

PERAC:
*Half a century of
construction of a legal framework
No end in sight*

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- *Current conflicts, in particular the one in Ukraine, are accompanied by legal and political discourses which reflect, first of all,*
- *the shock provoked by the unspeakable human suffering, caused directly by the hostilities or occupation,*
- *indirectly by the destruction of critical infrastructure.*
- *Yet there also appears a deep sorrow for the fate of the environment and thus*
- *the impact of the conflicts on the living conditions of future generations.*

- *This is a great challenge for the law, both national and international, and thus for the legal profession.*

- *I try to show how relevant actors have tried to meet the challenge by developing*
- *applicable law. Much remains to be done in this respect.*

- **1. Early developments : Clash of cultures**

- Emergence of the debate : protection of the environment relating to armed conflict (PERAC)
- Historical beginning: 1970s
- Factors: awareness of 2 competing needs: environmental problems – restraints to military activities

- The result of this first encounter between warfare and the environment :
- provisions in two relevant treaties,
- Environment Modification Convention (ENMOD), 1976,
- and
- Articles 35 and 55 of Protocol I of 1977 additional to the Geneva Conventions (AP I)

- Both treaties define impermissible environmental harm
- by using three qualifications: damage must be
- “*widespread,*
- *longlasting/long-term*
- and/or
- *severe.*”

- The meaning of these expressions : different in the two cases.
- ENMOD: agreed interpretations formulated in the negotiation.
- AP I: higher threshold

- Significance: defeat for the cause of the environment

- **2. Advancement of the legal construction - 1990s:**
- **Enhanced concerns for the preservation of the environment**

- **Key players:**

- ICRC

- IUCN

- UNEP

- Some NGOs

- some active States

- **Factual developments:**

- 1. 1993- ICRC Guidelines
- 2. 1990s – Gulf Wars – SC – UNCC
- 3. 1991 – UNEP – reports on environmental consequences of conflicts
- 4. 1991 – expert group established by Prosecutor ICTY: env protect., threshold unmet, analysis of env damage through lens of proportionality
- 5. 1998 - only one treaty provision Rome Statute
- 6. 1992 – Soft law Rio declaration Pr 24 – silence on troika (1982 WCN)
- 7. decade - cases: troika never played decisive role in discussions

3. XXI century: Recent developments

Discussions on substantive law

- 1.1. Elements of the environment are civilian objects.
- 1.2. meaning: the principles of distinction, proportionality and precautions apply.
- 1.3. Elements of the environment may not be the target of attack unless they are, because of a specific military use or significance, military objectives.
- 1.4. Even if they are, the environmental damage may not be disproportionate in relation to the direct military advantage anticipated. (ICTY expert group)
- *Military balancing decisions: weight given to env considerations*

- 2. legal assessment also reflected in
- the new formula of “due regard” for the environment.
- San Remo Manual on Naval Warfare 1994:
- *“Methods and means of warfare should be employed with due regard for the natural environment (..).”*
- ICRC 2005 CIHL + 2020 Guidelines

- 3. These & other documents restate other norms
- concerning the *conduct of hostilities* implying elements of environmental protection:
- the prohibition of pillage,
- the protection of works and installations containing dangerous forces,
- the protection of objects necessary for the survival of the civilian population

- **5. Documents**
reflecting the current status of the law

- 1. The customary international humanitarian law study published by the ICRC in 2005.
- Important clarifications

- 1.1. Rule 43: the protection of the environment as civilian object
- 1.2. the ensuing application of the proportionality principle
- 1.3. as well as precautionary measures
- 1.4. They constitute customary law,
- 1.5. applicable in both international and non-international conflict.
- 1.6. A provision containing the troika follows afterwards = reduced to an acceptable limited scope. = They only apply if certain elements of the environment could otherwise be lawfully attacked as military objectives

- 1.2. Rule 43 One element is particularly interesting:
- The assessment of proportionality and the requirement of taking precautions implies a prognostication : uncertainty.
- Rule on how to deal with that uncertainty:
- *“Lack of scientific certainty as to the effect on the environment of certain military operations does not absolve a party to the conflict from taking such precautions.”*
- = application of the peacetime precautionary principle in relation to armed conflict.
- Not supported by quotes of practice, but rather by the general assumption that general rules of environmental law also apply in armed conflict

- 2. ICRC - 2010, initiative : a proposal of four subject areas
- Where international humanitarian law needed further development.
- One of these areas was the protection of the environment.
- The proposal included the establishment of environmentally valuable protected zones,
- not accepted for further consultations by the majority of States
- Our time is not a good time for the development of international law by treaty-making

- **3. International Law Commission (ILC), 2013-2022**
- Takes up the issue of
- *“Protection of the environment in relation to armed conflict,”*

- M. Jacobsson – M Lehto

- not proposed a draft treaty,
- but the formulation of “principles.”

