

International Law Commission and Protection of the Environment in Times of Armed Conflict: A Possibility for Adjudication?

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Abstract

Armed conflicts have often devastating effects on the environment. They affect the ecosystems directly (degradation of the natural environment, pollutions due to different military activities, illegal exploitation of natural resources...) or indirectly (deforestation, massive exodus of refugees...). The International Law Commission has recently decided to include into its long term program the topic "Protection of the Environment in relation to armed conflict". This is a welcome decision as the international legal regime in this field needs clarification and coherence. The rules which aim to protect the environment in times of armed conflict have often created problems of interpretation which the Commission could help to resolve. The work of the Commission could also be useful in order to ascertain the applicability of environmental treaties in times of armed conflict. At the same time the problem of responsibility of States and criminal responsibility of individuals for widespread and severe damages to the environment or plunder of natural resources in times of armed conflict is also an important question that needs to be addressed by the ILC.

I. Introduction

War has developed with the natural environment some close liaisons, dangerous liaisons for the environment: the environment is the theater of war; the war often exploits and abuses the environment to serve its own purposes; and the

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war is too often synonymous with the disregard of any environmental protection leading to almost certain ecological degradation.

Armed conflicts sometimes affect the environment indirectly. They can cause massive displacements of populations and refugees, which often have a serious impact on the environment of host countries or regions.

War also promotes environmentally destructive practices by the various belligerents, even by civilians themselves as, for example, the plunder and the illegal exploitation of natural resources, including protected species.

But war also affects the environment directly: degradation or destruction of fauna and flora, pollution of soil, water and air. And it is clear that the development during the last decades of new targets and new weapons has also created new threats.

Armed conflicts often reflect the importance of oil as a military objective: whether to deprive the enemy from its use (as for example in Lebanon in 2006) or in order to deprive the enemy of the income and financial resources resulting from its commercialization (like during the first and the second Gulf wars). Other facilities, just as important from a military point of view, may be even more dangerous for the environment when targeted. If an attack on a nuclear plant comes immediately to our mind, attacks against chemical plants and more generally against industrial sites could be disastrous. However, it is clear that these sites are in no way spared from conflicts as it was witnessed by Israel's attacks in Lebanon or by NATO bombing in Kosovo in 1999.

If the development of new weapons has created new threats (one thinks again to nuclear weapons), even conventional weapons can be extremely dangerous. This applies, for example, with "weapons of the poor": landmines which are scattered by millions across the world and constitute, in the words of former Secretary General Kofi Anann, "one of the most widespread, lethal and long lasting forms of pollution we have yet encountered".¹ Cluster munitions can also have a disastrous impact as it was revealed by the Post-Conflict report of the UNEP in Lebanon.

This list of examples, which is not exhaustive, confirms that armed conflicts exert enormous pressure on the environment and that the evolution of war, combined with the spectacular technological progress in the military field, are far from reducing the risk of destruction and environmental degradation.

The question today is not whether or not to protect the environment in times of armed conflict. Indeed, to quote Marie Jacobsson of the ILC:

“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”.²

Today, the real question is how to protect the environment in times of armed conflict and to assess the effectiveness and efficiency of positive law in this area.

From a strictly quantitative point of view, the legal corpus seems to be well developed. The law of war has adopted numerous rules in this field since the late 70's. But this body of rules remains largely unsatisfactory.

As it was said recently:

“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”.³

Not only the legal regime in this field is inaccurate and incomplete but it also lacks consistency. For the moment we are dealing with a fragmented set of rules, rather than a uniform and coherent system.

