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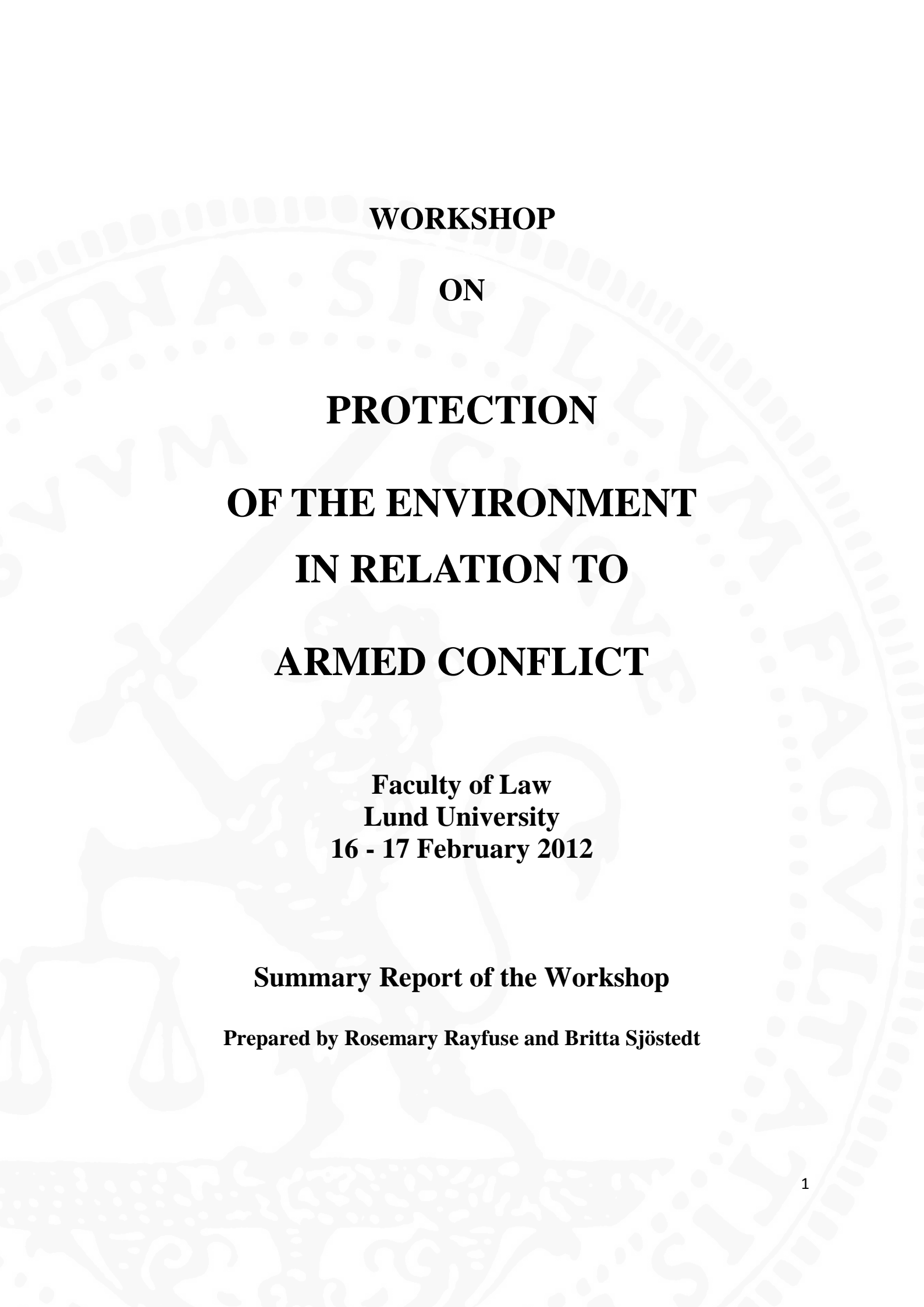
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WORKSHOP
ON
PROTECTION
OF THE ENVIRONMENT
IN RELATION TO
ARMED CONFLICT

**Faculty of Law
Lund University
16 - 17 February 2012**

Summary Report of the Workshop

Prepared by Rosemary Rayfuse and Britta Sjöstedt

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Introduction

On 16 and 17 February 2012, the Faculty of Law at Lund University hosted a Workshop on Protection of the Environment in Relation to Armed Conflict to examine the relevance and adequacy of the existing regime for environmental protection during armed conflict as well as the ability of other international legal mechanisms to contribute to the amelioration of damage to the environment arising as a result of or in relation to armed conflict.

The Workshop gathered together experts from Europe, the United States and Australia, including leading academics as well as representatives from the International Committee of the Red Cross (ICRC), the Swedish, Norwegian and Danish Red Cross Societies and the Swedish and Norwegian governments.

The Workshop was organised and co-chaired by Professor Rosemary Rayfuse, Professor of International Law, Faculty of Law, University of New South Wales and Conjoint Professor of International Environmental Law, Faculty of Law, Lund University and Associate Professor Marie Jacobsson, Faculty of Law, Lund University, Principal Legal Adviser on International Law at the Swedish Ministry for Foreign Affairs and Member of the United Nations International Law Commission with the assistance of Ms Britta Sjöstedt and Ms Anna Maria Johansson.

The Workshop was opened by Professor Christina Moëll, the Dean of the Law Faculty, who welcomed the participants on behalf of the Faculty. Mr. Rolf Ring, Deputy Director of the Raoul Wallenberg Institute, also welcomed the participants to the premises of the Institute in which the Workshop was held.

The Workshop was conducted as an academic workshop with paper presentations followed by presentations by commentators and general discussion of the issues raised. Student Rapporteurs recorded the proceedings. Presentations were grouped under four themes:

- Deficiencies in the legal regime for the protection of the environment in times of armed conflict;
- Addressing deficiencies in the legal regime for the protection of the environment in times of armed conflict;
- Legal and institutional mechanisms and frameworks for monitoring violations and seeking redress;
- Accountability for damage to the environment in relation to armed conflicts.

This Report summarises the presentations and discussions. The list of participants and the program are attached at Annexes 1 and 2.

Papers from the Workshop will be published in the *Nordic Journal of International Law* in 2013.

The Context for the Workshop

At its sixty-third session in 2011, the International Law Commission (ILC) decided to include the topic of *Protection of the Environment in relation to Armed Conflicts* on its future program of work. Recognising both the need and the opportunity for renewed academic input into the debates on the topic, the Workshop was convened to identify and discuss issues that will be relevant to the consideration of the topic by the ILC. The ILC's outline of the topic is attached at Annex 4.

Associate Professor Marie Jacobsson set the scene for the Workshop by outlining, for the Workshop participants, both the topic and its journey to prominence on the agenda of the ILC. She noted that protection of the environment in relation to armed conflict has traditionally been viewed through the lens of the laws of warfare. However, as recognized by the ILC in its recent work on the *Effect of Armed Conflicts on Treaties* where it noted that the existence of an armed conflict does not necessarily terminate or suspend the operation of treaties, this perspective is now too narrow. Thus, a range of treaties important to the protection of the environment may continue to operate during periods of armed conflict.

Associate Professor Jacobsson explained that the notion of the need for rules protecting the environment in times of armed conflict originated in antiquity where it had been closely connected with the need to have access to resources essential for survival. Given the conditions under which war was then conducted, there was limited risk of environmental destruction. Modern technological development had, however, placed the environment at greater risk, not only from nuclear weapons or other weapons of mass destruction, but also from conventional methods and means of warfare. These developments had coincided with an increasing international awareness of the need for environmental protection and, since the adoption of the United Nations charter in 1945, had resulted in three distinct phases in the development of rules to enhance the protection of the environment in relation to armed conflicts.

The first phase, which started in the 1960s, was spurred by reaction to the methods and means of warfare used during the Vietnam War and by the growing awareness of the need to protect the environment in more general terms. This phase resulted in the adoption of specific articles relating to protection of the environment in humanitarian law treaties, in particular, Articles 35(3) and 55 of the 1977 Additional Protocol I to the Geneva Conventions on the laws of armed conflict and the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD).

The second phase had begun in 1990 with the Iraq-Kuwait war when the burning of oil wells and other environmental effects of the conflict opened the international community's eyes to the damaging effects of such warfare on the environment. The UN Compensation Commission, established to deal with claims arising from the conflict, was specifically entrusted with cases relating to loss or damage to the environment and the depletion of natural resources although it discussed each claim for compensation in accordance with criteria provided by the UN Security Council and not in accordance with international law *per se*. At the same time, the issue of protection of the environment in armed conflict was placed on the agenda of UN, although it was subsequently subsumed under the agenda item relating to the UN's decade of international law. The ICRC was tasked by the General Assembly to work on the issue resulting in the adoption of the *Guidelines for Military*

Manuals and Instructions on the Protection of the Environment in Time of Armed Conflict. There was, however, no support for any modification to existing treaty provisions on the laws of armed conflict.

In 1992, the Rio Conference on Environment and Development adopted the *Rio Declaration*, Principle 24 of which specifically calls on States, *inter alia*, to respect international law providing protection for the environment in times armed conflict. The *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, adopted in 1994, similarly addressed the protection of the environment, including damage to or the destruction of the environment or objects that are not in themselves military objectives as collateral damage. The legal aspects of protecting the environment were considered particularly relevant in naval warfare as belligerents and third parties could have legitimate and competing claims to the use of maritime areas beyond national jurisdiction.

At the same time, pressure from international civil society forced states to address the use of anti-personal landmines. As conflicts in the Balkans, Cambodia and Mozambique (to name a few) had shown, the failure to implement existing provisions in the 1980 Convention on Prohibition or Restriction on the Use of Certain Conventional Weapons (the CCW) had resulted in devastation; both to individuals maimed by landmines, and to the ability to safely and securely utilize land once the conflict was over. Moreover, existing conventions were not applicable to non- international armed conflicts. As a result, the CCW and its Second Protocol on Landmines were revised while a parallel process was set in train focusing on the development of new regime for the protection of the civilian population. In 1997, the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction was adopted introducing a total ban on the use of anti-personal land-mines.

