Armed Conflict and Protection of the Environment: Possible or Not?

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environmental PEACEBUILDING

Today, as we see on a constant basis the human suffering as a result of military action — for example, the dreadful toll in the civil war in Syria — it may be provocative to raise concerns about how the international community can protect the environment while parties to a conflict face off against each other with force of arms. Why care about the environment when people are being shot at, are starving, are fleeing for their lives or dying?

The answer is that there is a clear connection between a safe natural environment and living conditions for human beings and international peace and security. The rights of women are often particularly affected.

The negative impact on the environment during and after an armed conflict has been seen the world over. We see it repeatedly, as in Iraq last fall, when 19 oil wells were set ablaze following the launch of military operations to retake the city of Mosul from the Islamic State. According to the United Nations Environment Programme, fire set in stockpiles of sulphur dioxide at an industrial facility created a large toxic cloud and hampered the delivery of humanitarian assistance. It was also reported that a drinking water plant was attacked, leading to a chlorine gas leak. As UNEP summarized the situation, "Environmental pollution is adding complexity and danger to the humanitarian crisis." Also the UN Office for the Coordination of Humanitarian Affairs reported on the devastating effects.

Protecting the environment in times of armed conflict is not a new idea. Even in ancient times, rules existed to ensure that natural resources essential for people's survival, such as clean water, were protected. During the last century, technological developments in weaponry carried with them unprecedented threats to the environment. In addition to the risks presented by conventional means and methods of warfare, environmental damage in connection with the testing and use of nuclear weapons loomed.

From the Vietnam War in the 1960s and 1970s to the Iraq-Kuwait War in the early 1990s, awareness of the environmental risks from military action grew slowly but surely. Many of us remember shocking images of environmental destruction, such as the Agent Orange defoliation in Vietnam or the burning oil wells in Kuwait, where

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600 oil wells were set on fire by retreating Iraqi forces during the Iraq-Kuwait War. Similarly, more recent conflicts in former Yugoslavia, Kosovo, Iraq, Sierra Leone, Lebanon, and Liberia have all demonstrated the high environmental costs for wartorn societies.

Other aspects are less visible to the international community. It takes extra effort to ensure that the rights of indigenous peoples are respected and protected during conflict. The Mesopotamian Marshes, home to the Marsh Arabs, were profoundly destroyed by Saddam Hussein, and it took substantive engagement by the international community to stop the continued destruction of the area and to take remedial measures. The efforts of Mishkat Al-Moumin, Iraq's first minister of environment after the fall of Saddam, were critical in establishing governance structures for environmental protection in Iraq and restoration of the celebrated wetland.

In stride with the advances in military technology, the 1970s saw the birth of modern international environmental law. The 1972 Stockholm Declaration on the Protection of the Environment contains in Principle 26 an assertion that "man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction." However, it did not contain any explicit reference to the environmental consequences of conventional warfare. That took another 20 years.

Yet, the Stockholm Declaration had an impact. Subsequently, the environmental concerns raised inter alia by the Vietnam War were reflected in two important legal documents. These are the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques and the 1977 First Additional Protocol to the Geneva Conventions. Attempts to further codify and strengthen the protection of the environment during armed conflict were made in the aftermath of the Iraq-Kuwati War. The UN General Assembly discussed the matter, adopted resolutions, but in the end these attempts failed to arrive at any new legally binding protection measures.

However, there were three important and lasting developments that followed. The first was the outcome of the 1992 Earth Summit in Rio de Janeiro. Principle 24 clearly provides, "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."

The second was the International Committee of the Red Cross and Red Crescent's "Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict." Without formally approving these guidelines, in 1994 the UN General Assembly invited all States to "give due consideration to the possibility of incorporating them

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into their military manuals and other instructions addressed to their military personnel." The guidelines were recognition of the need for military forces to address the protection of the environment in operational terms.

The third was the 2009 study by UNEP, the ICRC, and the Environmental Law Institute of how several different areas of international law could protect the environment during armed conflict. This analysis examined not only international humanitarian law, but also environmental law, human rights law, and international criminal law. It presented 12 recommendations in the publication "Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law."

One of the recommendations was a call for the UN International Law Commission to "examine the existing international law for protecting the environment during armed conflict and recommend how it can be clarified, codified, and expanded." The ILC thereupon decided in 2013 to place the topic "Protection of the Environment in Relation to Armed Conflicts" on its current program of work, and I was honored to be appointed Special Rapporteur for the topic.