It is in this context that a few months ago, at its Sixty-third Session, the International Law Commission (ILC) confirming its ambition that it “ should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole”⁴ and that it should “venture into fields which the Commission had not sufficiently considered so far”, decided to endorse the recommendation of its Planning

Group to include into the Long-Term Program of work of the ILC the “(e) Protection of the Environment in relation to armed conflict”.⁵

The ILC, considered that “the topic [...] reflect(s) the needs of States in respect of the progressive development and codification of international law; (...)” and was “sufficiently advanced in stage in terms of State practice to permit progressive development and codification”.⁶ It asked Mrs. Jacobsson to conduct a study final outcome of which 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”.⁷

This is a welcome decision. The work of the Commission could indeed permit to acknowledge the importance of legal problems in this field, to search in a systematic way State practice and *opinio juris* in this field in order to identify the existence of customary rules, to advance a coherent interpretation of existing treaty provisions and to suggest progressive development of new rules in order to fill the existing gaps in the legal regime.

Indeed, the protection of the environment in armed conflicts should not be viewed in a too narrow perspective exclusively through the lens of the laws of warfare. It should go far beyond the strict limit of the laws of warfare and should provide an analysis and a clarification of the applicability of and the relationship between International Humanitarian Law, International Criminal Law, International Environmental Law, Human Rights Law and, of course Treaty Law.⁸

It is not a coincidence that, at the same session, the Commission adopted the entire set of draft articles on the *Effects of Armed Conflicts on Treaties* and in accordance with its Statute, the Commission decided to recommend to the General Assembly:

First: “(a) to take note of the draft articles on the effects of armed conflicts on treaties in a resolution, and to annex them to the resolution”;

Second: “(b) to consider, at a later stage, the elaboration of a convention on the basis of the draft articles”.⁹

It goes without saying that these draft articles could inevitably have repercussions on the future work of the Commission concerning the *Protection of the Environment in Relation to Armed Conflict*.

Many other studies previously undertaken by the ILC in various fields could also be relevant. In addition to its work on State Responsibility, which included, as one remembers, a project on the crimes of the State that contained a provision on serious environmental damage, the ILC has also worked extensively on the issue of environmental crimes and the prosecution of perpetrators under the *Code of Crimes against The Peace and Security of Mankind*.

This paper will proceed as follows. Section II focuses on the effectiveness of the primary rules protecting the environment in times of armed conflicts and the major problems concerning the interpretation and the implementation of these rules. It proposes also some suggestions about the paths that the ILC could exploit in order to enable greater effectiveness of these primary rules and to fill the gaps of the legal regime. Section III turns to secondary rules in order to address both the problems of State liability and of individual criminal responsibility for serious damages to the natural environment in time of armed conflict.

II. Effectiveness of primary rules protecting the environment in times of armed conflicts

Rules which directly or indirectly aim to protect the environment in times of armed conflict are often ambiguous and the ILC will, without any doubt, have an important task to accomplish in order to introduce clarity and coherence. We do not intend to present here all the primary rules relevant to the protection of the environment in times of armed conflict or to discuss the effectiveness (or lack of it) of each one of them.¹⁰ We will limit this presentation to three series of remarks concerning successively the three sets of rules which aim to preserve the environment in times of armed conflict. First we will focus on rules which intend to protect directly the environment in times of armed conflict (1); we will then discuss briefly some general principles of the law of armed conflicts which could be relevant in this field (2); we will end this presentation of primary rules with some thoughts concerning the applicability of environmental treaties in times of international or

internal strife (3).

1. The rules aimed directly at the protection of the environment in times of armed conflict

There are two main instruments in this field. First, the *Convention on the prohibition of military or any hostile use of environmental modification techniques*, known as the ENMOD Convention.¹¹

When adopted in December 1976, the Convention was a direct response to the attempt of manipulating the climate during the Vietnam War. But this Convention, once adopted, was the subject of several criticisms.

According to this Convention (Article 1):

“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”.

According to its article 2:

“the term “environmental modification techniques” refers to any technique for changing - through the deliberate manipulation of natural processes - the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space”.

So, what are the problems of interpretation of this text?

First, it is clear that the Convention prohibits only the use of the environment as a weapon. It does not regulate the effects of war on the environment.

