

REVISITING THE LEGAL FRAMEWORK INDIRECTLY PROTECTING THE ENVIRONMENT IN SITUATIONS OF ARMED CONFLICTS

Theresa U. Akpoghome (Mrs), Ph.D* and T. C. Nwano**

Abstract

Environmental protection in times of armed conflict received the greatest attention in the 20th Century with the adoption of the two Additional Protocols to the Geneva Conventions of 1949. In the first Additional Protocol, only two articles – Articles 35 (3) and 55 addressed the issue of environmental protection directly. Unfortunately, these articles have not been effectively applied to any real war time environmental damage hence the need to examine other treaty provisions indirectly protecting the environment. The paper examines the protection of the environment as a civilian object. The effect the destruction of works and installations containing dangerous forces would have on the environment is considered. The paper also examines the role that cultural property plays in times of armed conflict. The paper discovers that most of the rules do not have penalty provisions and hence not enforceable against any State where breaches occur. The paper notes that these treaties can effectively protect the environment if States will honour their treaty obligations and if there are effective measures to monitor compliance. The paper concludes by noting that there is a need for the existing framework to be revised to bring the law in line with the present reality.

Key Words: Revisiting, Treaties, Indirectly, Cultural Property, Civilian Objects.

Introduction

This paper further examines International Humanitarian Law (IHL) treaty provisions indirectly protecting the environment in times of armed conflict. As we noted in the first part of the publication on the legal framework indirectly protecting the

* Reader, Department of Public Law, Faculty of Law, Benson Idahosa University, Benin City, Edo State. GSM No: 08065436545. E-Mail: teremajor@yahoo.com., takpoghome@biu.edu.ng

** LL.M, Lecturer, Faculty of Law, Benson Idahosa University, Benin City E-mail: glanson01@yahoo.com. GSM No: 08033372420.

environment in situations of armed conflicts,¹ international humanitarian law provisions protecting the environment in times of armed conflict have not been effective in this regard due to their imprecise nature and their high threshold for application. Due to the above reasons, they have not been applied to any real war time environmental destruction. It therefore becomes necessary to examine other provisions of IHL that seem to offer indirect protection to the environment to determine their strengths and existing gaps that need to be filled. The first part of this paper discussed some of the provisions. This concluding part will discuss the remaining provisions in order to make the work complete. Here, the paper begins by looking at the protection given to civilian objects and property which would include but not limited to protection of cultural objects and works and installations containing dangerous forces under some IHL treaties. It will further examine limitations based on targeted areas and these include territories under occupation, neutral territories and demilitarized zones.

Protection of Civilian Objects and Property

UNEP rightly argues that the various measures that relate to the protection of civilian object and civilian property “could provide more effective legal basis of protecting the environment during armed conflict than those protecting the environment *per se*.”² However, these provisions would only find application under existing IHL treaty law.³ They include: The Hague Regulations,

¹ The first part of this paper has been accepted for publication in the *University of Jos Law Journal*.

² Mrema, E. M., et al. *Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law* (Kenya: UNEF; 2009), p 16.

³ Such as The Hague Regulations attached to the fourth Hague Convention of 1907 which stipulates that it is forbidden “to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”. In addition, the enemy’s property could include protected areas and environmental resources which would, as such be, indirectly protected by The Hague Regulations. The fourth Geneva Convention which pertains to the treatment of civilian persons and property declares non-combatants “protected persons” whose life and livelihoods shall be kept safe during an armed conflict by any party to the conflict or in the event of an occupation, by the occupying power. Article 147 expressly includes the “extensive destruction and

Geneva Convention, Additional Protocols I and II, Protection of Cultural objects and Limitations based on targeted areas. These will be discussed.

A. The Hague Regulations (1907)

The Hague Regulations attached to the 1907 Hague Convention IV of the Laws and Customs of War on Land provides that it is forbidden “to destroy or seize the enemy’s property, unless such destruction or seizure is imperatively demanded by the necessities of war”. This “enemy property” could include protected areas, environmental goods and natural resources which could as such be indirectly protected by the Hague Regulations.

B. The Geneva Convention IV (1949)

Following the carnage of the Second World War, the International Community again returned to the negotiating table in search of new, and more responsive, normative structures for the conduct of armed conflict. The result came in the form of four Geneva Conventions, the fourth of which, the Convention Relative to Protection of Civilian Persons in the Time of War, relates to the issue at hand.⁴ Although some environmental protection will derive from sundry Geneva IV provisions such as that prohibiting pillage, it is Article 53 that has the greatest impact. It provides that:

Any destruction by the occupying power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.⁵

Like Hague IV’s Article 55, the Geneva IV provisions only apply in occupied territory. This limitation was viewed as

appropriation of property not justified by the military necessity and carried out wantonly and unlawfully” among the acts constituting grave breaches of the fourth Geneva Convention.

