹ UN Doc A/RES 62/30 (2007).

¹² UN Doc S/PRST/2007/22 (25 June 2007).

¹³ UN Doc S/PV.6946 (15 April 2013).

¹⁴ For an overview, see: Dam-de Jong (n 5) 267-365; M Pertile, *La relazione tra risorse naturali e conflitti armati nel diritto internazionale* (CEDAM 2012) 153-160.

- vere') is too high and makes the finding of a breach almost impossible;
- in practice the enforcement of the rules is fairly limited and, if one excludes the case of the oil wells in Kuwait and resolution 687 of the Security Council, there has been virtually no enforcement action in this field;
 - the interaction of IHL with other rules potentially regulating the linkage between conflicts and the environment, such as international environmental law and human rights protection, is still unexplored in many respects.

Faced with such problems, however, the position of several States is still very restrictive and the adoption of new legal instruments on the protection of the environment in armed conflicts seems to be an unrealistic perspective. A telling example is the reaction of the United States after the adoption of the ICRC Study on Customary International Humanitarian Law. Commenting upon rule 45 on the prohibition to cause 'serious damage to the natural environment' the US administration bluntly affirmed that '... the Study fails to demonstrate that rule 45, as stated, constitutes customary international law in international or non-international armed conflicts, either with regard to conventional weapons or nuclear weapons'.¹⁵ Along the same lines, in 2011, when the ICRC study on strengthening legal protection for victims of armed conflicts identified the protection of the environment as one of the four 'normative weaknesses' of the relevant legal framework, the ICRC itself, after engaging in a dialogue with States, was compelled to acknowledge that 'strengthening the law [on the protection of the environment] is not considered a priority by a number of States'.¹⁶

On the whole, in the light of the richness of the current debate, one might say that the environment, albeit still a victim of warfare, is no more 'silent'. However, whereas much has been done in creating

¹⁵ Initial response of US to ICRC study on Customary International Humanitarian Law with Illustrative Comments (November 3, 2006) available at <www.state.gov/s/1/2006/98860.htm>.

¹⁶ Statement addressed to the permanent missions in Geneva by Dr Jakob Kellenberger, President of the ICRC (12 May 2011) available at <www.icrc.org/eng/resources/documents/statement/ihl-development-statement-2011-05-12.htm>.



awareness, a number of legal questions remain and are met by substantial disinterest on the part of several States.

Against this complex background, the aim of this Zoom-in is exploring the current status of advancement of the International Law Commission (ILC) programme of work on the 'Protection of the environment in relation to armed conflicts'. As is known, the ILC included this topic in its programme of work in 2013 (65th Session), following the preliminary decision in 2011 to include this issue in its long-term programme of work,¹⁷ thus endorsing the request made by UNEP in 2009 to the ILC to 'examine the existing international law for protecting the environment during armed conflict and recommend how it can be clarified, codified and expanded'.¹⁸ As a result the ILC appointed Ms Marie G Jacobsson as Special Rapporteur in 2013. The Special Rapporteur then submitted a preliminary report in 2014¹⁹ and a second report in 2015²⁰ with some draft introductory provisions and draft principles provisionally adopted by the Drafting Committee. Finally, in 2016, at its 68th Session, the ILC addressed the third and latest report and adopted provisionally nine draft principles proposed by the Special Rapporteur with their commentaries.²¹

We assume this topic to be particularly timely for at least four reasons. Firstly, as has been mentioned, the relationship between the environment and armed conflicts is simultaneously regulated by different specialized areas of international law whose interaction has not been entirely clarified. There is thus a specific interest in renewing the doctrinal debate on the topic by discussing the perspective adopted by the ILC. Secondly, the Special Rapporteur has adopted a wide and modern approach to the topic, assuming that the legal regulation of the relation-

¹⁷ ILC, 'Report of the International Law Commission on the Work of its 63rd Session' (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10, 289, para 365, and Annex E 351-368.

¹⁸ UNEP, Protecting the Environment during Armed Conflict (n 4) 53.

¹⁹ 'Preliminary report on the protection of the environment in relation to armed conflicts. Submitted by MG Jacobsson, Special Rapporteur' UN Doc A/CN.4/674 (30 May 2014).

²⁰ 'Second report on the protection of the environment in relation to armed conflicts. Submitted by MG Jacobsson, Special Rapporteur' UN Doc A/CN.4/685 (28 May 2015).

²¹ 'Third report on the protection of the environment in relation to armed conflicts. Submitted by MG Jacobsson, Special Rapporteur' UN Doc A/CN.4/700 (3 June 2016).

ship between armed conflicts and the environment should be assessed chronologically, with reference to three interrelated phases (pre-conflict, conflict, and post-conflict). Thirdly, some solutions proposed by the Special Rapporteur and the ILC have largely moved toward the progressive development of international law rather than mere codification of the existing legal framework, thus requiring an assessment on their validity as well as their reception by States during debates at the UNGA Sixth Committee. Finally, considering that the current Special Rapporteur did not run for re-election and that her job has not been completed, one might expect that the future activities of the ILC could proceed adopting possibly a different approach. We therefore think that, at this juncture, taking stock of what has been done is even more important.

With these objectives in mind, we asked two experts in the field to take position on the work of the Special Rapporteur and on the Draft Principles. Our authors are Karen Hulme, Professor of international law at Essex, who has widely published on the effects of armed conflicts on the environment, and Stavros Pantazoupoulos, PhD candidate at the European University Institute, who served as Research Assistant to Ms Jacobsson during the 65th Session. As our readers will see, both authors – for different reasons – share a positive assessment of the work of the ILC on this subject, but at the same time they do not shy away from giving theoretical and practical suggestions for the future work of the new Special Rapporteur.