Second, even in this narrow context, all uses of the environment as a weapon are not prohibited. The effects must be widespread, long-lasting or severe and, furthermore, several techniques seem to be excluded from the framework of the Convention.

For example, it seems clear that the use of advanced technologies to cause earthquakes or tsunamis, or to modify the climate of a region are prohibited by the

Convention, but it is unclear whether more modest techniques, such as destroying a dam, divert a river or “scorched earth” policy are prohibited. This is why critics have frequently denounced a futuristic text which is out of touch with reality.

Beyond these two main problems, it is clear that the Convention applies only to inter-States war. This means that the vast majority of armed conflict which is not international is excluded from the regulation.

And finally, only 76 States are Parties to this Convention.

The year following the conclusion of the ENMOD Convention, States adopted the *Protocol I Additional to the four Geneva Conventions*¹² which is today ratified by 172 States and which includes two articles specifically designed to protect the environment against the effects of war. These two articles, article 35§3 and article 55, present a different scope, the latter adopts an anthropocentric approach, protecting the environment only as something important for humans, while the former seems to authorize an interpretation of protection of the environment as such, for its intrinsic value. Whatever their interest, we will not discuss here these variations between the two articles. We will only quote article 35§3 according to which:

“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”.

This system is much more protective than the regime protecting civilian objects. Indeed, contrary to this regime the rule requiring the application to the environment is absolute, which means that it is not subject to considerations of military necessity. As the ICRC has emphasized, if widespread, long-term and severe damage is inflicted “it is not relevant to inquire into whether this behavior or result could be justified on the basis of military necessity or whether incidental damage was excessive”.¹³

But this instrument also has several limitations. Let’s highlight at least two of them.

First, the Protocol prohibits only the means of warfare that are intended or may be expected to cause widespread, long term and severe damage to the environment.

The three conditions are cumulative and seem to set a very high threshold, without anyone knowing exactly where, in fact, are its limits. As these criteria are not defined in the Protocol it is not surprising that the implementation of these criteria has been plagued by controversy.

For example, *The Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia* stated in its final report in 2000 that the threshold was so high as to make it difficult to find a violation. The report indicated that for this same reason even during the 1990 Gulf War there was disagreement as to whether the environmental damage crossed this threshold too.¹⁴ It then concluded that:

“It is the opinion of the committee, on the basis of information currently in its possession, that the environmental damage caused during the NATO bombing campaign does not reach the Additional Protocol I threshold”.¹⁵

The second limitation of Protocol I is that it applies only to international armed conflicts. This is a major problem as we all know that most of the conflicts today are not international but civil wars or internal separatist conflicts.

In addressing these weaknesses of both the ENMOD Convention and of Protocol I, what could the ILC do? We all know that the mission of the ILC is not only to clarify existing law but also to determine the existence of customary rules and propose new developments in international law.

As part of these missions, the Commission could propose a clarification of certain key terms and act in three distinct fields:

First, in relation with the ENMOD convention, the ILC could clarify the concept of “modification techniques” considering if this convention is applicable in both High-tech and Low-tech environmental modification techniques. In this respect the Commission could rely on the work of the ICRC on Customary International Humanitarian Law which has considered that in all circumstances and irrespectively of the high-tech or the low-tech character of environmental modification techniques:

“there is sufficiently widespread, representative and uniform practice to conclude that the destruction of the natural environment may not be used as a weapon.”¹⁶

Second, and in relation both to the ENMOD convention and to Protocol 1 to the Geneva Conventions, the ILC could clarify the concepts of Widespread Long-term and Severe damage to the environment. In this regard it should be noted that States party to the ENMOD have already clarified these three criteria by the adoption of an “understanding” which could be considered as a kind of agreement regarding the interpretation of the treaty. This agreement could be a useful tool for the ILC.

It is also interesting to recall in this respect that the ILC in its *Draft Code of crimes against the Peace and security of mankind* in 1996 linked the terms widespread, long-term and severe damage to the natural environment to an anthropocentric approach. According to this Code it is a war crime:

“using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs”.¹⁷

It goes without saying that the interpretation of these criteria should also take into account the development of the international law of the environment in general which, as we know, has evolved considerably since the late 1970s.