⁴ Geneva Convention Relative to the Protection of Civilian Person in the Time of War, August, 12 1949 (hereinafter GC IV).

⁵ Ibid, Article 53.

acceptable because Hague IV's Article 23(g) would act to limit damage in situation not amounting to occupation.⁶ Of course, occupied territory is particularly susceptible to environmental damage not necessitated by military operations. For example, many argue that the Iraqi action in destroying Kuwaiti oil wells and the intentional release of Kuwait oil into the Persian Gulf in 1991 constituted a violation of Article 53.⁷ More problematic is the "absolutely necessary" phrase. The danger is twofold. First, as noted by the author of the ICRC Commentary to the Convention, Jean Pictet:

It is to be feared that bad faith in the application of the reservation may render the proposed safeguards valueless; for unscrupulous recourse to the clause concerning military necessity would allow the occupying power to circumvent the prohibition set forth in the Convention.⁸

His proposed remedy is reasonably interpreting the standard so as to evidence a "Sense of proportion in comparing the military advantages to be gained with the damage done".⁹ The dilemma lies in the fact that those who are "unscrupulous" are least likely to engage in reasonable interpretation. By the same token, acknowledgment that harm can be justified by military necessity is positive in the sense that it makes Article 53 militarily acceptable;

⁶ International Committee of the Red Cross, IV Commentary: Geneva Convention Relative to the Protection of Civilian Persons by Jean Pictet ed. (1958) p. 301.

⁷Kutner, L. and Nanda, V. "Draft Indictment of Saddam Hussein" (1991) *Denver Journal of Int'l Law and Policy*, Vol. 20, P. 93. In Charge 1, Specification 10, the Iraqi's were charged with having "destroyed the real and personal property to protected persons and the state of Kuwait; this destruction was not absolutely necessary to military operations and occurred for the most part after military operations had ceased...."

⁸ International Committee of the Red Cross, IV Commentary: Geneva Convention Relative to the Protection of Civilian Persons by Jean Pictet ed. (1958) p. 302.

⁹Ibid, p. 302.

but for such a limitation, this provision of humanitarian law risks desuetude as an impractical aspirational norm.¹⁰

A final article of environmental import is Article 147. It extends ‘grave breach’ status to ‘extensive destruction’... of property, not justified by military necessity and carried out unlawfully and wantonly.¹¹ Thus, once the quantum of damage violating Article 53 reaches the extensive level, all Parties to Geneva IV must search out and try offenders or turn them over to another State for prosecution. They must also criminalize the offense through domestic legislation¹², an obligation the United States complied with in 1996.¹³ Again, it has been suggested that Iraqi Gulf War environmental destruction breached the Article 147

¹⁰ The relevance of military necessity was illustrated in the case of the German retreat from Norway. General Rendulic, who ordered a form of “scorched earth” operation as the Germans withdrew in the face of Russian advances, was acquitted on the basis of his (reasonably mistaken) belief that the actions were necessary to slow the Russian Pursuit. See *Hostage Case (US v List)* II TWC 759 (1950); see also *High Command Case (US v Von Leeb)* (1950) II TWC 426 (Involving destruction in the Soviet Union). The ICRC noted in its Commentary that: (a) word should be said here about operations in which military considerations require recourse to a “scorched earth” policy, i.e. the systematic destruction of whole areas by occupying forces withdrawing before the enemy. Various rulings of the courts after the Second World War held that such tactics were in practice admissible in certain cases, when carried out in exceptional circumstances purely for legitimate military reasons. On the other hand, the same rulings severely condemned recourse to measures of general devastation whenever they were wanton, excessive or not warranted by military operations. IV Commentary. *Supra* note 5, p. 302.

¹¹Article 147, GC. IV.

¹²Article 146, GC IV.

¹³ United States War Crimes Act of 1996, Pub. L. 104-192, 110 Stat. 2104, 18 USC 2401, 35 ILM 1539. This act grants the Federal Courts Jurisdiction over grave breaches of the 1949 Geneva Protocols. Until this time, the presumption was that grave breaches would be tried as violations of the Uniform Code Military Justice in Military Courts –Martial. Note that active and passive jurisdiction (US actor/victim) are the bases for jurisdiction, not universal (all states) jurisdiction. The following year (1991) the Act was expanded to cover various violations of 1907 Hague Regulations, Common Article 3 of the 1949 Conventions (dealing with non-international armed conflicts), and, when ratified, Protocol III (Mines) to the Conventional Weapons Convention as amended in 1996. Expanded War Crimes Act of 1997 (Section 583 of the Foreign Operations, Export Financing and Related Programmes Appropriation Act, 1998) Pub. L. 105-118.

threshold.¹⁴ A modicum of offshoot environmental protection is also afforded by Article 147's characterization of "wilful killing (and) wilfully causing great suffering or serious bodily injury to body or health" as a grave breach; again, the chemical weapons example is apropos.

