

# Toxic Remnants of War and the Prohibition to Cause Excessive Collateral Damage to the Environment

Dr. Robert Heinsch, LL.M. (London)  
Assistant Professor of Public International Law



Universiteit Leiden  
The Netherlands

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## Outline

- I. Introduction
- II. Treaty Law
- III. Customary Law
- IV. Prohibition of Wanton Destruction
- V. Prohibition of Excessive Collateral Damage
- VI. Conclusion

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## I. Introduction

- **Toxic remnants of war, and especially the use of depleted uranium (DU)**
  - Are not explicitly prohibited by international humanitarian law
- **There is no**
  - International treaty like Protocol V to the CCW concerning the 2003 “Explosive Remnants of War”
- **But**
  - There might be general IHL rules and/or principles under treaty & customary international law which prohibit/regulate the use

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## II. Treaty Law

- **Article 35 (3) AP I**
  - “[i]t 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.”

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## II. Treaty Law

### - Article 55 (1) AP I

- “[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.”

## II. Treaty Law

### - ICRC commentary:

- “[t]he concept of the natural environment should be understood in the widest sense to cover the biological environment in which a population is living. It does not consist merely of the objects indispensable to survival (...) but also includes forests and other vegetation (...), as well as fauna, flora and other biological or climatic elements”.

### III. Customary International Law

- **Concerning the Prohibition of**
  - wanton destruction of and excessive collateral damage to the environment
- **Not unlikely**
  - that from the principle of necessity and its sub-principles of discrimination and proportionality **two new CL** rules have emerged

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### III. Customary International Law

- **ICJ:**
  - “States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.
  - 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.”

*ICJ, Legality of the Threat or Use of Nuclear Weapons*

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### III. Customary International Law

#### - Not unlikely, that

- In view of the frequent references to the principles of necessity and proportionality in the context of environmental protection during armed conflict, both principles have found new manifestations on the form of two new rules of CIL:

- Prohibition to cause wanton destruction or wilful damage to the environment not justified by military necessity
- Prohibition to cause excessive collateral damage to the environment
- (cf. also E. Koppe, *The Use of Depleted Uranium and the Direct Protection of the Environment under Ius in Bello*, in A. McDonald et al., Asser 2008)

### III. Customary International Law

#### - Prohibition to cause wanton destruction of the environment

- Reflection of the principle of necessity :

- Cf. prohibition “to destroy and seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war” (Article 23 (g) 1907 Hague Regulations)

### III. Customary International Law

- **Prohibition to cause excessive collateral damage to the environment**
  - Reflection of the principle of proportionality:
    - Prohibition to launch “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” (Article 51(5)(b) AP I)

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### IV. Prohibition of wanton destruction to the environment

- GA Res. 47/37 (25/11/1992)
  - “destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law”
- **Confirmed**
  - by members of the ILC and the ICJ (1996 Nuclear Advisory Opinion)
- **Confirmed**
  - by US Commanders handbook on the law of Naval Operations, British Military Manual (air warfare), San Remo Manual (naval warfare, ICRC guidelines, ICRC Model Manual
- **Further evidence**
  - Art. 2 (4) Incendiary Weapons Protocol, ILC discussion with regard to Draft Code of Crimes against Peace and security of mankind.

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## V. Prohibition of excessive collateral damage to the environment

### - Evidence for Customary Law Character

#### - Article 8 (2)(b)(iv) ICC Statute

- “Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or 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;”

→ reflection of customary law “within the established framework of international law” (no reservations from State parties)

#### - Further indications of State practice:

- US Commanders Handbook (naval warfare), 1994 San Remo Manual, 1993 ICRC guidelines for military manuals, 1999 ICRC Model Manual

## V. Prohibition of excessive collateral damage to the environment

### - Evidence for Customary Law Character

#### - ICTY Committee:

- “[e]ven when targeting admittedly legitimate military objectives, there is a need to avoid excessive long-term damage to the economic infrastructure and natural environment with a consequential adverse effect on the civilian population.”
- Indeed, military objectives should not be targeted if the attack is likely to cause collateral environmental damage which would be excessive in relation to the direct military advantage which the attack is expected to produce”.

## V. Prohibition of excessive collateral damage to the environment

### - Public Statements with regard to rules:

- Within the Sixth Committee of the GA in 1991 & 1992
- Before the ICJ (Nuclear Weapons Adv. Op.)
  - Canada and Iran explicitly recognised the existence of a customary prohibition to cause unnecessary damage to the environment
  - Uruguay, United Arab Emirates and Brazil in general referred to customary law that protects the environment
  - Egypt, India, Ireland, Marshall Islands, Nauru, New Zealand, Solomon Island, the USA, and Iran referred to the principle of necessity and proportionality

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## V. Prohibition of excessive collateral damage to the environment

### - ICRC Customary Law Study (Rule 43):

- “The general principles on the conduct of hostilities apply to the natural environment:
  - A. No part of the natural environment may be attacked, unless it is a military objective.
  - B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.
  - C. Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.”
- “Destruction of the natural environment may not be used as a weapon”

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## VI. Conclusion

### - **Article 35 (3) and article 55 AP I**

- Set a very high threshold
- Often difficult to prove that TRWs actually surpass this threshold
- E.g. ICTY committee did not raise charges because of the use of depleted uranium

- *cf. also E. Koppe, The Use of Depleted Uranium and the Direct Protection of the Environment under Ius in Bello, in A. McDonald et al., Asser 2008*

## VI. Conclusion

### - **Probably better chances**

- to go via the customary prohibition to cause wanton destruction or excessive collateral damage to the environment.

### - **Main Problem**

- Interpretation of the principle of proportionality
- Balancing between “damage to the environment being excessive” to the “direct military advantage anticipated”

## VI. Conclusion

### - **Several States**

- have stated that the expression “military advantage” refers to the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack.

### - **The relevant provision in the ICC Statute**

- refers to the civilian injuries, loss of life or damage being excessive “in relation to the concrete and direct *overall* military advantage anticipated” (emphasis added).

### - **Reflection of customary international law?**

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## VI. Conclusion

### - **According to the Commentary on the Additional Protocols,**

- the expression “concrete and direct” military advantage was used in order to indicate that the advantage must be “substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded”

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## VI. Conclusion

### ICTY Committee

- **49. The questions which remain unresolved once one decides to apply the principle of proportionality include the following:**
  - a) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants and or the damage to civilian objects?
  - b) What do you include or exclude in totaling your sums?
  - c) What is the standard of measurement in time or space? and
  - d) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?

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## VI. Conclusion

### ICTY Committee

"50. The answers to these questions are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision maker.

It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants.

Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases.

It is suggested that the determination of relative values must be that of the "reasonable military commander". Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to noncombatants or the damage to civilian objects was clearly disproportionate to the military advantage gained."

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## VI. Conclusion

### - In the end

- [t]here is not question that the principle of proportionality ... is among the most difficult of law of armed conflict norms to apply. (Mike Schmitt)

## VI. Conclusion

### - This is also shown by the fact that, e.g.

- studies of the WHO, UNEP and the IAEA indicate that the use of DU in some cases does not lead to either wanton destruction of the environment or to excessive collateral damages of the environment (*cf. E. Koppe, ibid.*)

### - In this regard

- There is still a long way to go to efficiently regulate TRWs by IHL

- Thank you for your attention!

[r.w.heinsch@law.leidenuniv.nl](mailto:r.w.heinsch@law.leidenuniv.nl)

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