Thirdly and finally, the ILC could also address the problem of universality of these rules. It could then investigate to which extent these rules could be considered part of customary law applicable during international armed conflict as well as during non-international armed conflict. In this regard, it should be noted that the ICRC in its study on customary law found that the prohibition of:

“The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is a norm of customary international law applicable in international, and arguably also in non-international, armed conflicts”.¹⁸

This last aspect could be confirmed by the ILC on the basis of an examination of State practice and *opinio juris* in this field.

2. Rules which might be useful in protecting the environment in times of armed conflict

These primary rules are some general principles of the law of armed conflict, and more precisely the principles of military necessity and proportionality.

According to the principle of military necessity, any intentional damage which is not intended to provide a military advantage is prohibited. The ICJ in the *Nuclear Weapons Advisory Opinion*, in 1996, stated that:

“Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality”.¹⁹

Thus, any environmental damage that is not required by the purpose of the war can be considered as illegal. Furthermore, under the principle of proportionality, collateral damage to the environment can be sanctioned if it is disproportionate to the military advantage expected.

The concrete implementation of these principles, however, raises some difficulties. The principle of necessity is elastic enough to justify a wide range of measures disastrous for the environment as evidenced, for example, in the jurisprudence of the various military tribunals after World War II, which have almost always accepted the defense of military necessity to justify the “scorched earth” policy.²⁰

Similar remarks can be made in respect with the principle of proportionality: indeed, as underlined B. Carnahan, rarely in history an attack was canceled for fear that it could cause disproportionate harm and losses to the environment.²¹

The clarification of these principles is absolutely necessary today. The Commission could conduct a study on the concept of proportionality and collateral damage, taking also into consideration the broader framework of international environmental law.

This brings us to the third set of rules which might be relevant to the protection of the environment in times of armed conflict. If the first two sets of primary rules were *jus in bello* rules, let's now examine if environmental treaties are applicable in wartime.

3. The question of the application of environmental treaties in wartime

We know that we have today more and more international treaties concerning the protection of the environment. These treaties could be relevant in order to determine the lawfulness of means and methods of warfare by allowing judgments on the proportionality of an attack. The interpretation of some of these treaties could also be useful in order to assess if there is "long term or severe damage" to the environment.

These legal instruments may also play a role in the fight against the illegal exploitation of natural resources. If we take the example of the CITES²² which prohibits trade in wild flora and fauna threatened with extinction, we understand the importance of this instrument which could outlaw illegal trade of protected species by militias and armed groups during conflict or military occupation.

However, the vast majority of these treaties are silent concerning their applicability in times of armed conflict.

The ILC has already provided some answers to this problem in its draft articles on the effects of armed conflicts on treaties. In this draft the ILC takes as its starting point the presumption that "the existence of an armed conflict does not ipso facto terminate or suspend the operation of treaties".²³

In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension the Draft highlights two main criteria:

- 1. The nature of the treaty; and
- 2. The characteristics of the armed conflict.²⁴

Although the Commission did not find it practicable to suggest more specific

guidelines, it has suggested in an annex an indicative list of treaties which exhibit a high likelihood of continued applicability in whole or in part during armed conflict.

According to this list several categories of treaties relevant to the protection of the environment and to international watercourses may continue in whole or in part during periods of armed conflict.²⁵

This position of the ILC is an important step forward, but is not enough. Indeed, the conceptual work of the ILC in this field remains quite vague.