Again, as natural resources are generally considered civilian property, which is held by private persons, their destruction could be considered to violate Articles 147 and 53 of Geneva Convention IV, if not justified by imperative military necessity.

C. Additional Protocol I to the 1949 Geneva Conventions (1977) and Relating to the Protection of Victims of International Armed Conflict.

As discussed earlier, Additional Protocol I is noteworthy for containing the key provisions of humanitarian law specifically addressing the environment. In addition to these are a number of additional articles which offer further, albeit non-specific, protection. Many restate principles expressed elsewhere in the law.¹⁵ Certain axial customary principles that enjoy environmental consequences have been codified in the Protocol. To a large extent, these reflect the principle of distinction which unifies a number of related but distinct sub-principles, and which exists as the principle of customary or conventional humanitarian law with greatest normative valence. The 'basic rule' for the protection of civilian objects against the effects of hostilities is enunciated under Article 48 of Additional Protocol I.

Article 52 further restates the prohibition against attacking civilian objects. Thus, to the extent the environment or a portion thereof, constitutes a civilian object, it may not be directly targeted and combatants must seek to differentiate between it and legitimate

¹⁴Dept of Defence, Final Report to Congress: Conduct of the Persian Gulf War 1992, p. 625 (hereinafter Final Report).

¹⁵ For instance, Article 35(1) mirrors the St. Petersburg Declaration and Hague IV in reiterating the Principle that "the right of the Parties to the conflict to choose methods and means of warfare is not unlimited. Similarly, Article 35(2) prohibits the causation of superfluous injury or unnecessary suffering, and as noted, the Martens Clause is found in Article 1 of Additional Protocol 1.

targets.¹⁶ As noted in the context of the ICC statute, it is not entirely clear whether all aspects of the environment are fairly characterized as civilian, let alone as “objects”.¹⁷ The principle of distinction also includes the sub principle of proportionality. In the context of civilian objects, Articles 57(2)(a)(iii) provides that:

(Those who plan or decide upon an attack shall) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.¹⁸

The Protocol went further to provide that:

An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.¹⁹

A similar prohibition is contained in Article 57 (5)(b) vis-à-vis injury or death to civilians and it reads:

An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.²⁰

¹⁶ Article 52(1)(2) and (3) Additional Protocol I.

¹⁷ Article 8(2)(b)(IV) ICC Statute.

¹⁸ Article 57(2)(a)(III) Additional Protocol I.

¹⁹ Article 57(2)(b) Additional Protocol I.

²⁰ Article 51(5)(b) Additional Protocol I.

Assuming that the environmental damage unintentionally but knowingly (foreseeable collateral damage) caused comprises damage to a civilian object, it will be balanced against the military advantage resulting from the operation. Before any balancing occurs, however, the military advantage sought must reach the 'concrete and direct threshold'. The ICRC Commentary to Additional Protocol I indicates that the "expression...was intended to show that the advantages which are hardly perceptible and those which would only appear in the long term should be avoided".²¹ Beyond codifying broad pre-existing norms of customary international law, Additional Protocol I includes various articles of narrower scope which also safeguard components of the environment. Article 54 which guarantees "protection of objects indispensable to the survival of the civilian population" provides that:

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food stuff, agricultural areas for protection of food stuff, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or any other motive.²²

Obviously, much of the environment (farmlands, water supplies, etc.) would fall within the ambit of potentially protected objects. Since these items cited in the article text are merely illustrative of those which may qualify, so too would certain others.²³ This article would also prohibit the use of the environment as a weapon in various circumstances.²⁴

²¹ Commentary to the Additional Protocol, p. 684.

²² Article 54(2) Additional Protocol I.

²³ For instance, fuel oil, electricity, and lines of communication could be essential to providing the civilian population sustenance and might be targeted as to deny such population. While none of these target sets are themselves

It is important to note that the protection only operates upon the existence of a particular *mens rea* – the desire to deny sustenance. There are two exceptions. Even though the requisite state of mind may be missing, if the result of an attack is to cause starvation among civilian population or cause it to move, Article 54 prohibits the operation.²⁵ Again, if the sustenance derived is used solely for opponents' armed forces, then the object that provides it is exempted from the prohibition.²⁶ Lastly, the article's restrictions are inapplicable when the destruction is conducted by a party to the conflict on its own territory and is motivated by "imperative military necessity".²⁷

From a humanitarian point of view, the weakness in this article lies in its intent element. Unless he harbours the desire to deny sustenance, the prescriptive norm does not apply, absent a resultant effect so severe as to occasion starvation or forced movement. Of course, the prohibition on targeting civilian objects moderates this structure, for the only intent necessary to violate it is that the civilian object be directly struck. Effectively, then, the sole permissible attack on objects contributing to other than solely military sustenance occurs when the military advantage that accrues outweighs the impact on the civilian population and the underlying goal of the operation is unrelated to sustenance. Attacks resulting in civilian starvation would never meet the threshold, except, possibly, when conducted on one's own territory.