The ILC was set up in 1947 by the UN. It consists of 34 experts representing the principal legal systems of the world, and its task is to report to the General Assembly on topics where it identifies a need to codify or progressively develop international law. In our case, the first challenge was how to deal with such a complex topic. The ILC decided to separately look at legal rules applicable before, during, and after armed conflict. Reports on these three temporal phases have been considered by the ILC and as a result a set of 18 draft principles have been outlined. These principles gather existing obligations under international law, address gaps, and allow the ILC to provide a holistic set of draft principles to be considered by the General Assembly.

The principles do not aim to rewrite the present law of armed conflict but, rather, focus on preventive and post-conflict measures. The ILC has already provisionally adopted a first set of principles relating to the protection of the environment during armed conflict. They are a reflection of the present law of armed conflict. Despite this, there is some disagreement among members of the ILC and among States whether the draft principles are going beyond lex lata, or not.

Two matters stand out as controversial: the applicability of the principles in non-international armed conflict, and the explicit proclamation that "attacks against the natural environment by way of reprisals are prohibited." However, some believe the principles do not go far enough.

For me, as Special Rapporteur, it was important to ensure that environmental considerations are a natural part of strategic thinking and in planning tactical military operations. It is not necessary to conclude new humanitarian treaties or to revise old ones. What is important, however, is to show that modern environmental law and human rights law are part of — or could be part of — the law that is applicable during armed conflict.

It is my firm conviction that sustainable peace will never last if the environment is irreparably destroyed. Therefore it is particularly important to look at postconflict measures. The principles include the need for environmental assessments and remedial measures and the sharing of information, to name just a few. They address environmental impact of peace operations, as well as the need for peace processes to include restoration and protection of the environment damaged by conflict. Finally, they address the need to remove or render harmless toxic and hazardous remnants of war on land and in the sea.

The principles also encourage the establishment of protected zones of major environmental and cultural interest. As we know, these areas can have a critical importance, both for conserving fragile ecosystems, and for ensuring the rights of local communities and indigenous peoples. Indeed, the most controversial principle discussed in the ILC last year was on the protection of the environment of indigenous peoples. According to the draft principle, "States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit."

In addition, States "should undertake effective consultations and cooperation with the indigenous peoples after an armed conflict that has adversely affected the environment of the territories that indigenous peoples inhabit." The work in the ILC is on-going, and it is encouraging to note that our efforts come at a critical time, when concurrent efforts from other organizations are emerging. For instance, the ICRC guidelines are being revised to better reflect the developments since 1994 — such as addressing non-international armed conflicts. The 2011 ICRC "Report on Strengthening Legal Protection of Victims of Armed Conflicts" recognizes environmental protection as one of the four areas of international humanitarian law that needed to be reinforced. In addition, the resolution on the protection of the environment in areas affected by armed conflict agreed by consensus at the UN Environmental Assembly last year was a major signal of the commitment of UN member states to confront the issue.

Not only is this resolution a positive signal in itself, but it will also establish synergies for the future between the on-going work of UNEP and the ILC, as well as the important work undertaken by the ICRC on this topic. Also issues relating to toxic remnants of war on land and particularly at sea are discussed

in the UN, but need to be addressed in a more structured and concrete manner.

In addition, the engagement by civil society organizations develops these issues further. One example of such contributions comes from a partnership between UNEP, ELI, academia, and civil society to share best practices on environmental protection and peacebuilding.

In parallel, an important development for protection of the environment is happening in international criminal law. Last September, the Office of the Prosecutor of the International Criminal Court published a policy paper on case selection and prioritization that signals that environmental crimes are to be regarded as priority areas for the court in terms of determining the gravity of the crimes.

Let us recall that law is not created in a vacuum. New legal rules are built on old ones. Sometimes new rules replace old ones. But there is an inherent, rational, and explicable resistance among States to press the delete button and create a totally new legal structure. We have a solid international legal system that serves us well. In addition, at present there is reluctance among States to enter into new binding agreements in areas that are sensitive to their sovereignty and security.

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Instead, States commit themselves through non-binding policy measures. They often emphasise that they act as a result of a policy decision and not because of a legal conviction. Hence, they are trying to ensure that the element known as opinio juris, is missing and that their actions or positions are not seen as establishing customary international law while at the same time acknowledging the need to protect the environment in relation to armed conflict.

Last year was a milestone in our global efforts to protect the environment before, during, and after armed conflict. It is my hope that the momentum established by these concurrent tracks within the United Nations, the International Committee of the Red Cross, the International Criminal Court, and the International Law Commission might serve to provide integrated protection for current and future generations.

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