In its preliminary report on the Protection of the Environment in relation to armed conflicts Marie Jacobsson recognized the need to develop further this body of work. She aims, as a first step, to present a list of 19 Multilateral Environmental Agreements classified in three categories:

1. Those that directly or indirectly provide for their application in relation to armed conflict;
2. Those that specifically provide for suspension, derogation or termination in relation to armed conflict;
3. Those that may be of relevance for the protection of the environment in relation to armed conflict.²⁶

Beyond drawing up lists of Multilateral Environmental Agreements that provide or exclude their application in time of armed conflict, it seems that the Commission, as a second step, should provide a conceptual work that can guide any further analysis in this field. The Commission should, for example, work on the idea that there is today a presumption of application of Multilateral Environmental Agreements (MEAs) in times of armed conflict.

This presumption arises from the inability to “break” these multilateral agreements into a multitude of bilateral relations dominated by reciprocity. According to the traditional approach, treaties were suspended in times of war between belligerents while continuing to apply in the relations between belligerents and third States to the conflict. However, for most environmental treaties assuming such a

dual system is technically impossible because obligations contained in MEAs are indivisible. If we use as an example the military intervention against Libya in 2011, or against Serbia in 1999, it is hard to see how some environmental conventions such as CITES or the Montreal Protocol on the protection of the ozone layer can be inapplicable in the relations between belligerents (for ex. France and Libya or France and Serbia) while being at the same time applicable in all other type of relations between these States and third “neutral” States.²⁷

But let’s turn now to the secondary rules and more precisely international responsibility of States and criminal responsibility of individuals and the problem of possibility for adjudication.

III. Effectiveness of secondary rules

Before discussing the question of international responsibility of States for violation of the primary rules discussed (2), we would like to say some words about the individual criminal responsibility for environmental harm in times of armed conflict (1).

1. Serious Environmental damage as a war crime

This individual criminal responsibility for serious environmental damages is influenced by the primary rules already discussed but it also involves a separate legal body as it is expressed by the statute of the International Criminal Court.²⁸

According to article 8(2) b (iv) of this statute it is a war crime:

“intentionally launching an attack in the knowledge that such attack will cause (...) widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”.

This is the first international legal binding instrument into force that qualifies as a war crime widespread, long-term and severe damage to the natural environment.²⁹ While it may be too early to assess the usefulness and effectiveness of this provision, we can already note that the cumulative use of the three criteria, widespread, long-lasting and severe damage, seem to set the threshold very high. And if this was not enough, the introduction in this provision

of the principle of proportionality, as it is expressed by the terms “which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” makes it extremely difficult to prosecute an individual for this crime. Moreover, it is clear that this provision is limited to international armed conflicts.

It is well known that jurisdiction of the ICC is only complementary to that of national courts. Many domestic legal orders recognize today as war crime or crime against humanity, widespread, long-lasting and severe damage to the environment. But to our knowledge, no case of environmental crimes in time of armed conflict has so far been tried before a national court. Once of the only, but well known, exceptions being the case of “Agent Orange”.³⁰

In this context it is obvious that any attempt to achieve a coherent and effective system of prosecutions and sanctions of crimes against environment should face the question of clarification and interpretation of the different criteria set by article 8 of the ICC. And, beyond the need of clarification of the rules and their application to non-international armed conflicts, it might be interesting for the Commission to develop the issue of illegal exploitation and plundering of natural resources as a war crime to the extent that these phenomena constitute today a major challenge in several conflicts around the world.

This led us to some final remarks concerning the implementation of State responsibility.

2. State responsibility

First, it goes without saying that any difficulties in this area are largely dependent on the regime of primary rules that we have presented. Nonetheless we think that the existing body of rules seems to be developed enough to make it possible to hold State responsibility for internationally wrongful acts in relation with violation of these rules.

For example, in the *Case concerning armed activities of the territory of the Congo (Republic democratic of the Congo against Uganda 2005)* the ICJ held Uganda responsible for the looting, plundering and exploitation of natural resources in the territory of DRC as a violation of Hague regulations and the Fourth Geneva Convention.³¹

But the issue is not only legal it is also a political one. After the invasion of Kuwait by Iraq in 1990, it is clear that the political willingness existed. The compensations requested

from Iraq for the damage to the environment are without any similar precedent; however they are not based on the violation of *jus in bello* by Iraq.