D. Protection of Works and Installations Containing Dangerous Forces: Article 56 Additional Protocol I

Article 56 of Additional Protocol I protects works and installations containing dangerous forces, but a critical review of this provision shows that some key points need to be mentioned. First, a similar provision exists in Additional Protocol II²⁸.

components of the environment, attacks thereon might well risk environmental harm.

²⁴ This would amount to situations like altering weather or climate cloud which could surely affect food production.

²⁵ Article 54(3)(b) Additional Protocol I.

²⁶ Article 54(3)(a) Additional Protocol I.

²⁷ Article 54(5) Additional Protocol I.

²⁸ Article 15, Additional Protocol II.

Therefore, the derivative environmental protection of these restrictions would apply in both international and non-international armed conflict. Second, although the article is titled ‘works and installations containing dangerous forces’, the ICRC Commentary makes clear that protected objects include only those detailed in paragraph 1²⁹. Thus, even though strikes against targets such as oil storage facilities, wells, or tankers would as amply demonstrated during the Gulf War, also release dangerous forces, they would not violate Article 56.³⁰ Third, despite utilization of the term ‘severe’ again, the threshold for prohibited damage is actually lower than might appear at first blush. The ICRC Commentary describes ‘sever losses’ as “important” or “heavy”. Anticipating criticism regarding the subjectivity of such non-quantifiable and difficult to predict standards, the Commentary cautions that “this concept is a matter of common sense and it must be applied in good faith on the basis of objective elements such as proximity of inhabited areas, the density of population, the location of the land etc.”³¹

Fourth, and most importantly, the article admits of a number of exceptions. Before dams and dykes may be struck, they must meet each of three criteria: (a) use for other than their intended purpose; (b) regular, significant and direct support of the enemy war effort³²; and (c) attack must be the only option

²⁹ This issue has caused confusion. For instance Green Peace has asserted in the context of Iraqi actions during Gulf War that ‘it is unclear whether oil wells constitute installations containing dangerous forces’. The examples given in Protocol 1...are not meant to be exhaustive, and a liberal construction could say that the release of the force of the oil fires and spills is covered. However, the ICRC Commentary demonstrates that this contention is incorrect; “According to some amendments, the list which is given should have been merely illustrative. However, as the Rapporteur indicated it was only after it was decided to limit the special protection granted by the articles to dams, dykes and nuclear electrical generating stations and other military objectives located at or in the vicinity of these works or installations that it was possible to draw up a text which was generally acceptable.

³⁰ The ICRC Commentary cites the example of attack on a factory manufacturing toxic products that, if released as a gas, could endanger entire regions, p. 668.

³¹ The ICRC Commentary, pp. 669-70.

³² The ICRC Commentary attempts to objectify some of the subjectivity inherent in the terms, albeit from a military officers’ point of view without much success. It begins by noting that the terms merely express common sense, i.e. their

available for denying the enemy that support. Instances might include a dyke forming a part of a system of fortification or a road across a dam that is integral to the enemy's logistics systems.³³ Military objectives in the vicinity of dams, dykes and nuclear electrical generating stations, given the critical role electrical generation plays in a war effort, need not meet the first of these criteria. Defensive emplacements at these locations employing only armaments capable of defensive purposes are not subject to attack. If used offensively, or capable of offensive use, they still benefit from the greater than normal protection extended to military objectives near protected works and installations. Finally, reprisal attacks against the enumerated objects are proscribed.

As should be apparent, the protection afforded these three types of facilities is substantial. Moreover, even if the criteria for exceptions are met, other humanitarian norms, particularly the proportionality principle, could act to immunize the targets. The United States objects to Article 56 because "it creates a standard that differs from the customary definition of a military objective as an object that makes 'an effective contribution to military action'³⁴. Specifically, concern exists that attacks would be forbidden against highly valuable targets even if the resulting military advantage outweighed the severe losses. In addition, the difficulty of determining the end use of electricity produced in an integrated power grid triggers US anxiety about the provision³⁵. Despite

meaning is fairly clear to everyone. Ibid at 671. It goes on to explain that 'regular' implies a time standard and is not 'accidental or sporadic'. "Significant" is more than 'negligible' or 'merely an incidental coincidence'. 'Direct' is explained as 'not in intermediate or round about way'.

³³Ibid, p. 671.