- 27 Principles – 5 Parts

- Lukewarm reception by GA

- Innovations:
- 3 periods (Parts II, III, V)
- Occupation (Part IV)
- Subjects
- Conflicts of laws
- IAC-NIAC

- The International Law Commission confirms and strengthens the former developments

- the protection of the environment as part of the protection of the civilian population and of civilian objects
- (applicable in both international and non-international conflicts),
- the need to establish protected zones
- and
- environmental restoration as part of the
- ius post bellum

- environmental restoration as part of the
- *ius post bellum*.
- This is an important element of peacebuilding, with ensuing duties of
- exchange of information, assistance, and cooperation.

- The three terms of Articles 35(3) and 55 AP I are included,
- but the Commentary to the ILC Principles
- states that they do not exclude the application of other norms of international law,
- in particular international environmental law and human rights,
- whose relevance may lead to stricter protections.
- Furthermore, the interpretation of these terms may not be based on the knowledge of environmental hazards as it existed in the 1970s when AP I was negotiated, but on today's insights concerning environmental protection

- 4. The work of the ILC is supplemented and strengthened by
- **new 2020 “Guidelines” of the ICRC,**
- which constitute a thorough comprehensive and complete stocktaking of the norms protecting the environment in armed conflict

- **5. Assessment of the current status of the law
and
the way forward**

- **5.1. where do we stand**
- and
- **5.2. where can we go**
- concerning the legal protection of the environment
- in relation to armed conflict?

- **5.1. Where do we stand**

- The work of the ICRC and of the ILC have solidified the legal basis for that protection.
- But a number of problems remain.

- maintaining a healthy environment in a territory and also at sea requires State controls and orderly administrative management,
- in other words *environmental governance*.
- .
- To what extent is a State obliged to maintain a healthy environmental governance even in the war-related chaos?

- question has first to be answered by the **internal law of the State** in question:
- to what extent does the national law require that the “normal” rules on
- environmental governance apply in times of armed conflict, too?

- question : As to international law, the answer lies,
- **first**, in the rule that as a matter of principle, treaties protecting the environment are not suspended in the situation of armed conflict. They remain, in other words, applicable in armed conflict
- **second**: the relationship between a party to an armed conflict and neutral states is governed by the law applicable in times of peace. Thus, in relation to the neutral State a belligerent must respect the rules of environmental protection, how difficult that might ever be
- **third** : the law of belligerent occupation.
- It is the general duty of the Occupying Power to ensure peace, order, and good governance in an occupied territory,
- as a matter of principle by applying the pre-existing law of the State whose territory has fallen into the hands of the occupying power

- **Fourth:** the protection of the environment based on the rules protecting the civilian population requires, as already explained, difficult balancing decisions, both in respect of the definition of military objectives and in relation to the proportionality principle.
- The uncertainties this involves have been mentioned.
- While military commanders are normally trained and accustomed to balancing civilian losses and the military advantage to be gained from an attack, this is not so regarding environmental damage.

- Creating relevant knowledge is also possible by bringing together experts from both fields to analyze typical scenarios of environmental damage caused by armed conflicts
- in order to give some guidance for the balancing processes on the battlefield.

- establishment of zones protected against the effect of hostilities
- because of their environmental value, an idea which has been discussed since the early 1990s, and it is still very much alive. It is a valuable idea, but somewhat problematic to implement.
- A model could (and would) be Art. 60 of AP I on demilitarized zones.

- The problem: determination of concrete protected zones.
- The parties to a conflict can of course agree on such zones (ILC).
- IUCN : determination by the Security Council.
- Determination by the parties : preestablished protected status. World Heritage Convention.
- Kunming-Montreal Global Biodiversity Framework, adopted

- **5.2. Where could we go ?**
- **Perspectives of legal development**

- 1. Protection of the environment in relation to armed conflicts remains on the agenda of international politics. This is shown by accusations regarding violations allegedly committed during a conflict.
- **A lot of fact-finding** is taking place in that regard. Institutional deficit – institutional building – CPA – UNCC - Courts
- 2. Reconstruction after the war in Ukraine is being discussed with a view to creating a greener economy.
- **Environmental peacebuilding** as part of the **ius post bellum** seems to become a trend. restoration in the post-conflict phase
- **3. Conflict resources : mandates for peakeepers**
- Yet
- more needs to be done in terms of development and clarification of the law, be it through expert work or through additional law-making.
- Examples of relevant subjects are the establishment of protected areas, the concrete meaning of the proportionality principle in respect of environmental damage and the maintenance of necessary environmental governance during armed conflict and its.

- 4. A final and critical problem remains: **the disposition of relevant decision-makers to accept international law**, whose content has been described, as a yardstick for their decisions.
- International law restraining military operations and thus the freedom of States to act as it pleases them, is necessary for the sake of common good, but it is in crisis. The blatant disregard of international legal restraints which we witness in the current conflict in Ukraine is in this regard only the tip of the iceberg

- Protecting the environment against damages
- caused by armed conflict

- remains an uphill fight.