Protection of the environment in and after armed conflict: overview and trends[1]

When we speak about toxic remnants of war, by definition the situation after an armed conflict is at issue. But in this regard, a stock taking of the legal situation cannot be undertaken without analysing environmental protection during armed conflict. To do this, a look back into history, recalling some fundamental issues, is necessary.

The essentials of the modern law of armed conflict derive from concepts developed in the age of enlightenment: the concept that war is limited to a confrontation between the military organisations of sovereigns, which logically leads to the principle of distinction between civilian and combatants. The ultimate source of the concept is the rule of reason: unnecessary violence is unreasonable and therefore a sin against human nature. Later, Henry Dunant, after witnessing the sufferings of the battle of Solferino, adds compassion as source of inspiration for the law of armed conflict. Compassion is also a part of human nature.

What triggered the development of environmental law, both national and international since the end of the sixtieth, is the awareness of the finite character of the resources of the Earth. This leads to restraints, namely restraint on the use of natural resources in order to ensure the living conditions of present and future generations. This, too, amounts to respecting a rule of reason, moderation for the sake of human survival.

Thus, reasonable moderation is a common basis of both international humanitarian law and environmental law. In addition, the two areas have in common that they have from time to time been pushed forward by disasters: international humanitarian law for instance by two World Wars and the Spanish Civil War, environmental law by various incidents of heavy

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poisoning of air, water and soil as well as from major oil spills, and both by the use of herbicides during the Vietnam War.

But in both areas of the law, the interest in reasonable moderation, restraining the causation of damage, is challenged by countervailing interests which militate against this moderation. This has to as certain extent overshadowed the relationship between them.

In the case of international humanitarian law, the countervailing interests are perceived security interests, often styled military "necessity". This countervailing interest is reflected in the definition of so-called military objectives, which may be attacked because this yields a military advantage, or in the definition of permissible incidental civilian damage caused by attacks against military objectives through the proportionality principle. Such damage is permissible where the military advantage is high enough to outweigh civilian interests.

In the case of environmental law, these countervailing considerations are alleged economic interest which would make environmental protection allegedly unaffordable. This fact accounts for many a controversy in national and international environmental law. Recent examples of this are the U.S. rejection of the Kyoto Protocol and the current difficulties in extending it.

This tension between moderation and countervailing interests has overshadowed the first encounter between international humanitarian law and environmental law which happened during the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law which took place in Geneva 1974-77. The fundamental issue was this: once it was proposed that environmental concerns, then a recent newcomer in the international legal order, should also restrain military activities, of course the countervailing interest of military necessity was put forward to stop this move.

This encounter resulted in a first victory of military interest. The conference came up with an unusable protective provision for the environment. Damage to the environment is prohibited when it reaches a certain threshold: it must long-term, widespread and severe. These generic terms are of course open to interpretation, and the first attempt to establish an interpretation is the negotiating history. Establishing a negotiating history is a power play. While the Conference of the Committee on Disarmament (CCD), which roughly at the same time

negotiated the Convention on the prohibition of environmental modification techniques (by the way a more or less useless treaty), defined "long-term" in the order of months, the CDDH negotiators defined the very same expression in terms of decades. While the CCD Convention uses the three terms in the alternative ("or"), the CDDH requires a cumulative application of the three adjectives ("and"). By thus putting the threshold of unlawful damage at a high level which practically cannot be reached, the provision is deprived of a useful protective content. This was exactly the goal of the military negotiators.

A second victory of the military interest: the treatment of environmental protection during wartime in the GA. Attempts were made indeed to put the issue on the GA agenda in 1992. But the GA did not accept it as an item of its own. It included or rather buried it in the "Decade of International Law" and finally recommended in 1994 a flawed text addressing it for consideration in drafting military manuals, really a third class burial.

The environmentalists have fought back. Indeed, during the decades of the 80ies and 90ies, there was a tremendous development of international environmental law and of the awareness of environmental concerns. The Rio Declaration 1992 recognized that military interests must not set aside environmental concerns. In 1990, UNEP started to systematically assess the environmental damage caused by armed conflict. Environmental rehabilitation-became a regular part of post conflict peace building. It is in this context that toxic remnants of war become an issue.