The third phase began in around 2010. Although difficult to connect the beginning of this phase with any particular conflict, it appeared to stem from a growing awareness of the need for greater protection of the environment in general and during armed conflict on particular. Several wars, such as those in Kosovo, Iraq, and Lebanon had all shown the high environmental price paid by war-torn societies. At the same time, international tribunals and courts were increasingly being called upon to address issues relating to protection of the environment and fact finding missions were also increasingly documenting the negative effects of warfare on the environment. Indeed, the International Criminal Court had even been given jurisdiction over crimes which caused certain damage to the environment.

In 2009, the United Nations Environment Program (UNEP) published its report, *Protecting the Environment During Armed Conflict: An inventory and analysis of international law*, recommending how this legal framework might be clarified, codified and expanded. As recognized by the International Court of Justice (ICJ) in its Advisory Opinion on the *Legal Consequences of a Wall on the Occupied Palestinian Territory*, it was clear that it was no longer sufficient to look for legal answers solely within the *lex specialis* regime of the laws of armed conflict but that recourse must now also be made to the broader corpus of international law in general, including international criminal law, international human rights law and international environmental law. Such an approach would be fully consistent with the reasoning of the ILC in its work on *Fragmentation of International Law* and on the *Effects of Armed Conflicts on Treaties* which made it clear that rules of the *lex specialis* co-exist with other rules of international law. The nature and extent of this co-existence in the

case of protection of the environment in relation to armed conflicts was the topic to be studied by the ILC.

Associate Professor Jacobsson concluded by highlighting other initiatives within the international community relating to the same topic. She noted that the ICRC has identified protection of the environment as a topic of priority for states to address. Although it did not gain similar priority at the Red Cross Conference in 2011, the topic is still on the agenda. In addition, during the Red Cross Conference, the Nordic countries announced a pledge to work on the topic, to address the deficiencies of the legal regime and to present their results in 2015. A copy of the Nordic Countries' pledge is attached at Annex 3.

SESSION I: DEFICIENCIES IN THE LEGAL REGIME FOR THE PROTECTION OF THE ENVIRONMENT IN TIMES OF ARMED CONFLICT

Session Chair: Ms Pernilla Nilsson, Ministry of Foreign Affairs, Sweden

The Environment as Civilian Object: Ms Cordula Droege,

Ms Droege argued against a blanket consideration of the environment as a civilian object, noting that the historical protections granted to the environment in Articles 35(3) and 55 of Protocol I were narrower than protections afforded to civilians and that in attempting to broaden protection of the environment we might inadvertently undermine the protections afforded to civilians. The issue related solely to the identification of legitimate military objectives; since only military objectives can be lawfully targeted, if there is no military objective then something cannot be lawfully targeted. Thus, as a general proposition, protection of the environment already operated as a by-product of the prohibition on targeting of civilian objectives. Moreover, Articles 35(3) and 55 of Protocol I provide special protections for the environment by forbidding the use of methods or means of warfare which are intended to or may be expected to cause widespread, long-term and severe damage to the natural environment.

While it may be possible to turn the environment into a military objective Ms Droege pointed out that this was not necessarily an easy task. The presence of soldiers might turn parts of the environment into a military objective, however, this would only apply to a limited portion of the environment. Even where the environment could be considered a military objective other rules of international humanitarian law (IHL), such as the rules of proportionality, precaution and the prohibition of damage to the environment reaching the threshold in Articles 35(3) and 55(1) would operate to provide protection to the environment. The rule on proportionality would protect the environment from excessive damage by balancing the anticipated direct military advantage with the foreseeable collateral effects such as damage to the electricity network or leaks of sewage and wastewater. The obligation to take precaution would be particularly relevant when assessing what is required of the belligerents in determining what, when, where and how to target in order to ensure the least environment impact.

Given the lack of political will amongst states for strengthening the law relating to environmental protection in times of armed conflict, Ms Droege concluded that a more

useful approach would be to clarify what protection of the environment in relation to armed conflict actually means in practice through, for example, clarification of what constitutes incidental damage or appropriate precaution.

The Environment as Collateral Damage: Dr. Erik Koppe

Dr Koppe discussed the topic of the environment as collateral damage by making two arguments: first, that the protection of the environment follows from a general principle of the law of armed conflict, namely the principle of environmental protection; and, second, that the specific prohibition to cause collateral damage to the environment is a part of customary international law. He began by referring to the inherently anthropocentric character of IHL and noted that protection of the environment does not fit within this framework. The general prohibition in Article 35(3) of Protocol I setting an absolute limitation on military activities, when seen from the view of its non-humanitarian character, thus could not follow from the principle of humanity. Rather, given the existence of Article 35(3), a new principle of environmental protection had to be inferred. Identification of such a general principle of environmental protection completed the general framework of law of armed conflict and qualified as a general principle of the law of armed conflict and therefore arguably as a general principle of law within the meaning of Article 38(1)(c) of the Statute of the ICJ. As such, the principle of environmental protection might entail separate rights and obligations for states under public international law, independent of the rules of law of armed conflict. Dr. Koppe suggested that the ILC, in discussing the protection of the environment in relation to armed conflict, should consider the scope of the principle of environmental protection and its place amongst the general principles of the law of armed conflict.

Addressing his second argument, Dr Koppe noted that the inclusion of articles 35(3) and 55 in Protocol I did not mean that there is no additional protection for the environment during international armed conflict. Rather, it was arguable that since the early 1990s a new rule of customary international law had emerged which specially prohibits excessive collateral damage to the environment during international armed conflict. This rule followed from the general principles of proportionality and environmental protection and complemented the conventional and customary prohibition against excessive collateral damage to civilian objects. The emergence of this specific prohibition was confirmed by the ICRC *Study on Customary International Humanitarian Law* (Rule 43C) and was evidenced by state practice. Further, the customary rule appeared to provide relative protection to the environment whereas Articles 35(3) and 55 provided absolute protection in certain circumstances. Thus, military action which causes damage to the natural environment would first have to be assessed under Articles 35(3) and 55 of Protocol I and, even if no breach established, then under this relatively new customary prohibition.

Commentator 1: Dr Dieter Fleck

Dr Fleck commented on the environment as a civilian object to which the rule of doubt applies. He criticised a general reluctance, found, for example, in the recent *Harvard Manual on Air and Missile Warfare*, to deal with specific obligations and procedures to protect the natural environment in times of armed conflict and argued that it would be less than convincing to suggest that international law had not changed in this respect since 1977. He also demonstrated that certain qualifications made relating to requirements of 'imperative

military necessity' both in the ICRC *Customary Study on International Humanitarian Law* and the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* are to be assessed in the light of their different implications and should be used with caution. While a general rule of 'eco-protection' in armed conflict might be derived from the *jus in bello* basic principles of distinction, avoidance of unnecessary suffering and humanity, the continued application of peacetime obligations under the *Draft Articles on the Effects of Armed Conflicts on Treaties* would deserve further study. Particular consideration should be given to the Draft Articles' Annex (g) concerning treaties protecting the environment, as years ago, in the written submissions for the ICJ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, there was not yet general consensus on the matter. Interdisciplinary case studies should be conducted to support fact-oriented evaluations of military requirements, ecological assessments and post-conflict effects rather than insisting in thresholds for legal regulation that appeared to be escapist already decades ago and might prove counter-productive in the years to come.

Commentator 2: Dr Ola Engdahl

Dr Engdahl highlighted the contrast between the approaches taken by the two speakers. He noted that the upper limit of tolerated environmental damage as set out in Articles 35(3) and 55 and the manner in which the environment is protected as a civilian object against direct attacks but not against non-excessive collateral damage, had been the main focus in the session. He raised the question of how to define the lower levels of damage to enable articulation of the point at which damage to the environment becomes a violation of IHL. While there were gaps in the law of armed conflict in relation to the environment, there were also different levels of protection. If the environment were considered a civilian object, it already had some level of protection including prohibition of attacks, excessive damage, and prohibition against destruction in addition to the upper level threshold as provided in Articles 35(3) and 55. He suggested that a useful way forward to address the issue of environmental protection would be to conduct assessments of a range of different situations involving military uses of various methods and means of warfare and their environmental impacts in order to shed light on the lower level thresholds of what constitutes impermissible damage to the environment.

General Discussion:

In the general discussion that followed the utility of the invocation of a new principle of environmental protection was queried. Given existing controversies over the status of other principles such as the precautionary principle it was suggested that the articulation of a totally new principle might be an overstatement. It was also queried whether such a principle could be considered as a general principle of law, given the generally understood interpretation of the term as referring to principles commonly applicable in domestic legal systems.

With regards to the question of proportionality and the foreseeability of damage, it was suggested that the primary difficulty lay in assessing whether a military commander had reasonably and adequately taken the environment into account and that this would depend on the accumulation and analysis of past practice. The need for conducting cases studies was therefore suggested.

Finally it was suggested that there was a need to investigate the relationship between IHL and other bodies of international law to determine the situations in which those other bodies of law might provide better protection than IHL and, where this occurred, whether there was any contradiction with IHL or whether those additional protections were complimentary to or additional to IHL protections.