³⁴ International & Operational Law Department, Operational Law Handbook (1998) Pp. 7-10.

³⁵ Abraham D. Sofaer, Legal Adviser at the Department of State expressed the position of the US thus: Protection can only end if a protected work or installation is used in regular, significant and direct support of military operations. "In the case of a nuclear power plant, this support must be in the form of electric power". The negotiating history refers to electric power for production of arms, ammunition, and military equipment as removing a power plants protection, but not 'production of civilian goods which may also be used by the armed forces'. The Diplomatic Conference thus neglected the nature of modern integrated power grids, where it is impossible to say that electricity from

objections, works and installations covered by Article 56 were not struck during Operations Desert Storm, Desert Fox or Allied Force³⁶. Given the nature of combined operations³⁷, in which the US forces operate with coalition allies that are parties to Additional Protocol I, this should not come as a surprise. Indeed, guidance issued by the US Army to its legal advisers states that while Article 56 is not 'US Law', it "should be considered because of the pervasive international acceptance of Additional Protocol I"³⁸.

a particular plant goes to a particular customer. It is also unreasonable for Article 56 to terminate the protection of nuclear power plants only on the basis of the use of their electric power. Under this provision, a nuclear power plant that is being used to produce plutonium for nuclear weapons purposes would not use its protection. Abraham, D.S. "The Position of the United States on Current Law of War Agreements," (1987) *American Journal of International Law (AJIL)*, Vol. 2, Pp. 460, 470-71. Arguably, he went too far. By its own terms, the article only prohibits attacks on nuclear electrical generating facilities. Facilities that use electricity generated to directly produce other products such as plutonium, would appear to fall outside its scope altogether; even if they did not, the targets could be struck based upon the regular, significant and direct exception. Moreover, the use of electricity produced is not as the electricity used in regular, significant and direct support of military operations, regardless of how else it might be used (assuming proportionality requirements are met). The term "only" is more logically interpreted to bear on the "regular, significant and direct" criteria, rather than "electric power". The reference to electric power would seem to make clear that the facility can be struck even if it is engaged in its intended purpose, the production of electricity, because dams and dykes used for their intended purpose are immune. For a detailed and excellent discussion of attacks on electrical grids, see Crawford, J.W. "The Law of Non Combatant Immunity and the Targeting of National Electrical Power Systems". (1997) *Fletcher Forum of World Affairs*, Summer/Fall (1997) P. 101.

³⁶ The Gulf War Offensive Operations by Coalition Forces, the 1998 attacks on Iraqi in response to Iraqi interference with the UN Weapons Inspection Programme, and the NATO air campaign against Yugoslavia, respectively. Note that US aircraft have attacked Iraqi facilities, but not nuclear electrical generating stations. See Goldblat, J. "Legal Protection of the Environment Against the Effects of Military Activities" (1991) *Bull. Peace Proposals*, Vol. 22, P. 399.

³⁷ "Joint" Operations include forces of more than one service. "Combined" Operations include forces of more than one state.

³⁸ Operational Hand Book, *Supra* note 137, Pp 7-10. The issue of targeting nuclear facilities was raised at the 1990 Review Conference for the Nuclear Non-Proliferation Treaty. The Hungarian and Dutch delegates, with support from several other delegations suggested an international agreement to address the topic. The US delegation did not respond to the proposal. See Fischer, D and

Like Geneva Convention IV, Additional Protocol I provides for a grave breach regime. While violation of neither of the two environment specific articles constitutes a grave breach in and of itself, making the civilian population the object of attack, launching an indiscriminate attack against civilians or civilian objects and striking works or installations containing dangerous forces can all amount to one if the acts are wilful and death or serious bodily injury results.³⁹

E. Additional Protocol II to the 1949 Geneva Conventions (1977).

Additional Protocol II specifically addresses issues of environmental protection during non-international armed conflicts (NAIC). This Protocol is significantly less substantive than Additional Protocol I, not least because it does not contain the basic rule that strongly articulates the principle of distinction enunciated in Article 48 of Additional Protocol I. The provisions that indirectly address environmental protection are Article 14 on civilian objects, Article 15 on installations containing dangerous forces and Article 16 on cultural objects and places of worship.

F. Protection of Cultural Objects

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention on Cultural Property) of 1954⁴⁰ and its Protocols seek to accord enhanced protection to civilian objects during armed conflict. Article 1 (a) defines cultural property as:

Movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other

Muller, H “The Fourth Review of the Non-Proliferation Treaty” (1991) Stockholm Int’l Peace Res. Inst. Year Book, Pp. 555, 566.

³⁹ Article 85(3)(a)(b)(c) Additional Protocol I.

⁴⁰ Adopted in the Hague, Netherlands, on 14th May 1954 and entered into force on 7 August, 1956.

objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of property defined above⁴¹.