Although in these activities, UNEP did not raise the legal issue of permissible or unlawful environmental damage, that development was accompanied by a renewed emphasis on legal issues. A consideration which had already been put forward during the Geneva negotiations became more prominent: Setting aside the flawed specific provisions of AP I, it was once more realized that environmental protection could be well promoted by applying the general rules on the protection of civilian objects to elements of the environment. This approach led to a development which is clearly reflected in the Customary Law Study published by the ICRC in 2005. By applying the general rules on the protection of the civilian population, this approach extends the rules on environmental protection to NIAC. It means that environmental values have to be placed on the side of civilian values in the so-called proportionality equation. An attack is unlawful if the damage to civilians and civilian objects, including elements of the environment, is excessive in relation to military advantage anticipated. As a

consequence, the duty to take precautionary measures in order to avoid disproportionate civilian damage must take into account the need to preserve the environment. This is the origin and rationale of the so-called due regard principle which was first formulated in the San Remo Manual of 1994 and then included in stronger terms in the ICRC study: Methods and means of warfare must be employed with due regard for the protection and preservation of the natural environment.

This trend has been buttressed by two further discourses: the continued application of environmental treaties during armed conflict and the concept of the protection of the environment as content of a human right. This presentation, however, will concentrate on the due regard principle.

The “due regard” approach was a major step to ensure the continuous relevance of environmental law in armed conflict.

But what does it mean? There are two major problems involved: Due regard and proportionality mean a balancing process. Subjective elements are by necessity parts of it. In internal law, where the proportionality principle also has many applications, it is the courts which finally clarify what is proportional and what not, or whether and to what extent decision-makers have certain margin of appreciation or even discretion in this balancing of interests and values. How can it be achieved that this balancing process gives enough weight to environmental concerns during armed conflict? In other words: the balancing process needs guidance.

There are a number of considerations which have inspired this search for guidance. One proposition has been that the yardstick of the balancing is the responsible or reasonable military commander. But this makes the environment so to say a military question, which it is not, at least not only. The ICRC Customary Law Study takes this into account when it tries an approach which is rather based on the idea of a unity of value conceptions in the international order. Values should not be interpreted differently in the different legal regimes which taken together nowadays constitute the fragmented international legal order. On this basis, the study holds that in the application of the due regard principle, a fundamental principle of environmental law, namely the precautionary principle, must be applied. This principle has found different definitions in national and international law. The essential point is that

uncertainty about future environmental damage must not lead to a disregard of environmental concerns. A sufficient risk of environmental damage is enough to trigger measures to exclude or reduce that risk, even if that damage cannot be forecast with certainty. Therefore, the precautionary principle is the major legal tool to preserve the interest of future generations.

It is significant that the authors of the Study do not quote specific State practice for their thesis that this interpretation of due regard is customary law. Their essential point is that international humanitarian law cannot disregard this development of international environmental law. The concern for future generations pervades the entire international legal order and is therefore relevant for IHL, too. The decisive argument is the unity of values in the international order.

Whatever the position on uncertainty, the due regard principle means an application of the proportionality principle which does not simply take into account damage in the vicinity of a military objective. Due regard is regard for indirect, longer term damage. This is the essential point where we ask for rules regarding toxic remnants of war: Any attack on objects will produce some kind of residue or fallout. More often than not, theses residues will be harmful for the environment. This circumstance has to be part of the so-called proportionality equation on the side of the collateral damage.