SESSION II: ADDRESSING DEFICIENCIES IN THE LEGAL REGIME FOR THE PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT

Session Chair: Mr Mads Harlem, Norwegian Red Cross

The Ethics, Principles and Objectives of Protection of the Environment in Times of Armed Conflict: Professor Michael Bothe

Professor Bothe's presentation focused on the ethical underpinning of the law relating to the protection of the environment in armed conflict. Noting that both the law of armed conflict and international environmental law owe their very existence to philosophical and ethical considerations, he explained that, in the early 1970s, the moral factors driving the development of these two bodies of law joined together. Thus, when the two Additional Protocols were negotiated, the awareness of the finite character of the Earth's resources could not be left aside and a provision on the protection of the environment in times of armed conflict had to be inserted. The negotiations were driven by what he referred to as a 'scandalisation' which related both to the law of armed conflict and environmental law, namely the use of chemical weapons, in particular herbicides during the Vietnam War with its disastrous environmental and health consequences.

Elaborating on the origins, content and scope of the fundamental principles of the law of armed conflict, those of distinction and the prohibition of 'unnecessary suffering', Professor Bothe noted the importance of both principles for the protection of the environment in times of armed conflict. Nevertheless, interpretation of Articles 35(3) and 55 of Protocol I in accordance with the fundamental principles of environmental law, including those of intergenerational equity, precaution and prevention of transboundary harm, would result in a different outcome to interpretation according to their negotiating history. As a means of resolving this classic demonstration of the problem of fragmentation of international law Professor Bothe referred to the emergence of a principle of 'mutual supportiveness' according to which conflicts between two areas of international law should be resolved in a way which allows respect of the norms of both. It was thus necessary to insert the core principles of international environmental law into the application of the law of armed conflict. This would have a number of concrete consequences including, for example, the need to adequately include environmental concerns on the civilian side of the proportionality equation and in the precautionary measures to be taken by persons deciding upon launching attacks, who would also be required to apply the precautionary principle where necessary. The rule prohibiting unnecessary suffering and that of military necessity would also need to take account of environmental concerns and the triple qualification of environmental harm in Articles 35(3) and 55 would need to be revisited. In addition, hostilities would have to be conducted in such a way as to avoid significant damage to the environment of states not parties to the conflict. Finally, it was suggested that a rule of customary international law

could be identified requiring methods and means of warfare to be employed with 'due regard' for the environment and that a further legal obligation to cooperate in post-conflict restoration of elements of the environment damaged by warfare was emerging. Professor Bothe called for the further clarification and concretisation of the ethical and legal principles on which he had expounded and the removal of any doubt concerning their validity, both in terms of the rules of restraint on military operations and of the obligations of post-conflict rehabilitation.

Defining "Impermissible Environmental Damage" in the Armed Conflict Context: How to Interpret Articles 35(3) and 55 of the First Additional Protocol 1977: Mr Carson Thomas

Mr Thomas focused on the conceptual and pragmatic considerations for interpreting the threshold of impermissible environmental damage in Articles 35(3) and 55 of Protocol I. Noting that the cumulative requirement of 'widespread, long-term and severe' damage to the environment is not further defined in the Protocol, he pointed out that the written law focuses on the balance between the principles of military necessity and humanity and that Articles 35(3) and 55 represent a point beyond which environmental damage is prohibited regardless of the military necessity. Beneath this threshold, however, other IHL instruments and customary principles applied to limit environmental harm.

As a practical matter, Mr Thomas noted that protection of the environment depended on military commanders balancing military necessity against environmental and humanitarian norms. There was thus a need to embed protection of the environment into military operations and to argue on strategic grounds that protection of the environment was necessary. He referred to the examples of NATO's bombings of the Pancevo oil refinery and chemical facility during the Kosovo conflict and of Israel's targeting of the Jiyeh petroleum storage facilities and refinery during the 2006 conflict with Lebanon. Both had been strategic targets chosen by strategic decision-makers. The military necessity of their targeting could thus be debated at a strategic level. If the appropriate stratum of military commanders could be convinced that their strategic goals would be better served by avoiding the type of damage caused at Pancevo and Jiyeh, then environmental protection would be furthered. Indeed, given their public visibility, these strategic decision makers were more likely to be held accountable in the court of public opinion, or occasionally, even through democratic processes. This, too, would factor into their decision making. The most obvious strategic argument relevant to protecting the environment would be that excessive environmental damage undermines long-term peace as natural resources and the environment play essential roles in post-conflict peace building and economic societal recovery. On the other hand, it could be argued that *not* destroying strategic resources, like the facilities at Pancevo and Jiyeh, could unnecessarily prolong the conflict and lead to greater loss of life, both civilian and military. Thus, framing military necessity in terms of strategic goals, rather than tactical operational aims, opened up important new arguments, including the effect of environmental damage on long-term peace.

Reconceptualising the 'Obligation to Care': Dr Karen Hulme

Dr Hulme analysed the 'care obligation' found in the first sentence of Article 55(1) of the 1977 Additional Protocol I, and the reformulation of that provision in Rule 44 of the *Customary International Humanitarian Law Study*. She noted that the often overlooked first

sentence of Article 55(1), which requires care to be taken in warfare to protect the natural environment against widespread, long-term and severe damage, was unclear as to what it means in practice and as to what, if anything, it achieves. The 'due regard' obligation requires a balancing exercise between military and environmental concerns, whereas the 'care' obligation refers more to a duty of cautionary action or to 'take steps' to positively protect the environment from harm, albeit harm beyond the threshold of widespread, long-term and severe environmental damage. There was no doubt that the 'due regard' formula is a lesser obligation. However, as there have been few state comments opposed to the 'due regard' formula in the context of the ICRC's *Customary Law Study*, it appeared to have received a measure of acceptance as a possible customary legal protection for the environment. Mobilising around this formula and giving it real meaning would allow a shift of focus away from the widespread, long-term and severe threshold and possibly achieve a more realistic level of protection for the environment.

At the substantive level, both Rule 45 of the *Customary Law Study* and Article 35(3) of Protocol I remained wedded to the 'widespread, long-term and severe' threshold. However, at the procedural level they were also clearly able to influence the decision-making process. Dr Hulme therefore called for the conduct of a number of case studies from which could be derived guidance on the content of the due regard requirement and the specific elements to be considered by those ordering and conducting military operations.

Commentator: Professor Silja Vöneky

Commenting on the presentations Professor Vöneky noted that IHL prohibits damage to the environment to the extent it is not a military objective and that the 'care obligation' similarly provided a basis on which to consider the environment prior to launching an attack, even if only for strategic purposes. However, she noted that there was little common acceptance of this interpretation of the care obligation as a compulsory rule. Moreover, Articles 35(3) and 55 did not apply to the environment in neutral states or in areas beyond national jurisdiction. If protection of the environment was a rule of customary international law then the obligation must relate to protection of the entire environment and not just that in areas of belligerent states. Thus these articles were unlikely to be binding as rules of customary international law which, it appeared, had no undisputed rules available to fully protect the environment in times of armed conflict. Given that treaty law was also inadequate the lacuna could only be filled on a case by case basis as, for example, the Security Council had done in the case of the Iraq/Kuwait conflict. Professor Vöneky raised the question whether there should be certain core areas of the environment that should receive an absolute protection. This would create difficulties in determining what those core areas should be, but some indications might be found in treaties such as the World Heritage Convention in respect of areas of natural heritage.

General Discussion

Discussion focused on the threshold set in Protocol I, whether it really is set as high as most international lawyers assume and, assuming it is, whether, and if so, how it could be lowered. Participants noted the passage of time since the Protocol had been adopted and the concomitant emergence of rules for protection of the environment while noting the intention of the drafters which had been to set the threshold high so that conventional means and methods of warfare should not be affected by these rules. Also discussed was the relationship between the duty of care, the requirements of due regard and the requirements of the rules of precaution. It was noted that the concept of 'due regard', whose origins lie in the

Law of the Sea, was used in the *San Remo Manual* in regard to naval warfare and in Rule 44 of the ICRC Customary Study where it was considered to have attained customary status.

SESSION III: LEGAL AND INSTITUTIONAL MECHANISMS AND FRAMEWORKS FOR MONITORING VIOLATIONS AND SEEKING REDRESS

Session Chair: Ms Malin Greenhill, Swedish Red Cross

The Role of Multilateral Environmental Agreements: Ms Britta Sjöstedt

Ms Sjöstedt spoke on the role of the UNESCO World Heritage Convention (the WHC) in protecting the environment during armed conflicts. While the applicability of multilateral environmental agreements during armed conflict was increasingly being recognised, as evidenced by the ILC's work on the *Effects of Armed Conflicts on Treaties*, these agreements were often considered to be general frameworks setting vague and flexible norms and lacking concrete enforceable content. This raised questions as to whether they could provide any substantial protection at all in relation to armed conflicts. The WHC does not provide any specific provisions to be applied in wartime.

Using the Virunga National Park, a World Heritage site located in the Democratic Republic of the Congo (the DRC), as a case study Ms Sjöstedt examined the effects of the armed conflict in the DRC on the park and the role of the WHC in ensuring its protection. She began by noting that the armed conflict had had severe impacts on the park. Armed rebel groups, as well as the Congolese army, had settled down inside the park and were involved in the illegal exploitation of its natural resources. In 2000, the World Heritage Committee, the executive organ of the WHC launched a project aimed at conserving the natural world heritage sites located in the DRC, including the Virunga Park. The Committee has called for demilitarization of the natural heritage sites, has provided the park rangers with salaries, training, including paramilitary training, and has requested that they should be equipped with arms and ammunition and receive support from the army to assist them to continue their work to protect the Park. The World Heritage Committee has involved UN Peace-keeping forces on an informal basis to assist the rangers in protecting and conserving the park. She described this mix of UNESCO's operations with those of the peace-keeping forces as a 'green keeping' operation for the protection of the Virunga Park. Ms Sjöstedt concluded that the fact that multilateral environmental treaties use vague and flexible language does not mean that they lack significance. Since much of the work to develop the content and application of the treaty rules was in fact in the hands of the intergovernmental bodies created by those treaties, it was important to look not only at the textual content in the treaties but also to consider their operational effects in a concrete context.