Cultural property would also include “buildings whose main and effective purpose is to preserve or exhibit⁴² movable cultural property such as museums, large libraries and depositories of archives, including refuges intended to shelter, in the event of armed conflict, the movable cultural property. Centres “containing a large amount of cultural property” would also be included under this definition.⁴³

In essence, the Hague Convention on Cultural Property provides for the protection⁴⁴, safeguard⁴⁵ and respect⁴⁶ for cultural property. To achieve these objectives, there are several provisions relating to the grant of special protection for the purpose of sheltering movable property⁴⁷, immunity of cultural property under special circumstances⁴⁸, transport⁴⁹ and the creation and use of a distinctive emblem.⁵⁰

The Convention expressly applies to international armed conflicts and to cases of occupation of territories⁵¹, and Article 28 allows States Parties to “prosecute and impose penal or disciplinary sanctions on “persons who commit or order” breaches of its provisions. The provision relating to liability only concerns individual responsibility; there is no liability regime for violations perpetrated by States Parties. And since the Convention does not apply to non-international armed conflicts, the liability regime

⁴¹ Ibid, Article 1(a).

⁴² Article 1(b) of the Hague Convention on Cultural Property.

⁴³ Article 1(c) of the Hague Convention on Cultural Property.

⁴⁴ Article 2 of the Hague Convention on Cultural Property.

⁴⁵ Article 3 of the Hague Convention on Cultural Property.

⁴⁶ Article 4 of the Hague Convention on Cultural Property.

⁴⁷ Article 8 of the Hague Convention on Cultural Property.

⁴⁸ Article 9 of the Hague Convention on Cultural Property.

⁴⁹ Article 12, 13 and 14 of the Hague Convention on Cultural Property.

⁵⁰ Article 16 and 17 of the Hague Convention on Cultural Property.

⁵¹ Article 18 of the Hague Convention on Cultural Property.

consequently only relates to violations of its provisions committed by individuals during an international armed conflict.⁵²

The Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (the Regulations) provide that the Protective Powers established under Article 21 of the Convention, should investigate violations⁵³. It further burdens the Commissioner General with this responsibility.⁵⁴ And yet there is no regime of sanctions for violations; the Regulations only create powers of investigation into any violations. The first Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict (the First Hague Protocol) of 1954, which only applies to international armed conflict⁵⁵, prohibits the export and sale of cultural property from an occupied territory.⁵⁶ Yet, unlike The Hague Convention on Cultural Property, the First Hague Protocol fails to provide for any liability in case of a breach of its provisions.

To remedy this deficiency of both The Hague Convention on Cultural Property and the First Hague Protocol in the former Yugoslavia, the Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict (the Second Hague Protocol) was adopted in 1999.⁵⁷ Not surprisingly, the Second Hague Protocol seeks to widen the scope of protection accorded to cultural property. To this end, Articles 3 and 22 of the Second Hague Protocol extend the protection of cultural property to non-international armed conflicts.⁵⁸

⁵² Article 16 Additional Protocol II guarantees this protection in the event of non-international armed conflicts. See Henckaerts, J.M. "New Rules for the Protection of Cultural Property in Armed Conflicts" (1999) *International Review of the Red Cross*, Vol. 81, No. 835, p. 593.

⁵³ Article 5 of the Regulation for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Regulation).

⁵⁴ Article 6 of the Regulations.

⁵⁵ Adopted in the Hague, Netherlands, on 14 May, 1954.

⁵⁶ Part I of the First Hague Protocol of 1954.

⁵⁷ In The Hague, Netherlands on 26 March 1999.

⁵⁸ See, Chapter 5, "The Protection of Cultural Property in Armed Conflict not of an International Character" of The Second Hague Protocol of 1999.

Chapter 4 of the Second Hague introduces a liability regime which covers individual criminal responsibility⁵⁹ and both of which adopts the principle of universality and provides for the extradition of offenders⁶⁰. Articles 15(1) and 21 expressly include offences such as attacks on protected cultural property and the misuse of cultural property, and thus remedy the First Hague Protocol by creating both an offence and express liability for the illicit export, removal and transfer from an occupied territory of cultural property⁶¹. Of particular significance is Article 15(2) which provides for the sanction of domestic criminalization and

⁵⁹ Article 15(2) of the Second Hague Protocol reads: “Each party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall, comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act”.

⁶⁰ Article 17(1) of the Second Hague Protocol stipulates: 1. The Party in whose territory the alleged offender of an offence set forth in Article 15 sub paragraph 1(a) to (c) is found to be present shall, if it does not extradite that person, submit without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law”.