Following this conflict, the Security Council of the United Nations established a Compensation Commission to rule on claims for damage occurred in relation with this conflict, including environmental damage.³² The assessment of the activity of this Commission is quite mixed.

It is undoubtedly positive that, for the first time, an international body has awarded compensation for significant environmental damage during wartime. It is also positive that this body has not hesitated to accept compensation for ecological damage. However, the Commission met difficulties in assessing prejudice when strictly environmental. The Compensation Commission declined to accept many claims for lack of sufficient evidence of environmental damage.³³ At the same time compensations accepted for environmental damage have been very limited in comparison with other fields with a rate of compensation of only 6 percent.

The case of the oil spill in Lebanon, occurred in 2006 by the Israeli's military intervention, is in this respect, very interesting too. In this case, the UN General Assembly adopted several resolutions stating the "responsibility to compensate" of Israel for the marine pollution.³⁴ But this "responsibility" seems to be far away from the legal regime of international responsibility that we know. Indeed, this "responsibility" is not based on recognition by the General Assembly of any specific violation of international law. It is rather based on the idea that States should refrain from causing serious environmental harm during armed conflict. Could there be, according to the UN General Assembly, a "responsibility to protect" the environment as a branch of the general concept of "responsibility to protect"?

While interesting and challenging, this idea and the choice of this terminology could also have some unwelcome effects. While it is understandable that the General Assembly did not wish to adopt a legal classification of the damage caused to the natural environment of Lebanon, its resolution should not send the message to States that they might be able to avoid their own legal responsibility and replace it by a more flexible kind of "soft responsibility" based on moral assessments. The International Law Commission should probably think twice

before engaging in such a slippery slope.

Last, but not least, the International Law Commission should address the pressing question of non-international armed conflicts and the problem of liability for damages to the environment by non-State-actors.

Notes

- 1 *Assistance in mine clearance*, Report of the Secretary-General, A/49/357/Add.1, 1994.
- 2 Report of the International Law Commission on the work of its sixty-third session (2011), *Official records of the General Assembly, Sixty-six Session* (Supplement No. 10), A/66/10, p. 355, para.18.
- 3 *Id.*, para. 19.
- 4 *Report of the International Law Commission on the work of its fiftieth session* (1998), Official Records of the General Assembly, Fifty-third session, (Supplement No.10), A/53/10, p. 110, para.553.
- 5 *Report of the Commission on the work of its sixty-second session* (2010), Official records of the General Assembly, Sixty-fifth Session (Supplement No. 10), A/65/10, Chapter III, paras. 26–28.
- 6 These two criteria were set out by the ILC in its Reports of its fiftieth session, *op.cit.*
- 7 *Report of the International Law Commission on the work of its sixty-third session...op. cit.*, p. 354, para. 33.
- 8 *Id.* p. 358, para. 31.
- 9 *Id.*, p. 182, para. 97.
- 10 For a complete and detailed analysis, see our book: K. Mollard-Bannelier *La protection de l'environnement en temps de conflit armé*, Paris, Pedone, 2001, 542 p.
- 11 *Convention on the prohibition of military or any hostile use of environmental modification techniques*, 10 December 1976, Entry into Force 05.10.1976.
- 12 *Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts* (Protocol I), Geneva, 8 June 1977, Entry into Force 07.12.1978.
- 13 See, ICRC, *Customary International Humanitarian Law*, Vol. 1, Rules, Chapter 14, Rule 45 and its commentary.
- 14 According to the Report : “The adjectives ‘widespread, long-term, and severe’ used in Additional Protocol I are joined by the word ‘and’, meaning that it is a triple, cumulative standard that needs to be fulfilled. Consequently, it would appear extremely difficult to develop a prima facie case upon the basis of these provisions, even assuming they were applicable. For instance, it is thought that the notion of ‘long-term’ damage in Additional Protocol I would need to be measured in years rather than months, and that as such, ordinary battlefield damage of the kind caused to France in World War I would not be covered. The great difficulty of assessing whether environmental damage exceeded the threshold of Additional Protocol I has also led to criticism by ecologists. This may partly explain the disagreement as to whether any of the damage caused by the oil spills and fires in the 1990/91 Gulf War technically crossed the threshold of Additional Protocol I”, in *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, June 200 para. 15.
- 15 *Id.* para. 17.
- 16 See, ICRC, *Customary International Humanitarian Law...*, *op.cit.*
- 17 Article 20 of the *Draft Code of crimes against the Peace and security of mankind* adopted by the International Law Commission at its forty-eighth session (1996). It should be noted that this anthropocentric