The Role of Human Rights Mechanisms: Dr Wybe Douma

Mr Douma focused his presentation on the precautionary principle and its relationship with international humanitarian law. He noted that the concept of precaution was found in the text of the Protocol and asked whether that conception was consistent with the requirements of the precautionary principle as articulated in environmental law. Certainly the focus on the words 'intended' or 'may be expected' had a precautionary ring to it. If the potential

occurrence of environmental damage should be taken into effect this could be considered to lower the very high threshold set in Articles 35(3) and 55. Of course, merely hypothetical risk would not be enough; a reasonable belief as to the risk of damage would be needed. However, where such reasonable belief existed, lack of scientific certainty would not excuse a failure to take precautions. This had been the position taken in the ICRC *Customary Law Study*. However, Mr Douma questioned whether the precautionary principle could, indeed, be considered a rule of customary international law. Only if it were, indeed, a rule of customary international law could it be used to assist in addressing the shortcomings in international humanitarian law.

Mr Douma then discussed the applicability of human rights treaties noting that, at the global level, international conventions on human rights make no mention of protection of environment. At the regional level, however, the African Charter mentions a right to a healthy environment, while the European Convention on Human Rights contains the right to life and the right to respect for one's private and family life. Referring to *Tatar vs. Romania* he suggested that the European Court of Human Rights appears to have interpreted these rights in a 'green' way. The manner in which human rights law was testing issues of precaution and proportionality appeared to be of more immediate relevance than reliance on IHL. Thus, aspects of human rights law could help to fill the gaps in IHL in order to provide greater protection for the environment in relation to armed conflicts.

Sustainable Development and Damage to the Environment During Armed Conflict: Ms Tara Smith

Ms Smith began by noting that armed conflict is an inherently disruptive act, which has adverse and often unsustainable impacts on many aspects of human life. The question to be answered was, therefore, not what the impact of armed conflict on sustainable development was. Rather, the success of sustainable development as a whole could be evaluated by the degree to which it enables societies to bounce back from the destruction and disruption caused to the environment by armed conflict. An assessment of sustainable development in this way was relevant to understanding the system of environmental protection that applies as a whole throughout the conduct of hostilities. If sustainable development is embraced and implemented to the fullest extent possible, it will equip societies with the ability to meet the challenges of the day, including environmental damage caused in armed conflict, thereby ensuring that the disruption caused by situations of armed conflict will not be detrimental to the ultimate goal of long-term environmental integrity and sustainability.

Ms Smith noted that sustainable development as a peacetime principle is a process of managing environmental, economic and socio-political resources to ensure that the needs of the present generation can be met without compromising the ability of future generations to do the same. It is a constant process, not a destination to be arrived at. The strong and meaningful pursuit of sustainable development would result in an environment that was more resilient and more capable of absorbing harm and withstanding the challenges that armed conflict may cause. Sustainable development may very well be disrupted in times of armed conflict, but it was imperative that a strong system of protection was in place throughout the conduct of hostilities, in the form of revised laws of armed conflict, robust environmental law and progressive interpretations of human rights law.

Commentator 1: Dr Lucas Lixinski

Dr Lixinski began by suggesting that a possible framework for analysis of the relationship between the laws of armed conflict and international environmental law could be provided by recourse to feminist legal theory. He analogized the relationship to the idea of war as masculine, and peace as feminine, noting that a feminist analysis would consider international humanitarian law as being in the foreground, public (therefore requiring the attention of the international community), and the environment in the background, the private sphere (and thus the reserved sovereign domain of states). As a result only when environmental harm reached an excessively high threshold it would become public and trigger the application of the law of armed conflict (drawing an analogy between domestic violence and systematic gender violence, to use a typical example of early feminist legal thinking). Below this threshold the harm would be considered 'too private'. Therefore, feminist international legal theory could offer an important frame of analysis to understand why international humanitarian law does not seem to be overtly concerned with environmental issues, and offer the foundations to deconstruct and challenge the status quo. He also posited the application of a global administrative law framework as a useful analytical tool to understand the multiple angles of operation of UN agencies with regards to the environment in armed conflicts. He then referred to the ongoing proceedings in the *Temple of Preah Vihear* case and the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage (2003) adopted after the destruction of the Bamiyan Buddhas in Afghanistan (2001), suggesting that the case law and state practice on protection of cultural heritage supported the argument that natural heritage was similarly protected in situations of armed conflict. Finally, Dr Lixinski raised the shortcoming of using human rights law to protect the environment because of the necessary anthropocentric understanding of the environment required for this turn, seen as international environmental law, at least from the perspective of many scholars, seemingly should shift and has been shifting towards a more eco-centric focus. Excessive reliance on a human rights framework could therefore mean a step back.

Commentator 2: Dr Onita Das

In her comments Dr Das raised the problem of complexity caused by confusion or differentiation between international and internal armed conflicts and discussed the manner in which the status of the conflict as international or internal would affect the use of international environmental agreements. She noted that the WHC worked because of both its vagueness, which allowed for a broad interpretation of the convention in favour of action, and its institutional structure which enable it to take such action. She considered both green keeping and recourse to the concept of sustainable development as useful tools for increasing protection of the environment before, during and after armed conflicts.

General Discussion:

In discussion participants further considered the question of whether IHL is incapable of addressing issues that might be addressed, instead, by other regimes of international law. It was noted that IHL already prohibits pillage, prohibits attacks against civilian objects and also applies in non-international armed conflicts. Clearly IHL offered the minimum protection needed. The gap in IHL lay rather in the mechanisms available to it to protect the environment, a gap which might well be filled by reference to other areas of international law including human rights law, international environmental law. It was pointed out,

however, that this raised questions as to how to resolve instances of normative conflict and issue relating to the application of the *lex specialis*.

The relation between the UN peace-keeping missions, the Security Council and protection of the environment was also discussed and the question posed as to whether damage to the environment could be considered a threat to international peace and security. Both the positive and negative aspects of a possible role for UN peace-keepers in protecting environmental areas were also canvassed. Discussants also underscored the role of sustainable development in providing an often neglected ethical dimension to IHL.

SESSION IV: ACCOUNTABILITY FOR DAMAGE TO THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

Session Chair: Ms Annette Bjørseth, Ministry of Foreign Affairs, Norway

State Responsibility for Damage to the Environment: Professor Vera Gowlland-Debbas

Utilising a series of case studies Professor Gowlland-Debbas began by discussing the fundamental rules relating to state responsibility. First she noted that compensation for environmental damage caused by an armed conflict would only be payable where a state had breached IHL. Damages caused in the normal course of an armed conflict were not compensable. She then referred to the *Nuclear Weapons* Advisory Opinion noting that environmental obligations were considered by the ICJ not to be a restraint on the conduct of armed conflict but only one aspect to be taken into account when assessing responsibility. Turning to role of the UN Compensation Commission in compensating for damage to the environment as a result of the Iraq/Kuwait war she noted that Security Council Resolution 687 had held Iraq responsible under international law for environmental damage caused by its breach of Article 2(4) of the UN Charter. IHL was therefore not in issue and Iraq's liability for damage was merely a question of causation not of attribution. In short, the damages ordered were basically reparations. In other cases claims involving damage to natural resources and the environment had been raised but had either been dismissed or not considered although in the *DRC v Uganda* case the ICJ had dealt with the issue of damage to natural resources as one involving the regime of the *ius in bello*.

Professor Gowlland-Debbas noted that existing international conventions relating to liability for environmental harm dealt only with civil liability and were therefore not applicable in the case of armed conflicts. While the ILC had, at one stage, suggested that massive pollution of the environment would be a state crime, this had been removed from the *Articles on State Responsibility* and the scope of responsibility circumscribed. In any event, even assuming damage to the environment or environmental values caused during an armed conflict was compensable, difficult questions of causation, proximate cause, foreseeability, intervening acts, and mitigation would arise. Other difficult questions related to the position of non-belligerent states and the question of to whom reparation would be due. Professor Gowlland-Debbas noted that there was a growing tendency to compensate ecological costs which are easily assessable. For example, the UN Compensation Commission, established after the Gulf war, added that the damage to public health should be compensated. She queried, however, whether this would extend to compensation for purely ecological damage in the face of no injury. She added that considerable work would need to be done with respect to

both valuation methodologies and remedies. She concluded by stressing the significant difference between the normative protection of the environment and the availability of remedies for damage to it.

Corporate Responsibility for Damage to the Environment and the Problem of ‘Conflict Resources’: Professor Phoebe Okowa

Professor Okowa began by referring to the conflicts in the DRC and Liberia and posited the question as to why, given the evidence that these conflicts were being sustained by exploiting the environment, no means existed to regulate this. She noted the difficulty of achieving international oversight due to the prohibition on interference in the domestic affairs of states which severely limited the efficacy of any potential Security Council resolutions, assuming any were adopted. The issue was how to respond to the destruction of the environment when globalization and global trade actually encouraged both rebels and governments to exploit the environment in order to fund their actions. If rebel forces could not be held responsible under the normal rules on state responsibility an entirely new approach was needed. Professor Okowa proposed shifting the regulatory focus onto corporations in order to effectively halt international trade in these resources thereby eliminating their exploitation as a source of funding to armed groups. She then examined the regulatory mechanisms that might be used to achieve this.

Turning first to self regulation she referred to emerging NGO and other initiatives to adopt codes of compliance and certification schemes designed to limit trade in materials to those that have been ethically obtained. She noted that, like all initiatives emanating from industry self-regulation, the success of these initiatives was dependant on their acceptance and implementation by companies. Elaborating on the OECD Guidelines on due diligence for companies operating in conflict zones she noted that while the DRC government had issued a directive requiring companies operating in the DRC to comply with the OECD Guidelines, these Guidelines did not create any environmentally specific obligations.