⁶¹ Article 15(1) of the Second Hague Protocol provides: 1. Any person commits an offence within the meaning of this Protocol, if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts: (a) making cultural property under enhanced protection the object of attack, (b) using cultural property under enhanced protection or its immediate surroundings in support of a military action; (c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol; (d) making cultural property protected under the Convention and this Protocol the object of attack; (e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention. This provision is of particular relevance to the current 176 natural sites on the United Nations Education, Scientific and Cultural Organization (UNESCO) World Heritage List (especially the 15 Categorized as “in danger”) and to the sites that will be registered under UNESCO 2002 Convention for the safeguarding of Intangible Cultural Heritage, provided that they fall within the definition of cultural property under Article 1 of the Hague Convention. See Techera, E.J. “Protection of Cultural Heritage in Times of Armed Conflict: The Int’l Legal Framework Revised”. (2007) *Macquire University Centre for Environmental Law, MQJICEL*, Vol. 4 Pp. 1-24.

extends responsibility against persons other than those who directly committed the proscribed act or acts. The Second Hague Protocol also allows for state responsibility and repatriation under Article 38, *albeit* that no sanctions for a violation of state responsibility are provided. There is also no mechanism provided for the enforcement of state responsibility.

On the whole, the Second Hague Protocol thus provides a somewhat improved regime of protection compared to that which preceded it. Not only does the Second Hague Protocol clarify the particular measures of precaution to be implemented, but it also articulates more clearly the types of conduct that would lead to criminal sanctions and insists that States Parties exercise jurisdiction over such violations⁶². In addition, the Second Hague Protocol extends the Hague Convention on Cultural Property's protection to non-international armed conflict⁶³. It furthermore introduces innovative concepts that could serve to significantly enhance the protection of all natural resources in wartime, to the degree that these could be conceptualized as cultural property in terms of Article 1 of the Hague Convention on Cultural Property⁶⁴.

The protection of cultural property is reinforced by provisions contained in the two 1977 Additional Protocols, namely Articles 38, 53 and 85 of Additional Protocol I and Article 16 of Additional Protocol II already discussed. Though they do not mention environment *per se*, these provisions could be useful in providing legal protection for the natural environment during armed conflict.

Limitations Based on Targeted Areas

⁶² Mrema, E.M et al. *Supra* note 1, p. 18.

⁶³ Article 22(1) of the Second Hague Protocol of 1999 which contains an express reference to non-international armed conflicts and reads: "This Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the parties".

⁶⁴ Mrema, E.M et al. *Supra* note 1, p. 18. See Malviya, R.A "Laws of Armed Conflict and Environmental Protection: An Analysis of Their Inter-Relationship" (2001) *ISIL Yearbook of International Humanitarian and Refugee Law*, Vol. 5, <http://www.worldlii.org/int/journals/ISILY/BIHRL/2001/5.htm>. Accessed 3rd October, 2015.

The limitations based on targeted areas can be subdivided into three categories: (a) territories under occupation; (b) neutral territories; (c) demilitarized zones.

The Hague Regulations were the first to articulate the rules applicable to occupied territories. To this end, Article 55 of the Fourth Hague Convention spells out the rules of *ususfructus* for the occupying power. Article 55 expressly provides that the Occupying Power must exercise its right of use over the occupied property in such a manner that it does not cause damage or destruction to it. An exception is, however, made in the case of military necessity. Furthermore, Article 53 of the fourth Geneva Convention lists as expressly prohibited “any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons” in occupied territories “except where such destruction is rendered absolutely necessary by military operations.”⁶⁵

Even though the rules applicable to neutral territories emanate from Customary IHL, these rules too were largely codified in the Hague Conventions.⁶⁶ The Idea of neutral territories is based on essentially two requirements, namely the ‘duty of abstention and impartiality’ and secondly, that the ‘relations between belligerents and neutrals are to be governed by the ‘law applicable in times of peace’.⁶⁷ Areas that are formally proposed

⁶⁵ According to UNEP, the special status of occupied territories and the accompanying legal regime “may offer some guiding principles for dealing with similar situations in the context of non-international armed conflict”. The damage caused to the natural environment and valuable resources is often directly due to the fact that such activities “finance” armed forces and their weaponry. Recent research shows that the last twenty years, at least eighteen civil wars have been fuelled by natural resources such as diamonds, timber, minerals and cocoa which have been exploited by armed groups in Liberia, Angola, and the Democratic Republic of Congo. See Mrema et al. *Supra* note 1, p. 19.

⁶⁶The Hague Convention V and the Hague Convention XIII of 1907. UNEP is rightly of the opinion that the “more recent treaties have not added to this codification, other than a few details”. Mrema et al *Supra* note 14, p. 19.