The development of this legal reasoning is one thing, its clarification for the purpose of practical application is another. Can and must the law be developed in an explicit manner? I mentioned earlier that attempts to do so have failed. A general look at the development of international humanitarian law during the last decades may shed some light on this question. The traumatic experiences of the Second World War and other disasters like the Spanish Civil War led to the great new codification of the four Geneva Conventions of 1949. It was incomplete, however, as the rules on the conduct of hostilities were left out. A first attempt to remedy this omission, the Delhi Rules proposed by the ICRC in 1956, failed. But only 20 years after the adoption of the Conventions, a process of development by treaty law was launched which lead to the negotiations of the Geneva conference 1974-77 and the adoption in 1977 of the two additional Protocols. Since then, treaty development concentrated on an issue which had been left out by the Protocols, namely the prohibition of specific weapons: UN Weapons Convention with additional Protocols starting 1980, land mines, cluster ammunitions. But general questions of the law of armed conflict also continued to arise and

required a development or at least clarification of the law. There has been a great resistance against achieving this through treaty making, and a solution was sought outside treaty making processes through non-State institutions and semi-official expert groups: the San Remo Manual on Naval Warfare, already mentioned, the more recent Manual on Air and Missile Warfare, elaborated by a group of experts convened by the Harvard Program on Civil Rights, the ICRC Customary Law Study and the ICRC "Interpretive Guidance" on direct participation in hostilities. The controversy surrounding the latter document shows the limitations inherent in this approach.

But at least the ICRC has not given up its efforts to see international humanitarian law updated in the light of the development in modern armed conflict. It has studied the question and singled out four areas where, in the opinion of the ICRC, the law needs some development: means to ensure the implementation of and respect for international humanitarian law, the treatment of detainees, internally displaced persons and the protection of the environment. It is remarkable that some old suggestions developed by the international environmental community have reappeared in the new ICRC suggestions last year.

A little more than half a year ago, the ICRC started consultations with States on these questions. In these consultations, States considered that the first two questions (implementation and detainees) deserved priority over the others. Once more, the reluctance of States to address the protection of the environment in armed conflict appears. No surprise for an observer of the development since the 1970ies! Thus, the environment was not discussed during the International Red Cross/Red Crescent Conference convened in Geneva last November.

Unfortunately, the question of the environmental consequences of war also seems to be neglected at the Rio + 20 Conference. The issue was put forward by NGOs in the preparation of the conference, but it is not mentioned in the final declaration adopted by the Conference. There is a great emphasis on sustainable development, eradication of poverty and green economy. Environmental consequences of military activities are not addressed.It is at least encouraging the Parliamentary Assembly of the Council of Europe last year adopted a resolution on "Armed conflicts and the environment" which, inter alia, demands the ratification of the Convention on cluster munitions, which also pose a problem of toxic

remnants. There are elements of the environmental community which will continue to push the issue. IUCN will continue to deal with the question.

A final point of law and policy has to be highlighted: recovery measures after an armed conflict are of course crucial. The "responsibility to protect", often called an "emerging" legal concept, comprises as a third pillar the "responsibility to rebuild". The latter includes measures of environmental rehabilitation. Furthermore, if the causation of damage was unlawful, rehabilitation measures are part of the compensation due under the rules of State responsibility. Finally, it has to be asked whether the regular practice of UNEP to assess environmental damage caused by armed conflicts and to grant assistance for environmental rehabilitation has developed, or is at least developing, into a legal principle. All this forms part of a new field of international law relating to armed conflicts, namely the so-called *ius post bellum.*

The final question to be asked is: what could and should be done? Concerning the subject of this conference, two questions must be addressed:

- Environmental rehabilitation as an important part of post conflict peace building should be formally recognized as part of the *ius post bellum*. This could indeed be the basis for a treaty on toxic remnants of war.
- The due regard principle should be clarified. An express recognition in a treaty provision would be helpful, and the formulations of the ICRC study would be a good basis for a formulation. But a balancing process will always have to address specific situations. It cannot and should not be predetermined by treaty in every detail. Such an attempt could only lead to the loss of necessary flexibility and could prevent the application of the principle to new and unforeseen scenarios. A new expert group could perhaps be used to clarify some scenarios.

The need to preserve the interest of future generations against all human activities putting them into jeopardy cannot spare military activities. Progress has been made in the recognition of this postulate. But much remains to be done. This is a challenge to our international environmental legal community, to which this conference, I trust, will make a major contribution.