Professor Okowa next turned to unilateral national mechanisms, such as the United States *Dodd-Frank Act* adopted in 2010 which requires US companies to conduct supply chain checks on resources obtained from the DRC to ensure that these resources were not obtained from armed groups engaged in the fighting. Noting that the *Dodd-Frank Act* was not environmental legislation but rather focused on regulating matter relating to the place of origin of resources, she highlighted the need for harmonization of such national approaches in order to avoid companies simply moving their state of incorporation. Finally, she discussed the possibility of national courts invoking universal jurisdiction to try individuals for crimes associated with the exploitation of conflict resources but concluded that it was unlikely, in the current legal and political climate, that states would be willing to assume such sweeping jurisdictional powers.

Individual Responsibility for Damage to the Environment During Armed Conflict: Judge Frederik Harhoff

Judge Harhoff focused his presentation on individual responsibility for wartime environmental damage noting that existing international criminal tribunals only have powers over individual criminal responsibility, and not states or organisations. However, in order to exercise jurisdiction, there must first exist a crime. Articles 35 and 55 of Protocol I are not

listed as grave breaches; therefore they could not be prosecuted before the tribunals. Indeed, the material scope of crimes related to environmental damage was limited to Article 8(2)(b)(iv) of the ICC statute. However, the ICC statute applied only where the perpetrator is aware that the action *will* cause long term damage which implied a higher threshold than that contained in Articles 35(3) and 55 of Protocol I. Moreover, the perpetrator must also have realised that the effects of the attack would exceed the criteria of proportionality. This appeared to place the threshold even higher still. Judge Harhoff noted that no one has ever been indicted for damage to the international environment and that States had gone to great lengths during negotiations of the Protocol and the Statute of the ICC to ensure that their generals could not be prosecuted for war strategies that caused environmental damage. Indeed, the most the ICRC had been able to conclude in its *Customary Law Study* was that attacks are unlawful unless the object is defined as a military object and is not disproportionate (Rule 43) and that all precautions must be taken (Rule 44).

Judge Harhoff provided examples of environmental damage in relation to armed conflicts, including the polluting of wells and lakes in Rwanda by deposition of dead bodies, the pollution of Vietnamese forests by Agent Orange, and other uses of mines, biological and chemical weapons. He noted that the water sources in Rwanda remain polluted and that Agent Orange had caused significant the long term biological defects in humans. Its use, however, had been justified by the US army on the basis that the natural environment had been defined as a military object. He noted that even in the aftermath of the Iraq war, no one had been indicted or tried for any crimes relating to the targeting of the oil pipelines and the resulting spills. This type of damage was always justified as subject to military necessity.

Noting that IHL prioritized human victims over the environment, Judge Harhoff suggested that the lack of focus to date on the issue of environmental damage did not mean that prosecution for environmental crimes under the ICC Statute might not occur in future. It was undoubtedly just a question of time. It would then be up to the Judges to interpret the elements of the crime and the threshold limits in Article 8. He predicted that given the uniqueness, complexity and importance of the environment Judges would exercise caution in binding themselves too rigidly to an interpretation of 'wide spread, long-term and severe' expressed in quantifiable restrictions in terms of precise numbers of years and delineation of geographical areas. Rather the essential nature of the judicial function would lead judges to retain discretion over how the law was interpreted and applied in practice. Judge Harhoff concluded that as trials got underway in the ICC, the Court would rise to the challenge of developing the necessary judicial framework to convict individuals for environmental damage in armed conflict.

Individual Responsibility for Damage to the Environment During Armed Conflict: Ms Daniëlla Dam

Ms Dam also addressed the issue of individual responsibility with a focus on predatory resource exploitation as a means of financing armed conflicts. Noting the special threat to the environment posed by destructive resource exploitation during armed conflict she examined the regulatory framework including the basic rules of IHL, human rights and environmental law applicable to natural resource exploitation during armed conflict. She noted that IHL already provides several rules for protection of the environment as a function of its rules regarding the protection of human property. Beyond that, general international law provided obligations deriving from the concept of sustainable development. With respect

to resource exploitation conducted by rebel groups, however, the law was more limited, with only a few international provisions directly applicable. In particular there was still considerable controversy as to whether human rights law was applicable to these groups. While general IHL principles of proportionality and distinction together with the prohibition on removing or destroying objects necessary for the survival of a society such as agricultural areas, lakes, rivers provided some protections she queried whether these prohibitions could be read more widely, particularly where exploitation of natural resources was carried out by a government in the context of an internal armed conflict.

Examining other regimes of international law Ms Dam noted that governments remain bound by peace time obligations and that states must therefore continue to respect their multilateral environmental agreements even during armed conflict. With respect to international criminal law, Ms Dam noted that pillage is a war crime in the ICC statute although the provisions on pillage have never yet been used in prosecuting war crimes relating to exploitation of natural resources. Rather, they have primarily been used in cases involving civilian property. Looking at Security Council sanctions regimes she referred to the role SC resolutions had played in the development of certificate of origin schemes, such as the Kimberly Process Scheme aimed at stopping the trade in rough diamonds used by non-state armed groups to finance their operations, and the sanctions imposed against Liberia to stop the use of the timber trade as a means of financing the conflict. She concluded that the greater use of international criminal law and Security Council sanctions regimes may help to fill the gaps in the existing fragmented international law framework but that, in the end, it was still essential to have a more adequate legal framework which unequivocally set out the rights and duties of all parties to an armed conflict in respect of natural resources.

General Discussion:

In discussion it was noted that even if damage to the environment was not a crime under the ICC Statute, it might still constitute a breach of IHL for which domestic legal processes, assuming relevant domestic legislations existed, would be relevant.

It was also noted that while targeting consumers may provide a useful means of dealing with issues of corporate responsibility, companies often rebounded from these measures by simply rebranding. The question was how to successfully take the profit out of the sorts of predatory practices being examined. In this respect, the need for national legislation criminalizing corporate behavior relating to these practices was noted, although it was realized that these activities generally took place in the states least likely to adopt or implement such legislation.

The discussion also touched on the utility of judicial proceedings in international tribunals, including the ICC, in raising awareness of the issue of armed conflict related environmental damage to a new level.

Close of Workshop

ANNEX 1

LIST OF PARTICIPANTS

Ms Anette Björseth

Senior Adviser Section for international humanitarian and criminal law
Norwegian Ministry for Foreign Affairs

Professor Dr Michael Bothe

Professor emeritus, Johann Wolfgang Goethe-Universität Frankfurt

Ms Daniëlla Dam-de Jong

PhD Candidate, Leiden Law School, Leiden University

Dr Onita Das

Research officer, Global Network for the Study of Human Rights and the Environment, University of the West of England

Dr Wybe Th. Douma

Senior researcher, Research Department, Law of the European Union, T.M.C. Asser Institute

Dr Cordula Droege

Legal Adviser, International Committee of the Red Cross

Dr Ola Engdahl

Strategy Section and International Law Centre, Department of Security, Strategy and Leadership,
The Swedish National Defence College

Dr Dieter Fleck

Former Director International Agreements & Policy, Federal Ministry of Defence, Germany;
Honorary President, International Society for Military Law and the Law of War; Member of the
Advisory Board of the Amsterdam Center for International Law (ACIL); Member of the Editorial
Board of the Journal of International Peacekeeping

Mr Peter Gottschalk

PhD Candidate, Faculty of Law, Lund University

Professor Dr Vera Gowlland-Debbas

The Graduate Institute of International and Development Studies

Ms Malin Greenhill

IHL-advisor, Swedish Red Cross

Judge Frederik Harhoff

The International Criminal Tribunal for the former Yugoslavia

Mr Mads Harlem

Head of international law at Norwegian Red Cross

Mr Vaar Havnelid

Norwegian Red Cross, Student at the Faculty of Law, University of Oslo

Ms Inger Holten
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Associate Professor Dr Marie Jacobsson
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Faculty of Law, University of New South Wales

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Faculty of Law, Lund University

Ms Pernilla Nilsson
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Mr Simon O'Connor
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Dr Phoebe Okowa
School of Law, Queen Mary, University of London

Professor Dr Rosemary Rayfuse
Faculty of Law, The University of New South Wales,
Conjoint Professor, Faculty of Law, Lund University

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Deputy Director, The Raoul Wallenberg Institute of Human Rights and Humanitarian Law

Ms Claire Schachter
MPhil International Relations, St Antony's College, Oxford

Ms Britta Sjöstedt
PhD Candidate, Faculty of Law, Lund University

Ms Tara Smith
PhD Candidate, National University of Ireland

Mr Carson Thomas
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Professor Dr Silja Vöneky
University of Freiburg

Ms Nina Weber
PhD Candidate, Faculty of Law, Lund University

Rapporteurs

Mr Amir Amirsolimani
Ms Anja Greenshields
Ms Theresa Hamburger
Ms Nicola Harvey
Ms Izzy Munyabarenzi
Ms Ceclia Purcell
Ms Sarvenaz Shahi
Mr Christopher Timbs

ANNEX 2

PROGRAM

THURSDAY 16 FEBRUARY

- 13.30** **Registration and Coffee**
- 14.00** **Welcome and Introduction**
Professor Christina Moëll, *Dean, Faculty of Law, Lund University*
Mr Rolf Ring, *Deputy Director Raoul Wallenberg Institute*
Professor Rosemary Rayfuse, *Lund University and University of New South Wales*
- 14.20** **Setting the Scene**
The International Law Commission and the Issue of Protection of the Environment in relation to Armed Conflicts
Associate Professor Marie Jacobsson, Lund University, Ministry for Foreign Affairs, Sweden and International Law Commission
- 14.40** **Deficiencies in the legal regime for the protection of the environment in times of armed conflict**
Chair: *Ms Pernilla Nilsson, Ministry for Foreign Affairs, Sweden*
- The environment as civilian object
Ms Cordula Droege, International Committee of the Red Cross
 - The environment as collateral damage
Dr Erik Koppe, Leiden University
 - Commentators: *Dr Dieter Fleck, Formerly, Federal Ministry of Defence, Germany*
 Dr Ola Engdahl, Swedish National Defence College
- 16.00** **Afternoon Tea**
- 16.30** **Addressing deficiencies in the legal regime for the protection of the environment during armed conflict**
Chair: *Mr Mads Harlem, Norwegian Red Cross*
- The ethics, principles and objectives of protection of the environment in times of armed conflict
Professor Michael Bothe, Goethe University Frankfurt
 - Defining “impermissible environmental damage” in the armed conflict context: How to interpret Articles 35:3 and 55 of the First Additional Protocol 1977 – *Mr Carson Thomas, New York University*
 - Reconceptualising the ‘obligation to care’
Dr Karen Hulme, University of Essex
 - Commentator: *Professor Silja Vöneky, University of Freiburg*
- 18.00** **Close**