⁶⁷ With respect to the environment, this customary law principle is articulated in Article 11(5) (“General Principles of Intl Law”) of the ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, where it is stipulated that “obligations relating to the protection of the environment towards States not Party to an armed conflict (e.g.

by any party to the conflict as “demilitarized” zones can be established by way of a written agreement between the parties “in the regions where fighting is taking place”.⁶⁸ The express object of such “demilitarized” zones is “to shelter from the effects of war” persons who do not (or who no longer) take active part in the hostilities. Any violation of the written agreement will constitute a grave breach of IHL. Areas like Antarctica and outer space are also specifically protected by way of treaties from the impact of armed conflict.⁶⁹

It thus follows that one option to enhance the protection of particularly valuable protected areas or dangerous environmental hotspots would be to formally classify them as “demilitarized zones”. To this end, the International Union for the Conservation of Nature (IUCN) has strongly advocated for the adoption of a Draft Convention on the Prohibition of Hostile Military Activities in Protected Areas⁷⁰ which was developed following the 1990-91 Gulf War, in response to intensifying concerns about environmental and ecosystem damages during armed conflict. The Draft Convention would require the UN Security Council to designate protected areas that would be marked “non targets” or demilitarized areas during conflicts, while the listing process would set up the criteria to demarcate an “international protected area”. To date, however, the Draft Convention has not been supported by the United Nations Security Council, nor has it

neighboring States) and in relation to areas beyond the limits of national jurisdiction (e.g. High Seas) are not affected by the existence of the armed conflict to the extent that they are not inconsistent with the applicable law of armed conflict. See Gasser, H.P. “Guidelines For Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict” (1996) *International Review of the Red Cross*, Vol. 78, No. 311, pp. 230-237.

⁶⁸Article 15 of the Fourth Geneva Convention and Article 60 of Additional Protocol I.

⁶⁹ See the Antarctica Treaty of 1959 and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies of 1987.

⁷⁰ Draft Convention on the Prohibition of Hostile Military Activities in Protected Areas, International Council of Environmental Law. IUCN, 1995.

received the international diplomatic support needed for its adoption⁷¹.

Conclusion

The paper examined the protection of civilian objects and property and clearly shows that in times of armed conflicts, these properties and objects are not to be destroyed or seized except where military expediency demands it. This is an unfortunate situation because an otherwise protected object suddenly becomes a military objective which can be destroyed or captured on the excuse of military necessity especially where the object is used for dual purpose in line with the provision of Article 52 (2) of Additional Protocol I. This is trite because the only objective of war is to defeat the enemy and not to direct attacks on civilians and civilian objects. They should never become military objects or objectives and should in no circumstance be targeted. The provision of Article 52 (2) of Additional Protocol I also requires that the military advantage must be weighed against civilian casualty and where the casualty will outweigh the military advantage sought, the attack should be called off. This is to ensure the continued existence of civilians during belligerency. Water, food, agricultural lands which are survival objects should not be targeted. In all, the law by protecting civilian objects indirectly protects the environment because most of these objects are environmentally based. Works and installations containing dangerous forces are not to be attacked because such an attack would lead to the death of civilians. It also sad to note that this protection can be denied if the test or criteria set out above is met irrespective of the fact that it would result to civilian casualties.

⁷¹ Draft Convention on the Prohibition of Hostile Military Activities in Protected Areas, International Council of Environmental Law, IUCN, 1995. The lack of necessary international diplomatic support for the Draft Convention may be attributed to opposition by some prominent states that in particular resist the approach of absolute protection, as they insist on their right to self defence in every circumstances, including against enemies that would disregard the “demilitarized” status of the protected areas and would make a military use of these zones. See Article 56 (7) of API which also advises visually making industrial hotspots as non-target zones.

Cultural property belonging to a people is not to be damaged in times of armed conflict. The gap which existed in this law was its non-application in times of non-international armed conflict. But one is relieved to discover that this anomaly has been corrected in the 1999 amendment. This is good because most of the major conflicts around the world today are internal and those who fight must respect the law of war. If all parties to the conflict respect the law of war by conducting hostilities in line with the rules and customs of warfare, the problem of indiscriminate destruction of property and life will be curtailed. One beautiful discovery in this paper is the fact that the principles of universal jurisdiction applies when the provisions of the law is breached. The States are encouraged to look for, fish out and try any person who has committed a grave breach of the Conventions as the issues discussed are categorised as grave breaches of the Geneva Conventions. The above obligations are categorised as jurisdictional and procedural grave breaches. Finally, it can be safely concluded that the treaties discussed if religiously followed and applied provides indirect protection to the environment in times of war. The paper therefore calls on the United Nations Security Council to support the Draft Convention by the International Union for the Conservation of Nature specifically designed for prohibition of attacks on protected areas in order to give it the international recognition it requires to make it effective for implementation as there is an urgent need to protect humanity by protecting the environment.