- approach was not obvious in the former version of this article. In the 1991 version, article 22 stated that it is war crime : “employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment”, *Report of the International Law Commission on the work of its forty-third session*, 29 April -19 July 1991, Official Records of the General Assembly, Forty-sixth session, (Supplement No. 10) A/46/10, pp. 105-107.
- 18 See, ICRC, *Customary International Humanitarian Law...*, *op.cit.*
- 19 ICJ, *Nuclear Weapons case*, Advisory opinion 8th July 1996, ICJ Report, 1996, para. 30.
- 20 For a more detailed analysis, see K. Mollard-Banelier, *La protection de l'environnement en temps de conflit armé...*, *op.cit.*, pp. 146-155.
- 21 B. Carnahan, “Protecting nuclear facilities from military attack: Prospects after the Gulf War”, *AJIL*, Vol. 86, 1992, p. 532.
- 22 *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973, Entry into Force, 1 July 1975.
- 23 Article 3 of the *Draft articles on the effects of armed conflicts on treaties*, *Report of the International Law Commission on the work of its sixty-third session...op. cit.*, p. 183.
- 24 *Id.*, Article 6, p. 187.
- 25 *Id.*, p. 198.
- 26 *Report of the International Law Commission on the work of its sixty-third session...op. cit.*, p. 361.
- 27 For a detailed analysis of this question see our developments in K. Mollard-Bannelier, *La protection de l'environnement en temps de conflit armé...op. cit.*, pp. 217-342 and also in K. Bannelier “Les effets des conflits armés sur les traités : Et si la Convention de Vienne et le droit de la responsabilité suffisaient ?”, in Angelet (N.), Corten (O.), David (E.), Klein (P.) dir., *Droit du Pouvoir – pouvoir du droit (en l'honneur du Professeur Jean Salmon)*, Bruxelles, Bruylant, 2007, pp. 125-159.
- 28 *Rome Statute of the International Criminal Court*, 17 July 1998, Entry into Force 01.07.2002.
- 29 It should however be recalled that prior to the ICC Statute, the International Law Commission in 1996 adopted the Draft Code of Crimes against the Peace and Security of Mankind which states in article 20(g) that it is war crime “In the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs” (*Report of the International Law Commission on the work of its forty-eighth session*, 6 May–26 July 1996, UN Doc. A/51/10, 1996). But this code, while adopted by the UN general Assembly, should not be considered as a legal binding instrument.
- 30 It should be recalled that in this case, the Court found that the use of Agent Orange and more generally the use of herbicide in Viet-Nam by the US between 1961 and 1975 did not violate, at the time, either customary or conventional international law. See, United State, Eastern States District Court, *Agent Orange case*, Judgment, 28 March 2005, p. 207.
- 31 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment 19.12.2005, ICJ Reports 2005, paras. 237 f.
- 32 *Status of Processing and Payment of Claims*, United Nations Compensation Commission, 27 décembre 2007, www.uncc.ch.
- 33 *Report and Recommendations made by the Panel of Commissioners concerning the Fifth Instalment of “F4” Claims*, S/AC.26/2005/10, 30 juin 2005, paras.44-72.
- 34 See A/Res/62/194, 6 february 2007 and A/Res/63/414, 19 december 2008.