FRIDAY 17 FEBRUARY

08.30 Coffee

09.00 **Legal and institutional mechanisms and frameworks for monitoring violations and seeking redress**

Chair: *Ms Malin Greenhill, Swedish Red Cross*

- The role of multilateral environmental agreements
Ms Britta Sjöstedt, Lund University
- The role of human rights mechanisms
Dr Wybe Douma, TMC Asser Institute
- Sustainable development and damage to the environment during armed conflict
Ms Tara Smith, National University of Ireland
- Commentators: *Dr Lucas Lixinski, University of New South Wales*
Dr Onita Das, University of the West of England

10.30 Morning Tea

11.00 **Accountability for damage to the environment in relation to Armed conflicts**

Chair: *Ms Annette Bjørseth, Ministry for Foreign Affairs, Norway*

- State responsibility for damage to the environment
Professor Vera Gowlland-Debbas, Graduate Institute of International and Development Studies
- Corporate responsibility for damage to the environment and the problem of 'conflict resources'
Professor Phoebe Okowa, Queen Mary College, University of London
- Individual responsibility for damage to the environment during armed conflict
Judge Frederik Harhoff, International Criminal Tribunal for Yugoslavia
- Individual responsibility for damage to the environment during armed conflict –
Ms Daniëlla Dam, Leiden University

12.30 **Concluding Remarks**

Professor Ulf Linderfalk, Lund University and Editor-in-chief, Nordic Journal of International Law

Professor Rosemary Rayfuse

Associate Professor Marie Jacobsson

13.00 Close

ANNEX 3

NORDIC PLEDGE

PLEDGE P1290 presented at the 31st International Conference of the Red Cross and Red Crescent, Geneva, 28 November – 1 December 2011

Proposed Evaluation Criteria :

- Desk study of empirical effects on the environment by hostilities during armed conflict
- Review of legal framework and criterion for protection of the environment
- Meeting of international experts to evaluate effects and criterion relevance to those effects
- Proposals to existing legal framework to ensure protections properly afforded to the environment and to those reliant on it.

Pledge text : Protection of the natural environment is one element necessary to give proper effect to the protection of civilian populations in times of armed conflict. Conscious of the profound effects damage to the environment, caused during armed conflicts, has or may have on the health and survival of civilians and civilian populations, and cognizant of the fact that the scope and extent of legal protections of the natural environment merits analysis and where appropriate clarification

The Governments and National Red Cross societies hereby pledge:

1. On the basis of recent armed conflicts, to undertake and support a concerted study highlighting the relevance of the existing legal framework for the protection of the natural environment in contemporary armed conflicts, and identifying any gaps in that context.
2. To co-ordinate and host a meeting of experts, and on this basis prepare a report, to propose, if appropriate, areas in which the legal protection of the natural environment may be clarified and, if necessary, reinforced.

ANNEX 4

REPORT OF INTERNATIONAL LAW COMMISSION

SIXTY-THIRD SESSION

GAOR 66TH SESSION SUPPLEMENT NO. 10 (A/66/10)



Annex E

Protection of the environment in relation to armed conflicts (Ms. Marie G. Jacobsson)

I. Introduction

1. It has long been recognised that the effect on the environment during and after an armed conflict may pose a serious threat to the livelihoods and even existence of individual human beings and communities. The effect on the environment differs from other consequences of an armed conflict since it may be long-term and irreparable. It may remain long after the conflict and prevent an effective rebuilding of the society, destroy pristine areas or disrupt important ecosystems.

2. The protection of the environment in armed conflicts has been primarily viewed through the lens of the laws of warfare, including international humanitarian law. However, this perspective is too narrow as modern international law recognises that the international law applicable during an armed conflict may be wider than the laws of warfare. This is also recognised by the International Law Commission (ILC) in its recent work on Effect of Armed Conflicts on Treaties. This work takes as its starting point (Article 3) the presumption that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties. The combined implication of Article 7 and the Annex of treaties is that, because of their subject matter, several categories of treaties relevant to the protection of the environment may continue in operation during periods of armed conflict.¹

II. Background²

3. The need to protect the environment in times of armed conflict is not a 21st Century idea, or even a 20th Century idea. On the contrary, it is possible to trace legal rules relating to the natural environment and its resources back to ancient time. Such rules were closely connected with the need of individuals to have access to natural resources essential for their survival, such as clean water. Given the conditions under which war then was conducted, as well as the means and methods used, there was limited risk of extensive environmental destruction.

4. This changed during the 20th Century when technological development placed the environment at a greater risk of being permanently destroyed through destruction caused by nuclear weapons or other weapons of mass destruction, but also through destruction caused by conventional means and methods of warfare. The technological development went hand in hand with a rising awareness of the need to protect the environment for the benefit of existing and future generations.

¹ Article 7 (Continued operation of treaties resulting from their subject-matter) and the indicative list of treaties annexed. The list includes treaties relating to the international protection of the environment, treaties relating to international watercourses and related installations and facilities, treaties relating to aquifers and related installations and facilities, treaties relating to human rights and treaties on international criminal justice, and, for obvious reasons: treaties on the law of armed conflict, including treaties on international humanitarian law.

² This section is by necessity brief and incomplete. It serves only as a frame of historical reference.

5. It is possible to identify three periods since the adoption of the UN Charter when the protection of the environment in relation to armed conflict has been addressed with the aim of enhancing the legal protection. The first phase started in the early 1960s, the second in the early 1990s and the third in the 2010s.

6. The **first phase**, begun in the 1960s, was spurred, on the one hand, by the means and methods of warfare during the Vietnam War, and, on the other hand, by the rising awareness of the need to protect the environment in more general terms (the birth of the international environmental law). The Stockholm Declaration on the Protection of the Environment (a political declaration in 1972) signals an attempt to expand the “Trail Smelter” principle beyond a bilateral context (Principle 21). The sensitive issue of the use of nuclear weapons was addressed, in vague terms, in Principle 26. Although no decisive legal conclusions can be drawn from the Stockholm Declaration, it gave a signal of what was the concern and what was to come in the Rio Declaration (1992), see below.

7. A few years later, specific provisions addressing the protection of the environment were included in international humanitarian law treaties. It is worth quoting two articles, Article 35 and Article 55 of the First Additional Protocol (1977) to the 1949 Geneva Conventions, not least because they partly seem to contradict each other.

Article 35, para.3 reads:

“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.”³

Article 55 reads:

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

2. Attacks against the natural environment by way of reprisals are prohibited.”

8. In addition, the ENMOD treaty, which aims exclusively to protect the environment, was adopted.⁴ The standard-setting Article 1, para. 1 reads:

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

9. During the 1980s, the Iran-Iraq war drew the attention of States and organizations to the need for enhanced protection of the environment during armed conflicts. This is

³ This is repeated in the Preamble of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, the so-called CCW (1980).

⁴ Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques, 10 December 1976, ENMOD. The Convention provides for review conferences to be held at least every five years, but thus far, only two review conferences have been held, in 1984 and in 1992.

evidenced e.g. by the request from the Commission of the European Communities for a report on the matter.⁵

10. The **second phase** started with the Iraq-Kuwait war in 1990. The burning of oil wells and other environmentally disastrous effects of the war awoke the international community to the effect of modern warfare on the environment. In addition, the United Nations Compensation Commission (UNCC) was established and entrusted with cases relating to loss or damage of the environment and the depletion of natural resources.⁶ In its reports, the Commission discusses each claim for compensation separately and gives reasons for their acceptance, denial or adjustment. This provides a substantial amount of case law although the Commission relies on the criteria provided by the United Nations Security Council and Governing Council and not international law *per se*. It is noteworthy that the Commission awarded some compensation for all these claims, including for indirect damage to wetlands from water consumption by refugees.

11. In parallel, the item of protection of the environment was placed on the agenda of the United Nations: first under the heading, *Exploitation of the environment as a weapon in times of armed conflict and the taking of practical measures to prevent such exploitation*; and subsequently as *Protection of the environment in times of armed conflict*.⁷ The Secretary General submitted his first report on the protection of the environment in times of armed conflict in 1992 and a second report in 1993. In essence, these reports were a reproduction of information received from the ICRC. The report of 1993 suggested what issues could be examined by the Sixth Committee.⁸ The issues included the question of “[a]pplicability in armed conflict of international environmental law; general clarification and action on case of revision of treaties”.⁹ At that time, the item had lost its place as an independent agenda item. Instead, it was dealt with under the item United Nations Decade of International Law.¹⁰

12. The ICRC was mandated by the General Assembly to work with the issue. As a consequence, expert meetings were held, and the issue was also on the agenda of the International Red Cross and Red Crescent Conferences. One result was the *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Time of Armed Conflict*, annexed to the Report submitted by the ICRC to the forty-eighth session of the United Nations General Assembly. Due to lack of political support for any modification of the law of armed conflict as reflected in existing treaty provisions, annexing the Guidelines to a resolution and inviting States to disseminate them, was as far as it was possible to go at the time.¹¹

⁵ Bothe, Michael, Antonio Cassese, Frity Kalshoven, Alexandre Kiss, Jean Salmon and K.R. Simmonds. “Protection of the Environment in Times of Armed Conflict”, *Report to the Commission of the European Communities*, SJ/110/85 (1985).

⁶ The United Nations Compensation Commission (UNCC) was established under UNSC Resolution 687 (3 April 1991). The mandate of the UNCC is more closely related to the old so-called Hague rules (1907), which contain regulations on compensation for violations of the laws of war, than to the Geneva Conventions and their First Additional Protocol.

⁷ It was originally Jordan in 1991 that proposed to include the item on the agenda, see A/46/141, and the proposal was accepted. In 1992, the General Assembly decided to include the topic “*Protection of the environment in times of armed conflict*” on its agenda and to allocate it to the Sixth Committee.

⁸ A/48/269.

⁹ A/48/269, para. 110.

¹⁰ A/RES/47/37.

¹¹ A/RES/49/50, op. para 11. The lack of a broad support for bringing the issue forward was further evidenced by the lack of development relating to the ENMOD treaty.

13. It should be recalled that the United Nations Conference on Environment and Development took place in 1992. The conference adopted the Rio Declaration, which clearly stipulates in Principle 24 and Principle 23 respectively that:

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

and

“The environment and natural resources of people under oppression, domination and occupation shall be protected.”

14. The San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994) repeatedly addresses the protection of the environment, for example by including damage to or the destruction of the natural environment or objects that are not in themselves military objectives as collateral casualties or collateral damage. The legal aspect of protecting the environment is particularly relevant in naval warfare since belligerents and third parties may have legitimate and competing claims to use an area outside the sovereignty of a State.¹²

15. The armed conflicts in the former Yugoslavia also bore evidence of the disastrous effects on the environment of both legal and illegal means and methods of warfare. At the same time, pressing concern from the international civil community forced states to address one particular aspect of IHL of direct relevance to the protection of the environment: the use of anti-personnel landmines. It is obvious that the lack of implementation of the existing provisions in the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW) brought about devastation, not only to those individual civilians that were maimed by the landmines, but also to their effective and secure use of land after the war was over. The examples of Balkan, Cambodia and Mozambique are self-explanatory. In addition to the lack of implementation, a major concern was the simple fact that the existing convention was not applicable in non-international armed conflicts. As a result, the Convention and its Second Protocol on Landmines were revised. However, this was not enough for those states and individual groups that wanted a more extensive ban. In a parallel track, the Ottawa Convention on a total ban on the use of anti-personnel landmines was negotiated and adopted.

16. The legally interesting aspect of this development is that the initial reluctance on the part of important militarily powerful states to modify the laws of armed conflict did not prevent the parallel development of a regime for the protection of the civilian population and its base of subsistence.

17. The **third phase** started in the early 2010s. It is difficult to connect the beginning of this phase with any particular war, but rather stems from a growing awareness of the need to protect the environment as such. Indeed, several wars such as those in Kosovo, Iraq, and Lebanon all bore evidence that war-torn societies pay a high environmental price. At the same time, international courts and tribunals addressed the issue of the protection of the environment in court practice. The negative effects on the environment were also raised by fact-finding missions. Starting with the legal cases in the 1990s, it was no longer sufficient to seek for legal answers in the realm of the laws of warfare. The development of environmental law and international criminal law could not be neglected, and it is worth

¹² Manual on International Law Applicable to Air and Missile Warfare (2009) also contain specific rules regarding the protection of the natural environment, see Rules 88–89.

noticing that the International Criminal Court has jurisdiction over crimes that cause certain damage to the environment.¹³

III. Work done by other bodies

18. As mentioned above, the ICRC summoned expert meetings and presented important reports during the 1990s. Those include *Guidelines for military manuals and instructions on the protection of the environment in times of armed conflict* (1994). The perspective of the ICRC is, for obvious reasons, that of international humanitarian law. This in essence poses the question: to what extent does existing international humanitarian law contain principles, rules or provisions that aim to protect the environment during an armed conflict. It is often noted that the environment needs to be protected in order to achieve the goal of protecting civilians and their livelihoods. But it is likewise pointed out that the environment as such needs protection. The underlying assumption is that the environment is civil in nature. This is evidenced by the ICRC's multi-volume explanation of customary international humanitarian law, published in 2005. Three of the rules identified by the ICRC as customary law, namely Rules 43–45, relate particularly to natural resources and environmental protection during armed conflicts. Rule 44 reads:

“Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions.”

19. In 2010, the ICRC raised the issue on the current state of international humanitarian law. In its presentation on the topic *Strengthening Legal Protection for Victims of Armed Conflict*, the ICRC draws the conclusion that humanitarian law needs to be reinforced in order to protect the natural environment.¹⁴ The ICRC apparently concludes that the extensive development of international environmental law in recent decades is not matched by a similar development in international humanitarian law. The clarification and development of international humanitarian law for the protection of the environment has lagged behind. It is a noteworthy conclusion since the ICRC predominantly expresses concern over the lack of the implementation of IHL provisions.

20. The **International Law Association (ILA)** has issued several reports of relevance to the topic. Of direct relevance is the 2004 report from the Committee on Water Resource Law. Chapter X, Articles 50–55, is entirely devoted to Protection of Waters and Water Installations During War or Armed Conflict. Another report is the 2010 Report on Reparations for Victims of Armed Conflict. It is also worth mentioning the 2006 report of the ILA's Committee on Transnational Enforcement of Environmental Law. While it does not specifically discuss the protection of the environment in the context of armed conflict, it does propose rules relating to the standing of individuals to bring claims for the destruction of the environment and other access to justice issues.¹⁵

¹³ Article 8 of the Rome Statute (1998).

¹⁴ <http://www.icrc.org/eng/resources/documents/statement/ihl-development-statement-210910.htm>.

¹⁵ Its main focus seems to be domestic remedies for environmental claims, but the report also discusses the rejected Draft Article 7, which would have allowed judicial proceedings against a government for breaches of international environmental law.

21. The **International Union for the Conservation of Nature (IUCN)** has formed a Specialist Group on Armed Conflict and the Environment which is undertaking two related activities: exploring current questions of the law of armed conflict as it relates to the protection of the environment and assessing experiences in post-conflict management of natural resources and the environment. A survey on the status of international law protecting the environment during armed conflict, including opportunities for strengthening the law and its implementation is apparently under way.

22. The **United Nations Environmental Programme (UNEP)** and the **Environmental Law Institute (ELI)**, together with leading specialists in international law and the **ICRC**, have conducted a legal assessment of the protection of the environment during armed conflicts which produced the 2009 report *Protecting the Environment During Armed Conflict – An Inventory and Analysis of International Law*. The report examines four main bodies of international law that provide protection for the environment during armed conflicts: international humanitarian law, international criminal law, international environmental law, and human rights law. The report culminates with a number of key findings explaining why the environment still lacks effective protection in times of armed conflict. It also makes recommendations for how these challenges can be addressed and the legal framework strengthened.

IV. The UNEP proposal to the ILC

23. It was out of concern “that the environment continues to be the silent victim of modern warfare” that the UNEP and the Environmental Law Institute “*undertook a joint assessment of the state of the existing legal framework protecting natural resources and the environment during armed conflict*” in 2009.¹⁶ The assessment is the result of an international expert meeting held by UNEP and the ICRC in March 2009. Based on ten key findings, the Report provides for twelve recommendations, among them that the ILC, as “*the leading body with expertise in international law*”, should “*examine the existing international law for protecting the environment during armed conflict and recommend how it can be clarified, codified and expanded*”.¹⁷

The Report suggests that the following issues be addressed.

- (a) *An inventory of the legal provisions and the identification of gaps and barriers to enforcement;*
- (b) *An exploration of options for clarifying and codifying this body of law;*
- (c) *The definition of key terms such as “widespread”, “long-term” and “severe”;*
- (d) *The consideration of the applicability of multilateral environmental agreements during armed conflicts as part of its ongoing analysis of the “effect of armed conflict on treaties”;*
- (e) *Extending protection of the environment and natural resources in the context of non-international armed conflict; and*

¹⁶ UNEP Report, 2009, p. 9.

¹⁷ UNEP Report, 2009, Recommendation 3, p. 53.

(f) Considering how the detailed standards, practice and case law of international environmental law could be used to clarify gaps and ambiguities in international humanitarian law.¹⁸

V. Major issues raised by the topic

24. The proposal submitted by the UNEP Report raises the issue if the suggested topic would be a suitable topic for the Commission.

25. The ILC should continue to keep an open mind with respect to proposals submitted to it. Proposals submitted by the General Assembly, other bodies within the United Nations system and States, carry a special weight. It should be noted that the ILC has tried to encourage other United Nations bodies to submit proposals to the Commission at least since 1996.¹⁹ Hence, the suggestion by UNEP deserves serious consideration, particularly since it *prima facie* appears a well-founded proposal.

26. So, what are the major issues raised by the topic?

27. The applicable law in relation to armed conflict clearly extends beyond the realm of the laws of warfare. It is not sufficient to refer to international humanitarian law as *lex specialis* in the hope of finding a solution to a specific legal problem. Also other areas of international law may be applicable, such as human rights. The International Court of Justice has clearly recognised this.

*“More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”*²⁰

28. The underlying assumption of the Court’s reasoning is also recognised by the ILC, *inter alia* in its work on fragmentation²¹ and in its recent work on Effect of Armed Conflicts on Treaties. This work takes as its starting point (Article 3) the presumption that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties.²²

29. Even if one were to assume that only the law of armed conflict is applicable during an armed conflict, that law is also applicable before and after the an armed conflict since it contains rules relating to measures taken before and after an armed conflict. Therefore, it is

¹⁸ UNEP, *Protecting the Environment During Armed Conflict – An Inventory and Analysis of International Law* (2009), p. 53.

¹⁹ *Yearbook of the International Law Commission, 1996*, Volume II, Part Two, para. 148. and para. 165.

²⁰ *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory*, ICJ, Advisory Opinion, 2004, p. 178, para. 106.

²¹ *Fragmentation of international law: Difficulties arising from diversification and expansion of international law*. Report of the Study Group of the International Law Commission, A/CN.4/L.682.

²² *Supra*, p. 1.

obvious that applicable rules of the *lex specialis* (the law of armed conflict) co-exist with other rules of international law.

30. It seems as if no State or judicial body questions the parallel application of different branches of international law, such as human rights law, refugee law and environmental law. It also seems as if States and judicial bodies are uncertain as to the precise extension and balance of those areas of the law. At the same time, there is an expressed need to analyse and come to conclusions with respect to this problem. This is a new development in the application of international law, and States are faced with concrete problems of urgent needs. The case of the environmental effects of the war in the Democratic Republic of the Congo provides an important example of how internal wars force the population to flee and resettle – often in or near sensitive forest ecosystems. In such a situation, does the 1972 Convention for the Protection of the World Cultural and Natural Heritage continue to apply?

VI. Proposal

31. Beginning almost two decades ago, several legal and semi-legal bodies have addressed the issue of the protection of the environment in times of armed conflict. This is a clear indication both of the existence of a legal problem and the need to address the matter.

It is therefore proposed that the ILC examine the topic in its long-term programme of work. The aim should be to:

- Identify the extent of the legal problem
- Identify any new developments in case law or in customary law
- Clarify the applicability of and the relationship between International Humanitarian Law, International Criminal Law, International Environmental Law and Human Rights Law
- Further develop the findings of the ILC's work on the Effect of Armed Conflict on Treaties, particularly on matters concerning the continued application of treaties relating to the protection of the environment and human rights
- Clarify the relation between existing treaty law and new legal developments (including legal reasoning)
- Suggest what needs to be done to achieve a uniform and coherent system (so as to prevent the risk of fragmentation)
- Envisage the formulation of applicable rules and formulate principles of general international law of relevance for the topic

32. The topic would also fit well into the ambitions expressed by the Commission in 1997, namely that the Commission should not restrict itself to traditional topics, but should also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.²³

33. The final outcome could be either a Draft Framework Convention or a Statement of Principles and Rules on the Protection of the Environment in Times of Armed Conflict.

²³ *Yearbook of the International Law Commission, 1997*, vol. II (Part Two), para. 238; and *ibid.*, 1998, vol. II (Part Two), para. 553.

34. The time frame envisaged should be five years. The first three years should be devoted to indentifying existing rules and conflicts of rules. The fourth and fifth years should be devoted to operative conclusions and finalization of the outcome document in whatever form the ILC may deem most appropriate.

Appendix I

Examples of relevant treaties and non-treaty practise

1. The laws of warfare and international criminal law

- (g) *Treaties directly addressing the protection of the environment in relation to armed conflict*
- (i) Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) (1976)
 - (ii) Additional Protocol I to the 1949 Geneva Conventions (1977), especially Article 35(3) and Article 55(1)
 - (iii) Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW) (1980), and its Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons (1980)
 - (iv) The Rome Statute of the International Criminal Court (1998), especially Articles 6, 7 and 8
- (h) *International humanitarian law and disarmament treaties that indirectly protect the environment in relation to armed conflict*
- (i) Convention Respecting the Laws and Customs of War on Land (Hague Convention IV) (1907)
 - (ii) Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague Convention V) (1907)
 - (iii) Convention Concerning the Right and Duties of Neutral Powers in Naval War (Hague Convention XIII) (1907)
 - (iv) The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925)
 - (v) Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) (1949)
 - (vi) Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), and its Protocol I (1954) and Protocol II (1999)
 - (vii) Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (1963)
 - (viii) Treaty on the Non-Proliferation of Nuclear Weapons (1968)
 - (ix) Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC) (1972)
 - (x) Additional Protocol II to the 1949 Geneva Conventions (1977)

- (xi) Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC) (1993)
 - (xii) Comprehensive Nuclear Test Ban Treaty (1996)
 - (xiii) Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention) (1997)
 - (xiv) Convention on Cluster Munitions (2008)
 - (xv) Examples of special regimes:
 - (1) The Spitzbergen Treaty (1920)
 - (2) The Åland Treaty (1921)
 - (3) The Antarctic Treaty (1959)
 - (4) Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco) (1967)
 - (5) The South Pacific Nuclear Weapon Free Zone Treaty (Treaty of Rarotonga) (1985)
 - (6) The African Nuclear Weapons Free Zone Treaty (Treaty of Pelindaba) (1996)
 - (7) The Treaty of the Southeast Asia Nuclear Weapon Free Zone (Bangkok Treaty) (1995)
 - (8) *Central Asian Nuclear-Weapon-Free Zone* (Treaty of Semipalatinsk) (2006)
 - (i) *General principles and rules of international humanitarian law of relevance to the protection of the environment in relation to armed conflict*
 - (i) The principle of distinction
 - (ii) The rule of military necessity
 - (iii) The principle of proportionality
 - (iv) The principle of humanity
 - (j) *Other instruments related to the corpus of the law of warfare*
 - (i) The San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994)
 - (ii) The Customary Law Rules by the International Committee of the Red Cross (ICRC) (2005)
 - (iii) The Manual on International Law Applicable to Air and Missile Warfare by the Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR) (2009)
- Numerous resolutions from UNGA addressing the question of protection of the environment in relation to armed conflict. They are not cited here.
- (k) *Cases in courts and tribunals in which the issue of the protection of the environment in relation to armed conflict has been addressed*
 - (i) Case law of the International Court of Justice (ICJ)

- (1) Legality of the threat or use of nuclear weapons, Advisory opinion 8 July 1996
- (2) Legality of the use of force (*Serbia and Montenegro v. NATO*), Orders of 2 June 1999²⁴
- (3) Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005.

Decisions of international tribunals such as the decision of the International Criminal Court (ICC) on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir of 4 March 2009, the second Decision of the ICC on the Prosecution's Application for a Warrant of Arrest of 12 July 2010 and decisions by the United Nations Compensation Commission (UNCC).

2. International environmental law

(a) *Multilateral environmental agreements (MEAs)*

(i) MEAs that directly or indirectly provide for their application in relation to armed conflict:

(1) Universal conventions:

(a) International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL) (1954);

(b) Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention) (1971);

(c) Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) (1972);

(d) Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention) (1972);

(e) International Convention for the Prevention of Pollution from Ships (MARPOL) (1973), as amended by its Protocol I (1978);

(f) Convention on Long-Range Transboundary Air Pollution (LRTAP) (1979);

(g) United Nations Convention on the Law of the Sea (UNCLOS) (1982);

(h) United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (1997).

(2) Regional conventions include:

(a) Convention for the Protection of the Mediterranean Sea against Pollution (1976), amended and renamed Convention for the

²⁴ On 30 June 1999 the Court delivered its orders in the following eight cases between Serbia and Montenegro and members of NATO: *Serbia and Montenegro v. Belgium*, *Serbia and Montenegro v. Canada*, *Serbia and Montenegro v. France*, *Serbia and Montenegro v. Germany*, *Serbia and Montenegro v. Italy*, *Serbia and Montenegro v. Netherlands*, *Serbia and Montenegro v. Portugal* and *Serbia and Montenegro v. United Kingdom*.

Protection of Marine Environment and the Coastal Region of the Mediterranean (1995);

(b) Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena Convention) (1983);

(c) African Convention on the Conservation of Nature and Natural Resources (Revised) (2003);

(ii) Multilateral environmental agreements that specifically provide for suspension, derogation or termination in relation to armed conflict:

(1) Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (1993)

(2) Convention on Third Party Liability in the Field of Nuclear Energy (1960)

(3) Vienna Convention on Civil Liability for Nuclear Damage (1963)

(4) International Convention on Civil Liability for Oil Pollution Damage (1971)

(iii) Multilateral environmental agreements that may be of relevance for the protection of the environment in relation to armed conflict:

(1) Convention on Early Notification of a Nuclear Accident (1986)

(2) Convention on Biological Diversity (1992)

(3) Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) (1989)

(4) United Nations Convention to Combat Desertification (1994)

(b) *Customary international environmental law as reflected in:*

(i) The Trail Smelter Principle

(ii) Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) (1972)

(iii) World Charter for Nature, UNGA Resolution 37/7 (1982)

(iv) Declaration on Environment and Development (Rio Declaration) (1992)

(v) Programme of Action for Sustainable Development (Agenda 21) (1992)

(vi) UNGA Resolutions 47/37 Protection of the environment in times of armed conflict (1993) and 49/50 United Nations decade of international law (1995)

(vii) World Summit on Sustainable Development (2002)

(viii) UNEP Governing Council Decision 23/1/IV (2005)

3. Human rights law

(a) *Framework conventions*

(i) Universal Declaration of Human Rights (1948)

(ii) International Covenant on Civil and Political Rights (1966)

(iii) International Covenant on Economic, Social and Cultural Rights (1966)

- (iv) Other instruments of international human rights law:
 - (1) The Convention on the Elimination of Discrimination against Women (1979)
 - (2) The Convention on the Rights of the Child (1989)
 - (3) Indigenous and Tribal Peoples Convention (1989)
 - (4) Declaration on the right to development (1986)
 - (5) Declaration on the Rights of Indigenous Peoples (2007)
 - (6) UNGA Resolution XXIV 2542 Declaration on social progress and development (1969) (especially Articles 9 and 25)
 - (7) UNGA Resolution 55/2, The United Nations Millennium Declaration (2000)
- (v) Regional conventions:
 - (1) The European Convention on Human Rights (1950)
 - (2) The American Convention on Human Rights (1969)
 - (3) The African Charter on Human and Peoples' Rights (1981)

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