



Workshop Report

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Exploring a legal framework for Toxic Remnants of War

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THE PROBLEM

With the emergence of International Humanitarian Law (IHL), the protection of civilians during war or armed conflict has improved substantially. However, towards the end of the 20th Century, it became apparent that the environment is inadequately safeguarded. The deployment of Agent Orange in Vietnam and the burning oil fields in Iraq are only two examples of the tremendous burden that has been borne by the environment during armed conflict. This led to the appearance of this topic in the discussion forums of the international community. UN organisations (such as the Environment Programme - UNEP), NGOs and the ICRC engaged with the topic but consensus on comprehensive rules that ensure the protection of the environment during armed conflict could not be reached.

Nevertheless, there is a growing awareness that certain military materials and practices have the potential for significant environmental harm, which may also affect the health of the civilian population. Explosive Remnants of War (ERW) have been dealt with to some extent (see treaties on landmines and cluster munitions), yet the diverse range of toxic remnants of war remain largely ignored.

The Toxic Remnants of War (TRW) Project was launched to counteract this. On the 22nd June 2012, the legal aspects of this approach were the focus of a workshop at the Free University of Berlin, Germany. A wide range of humanitarian and environmental lawyers, as well as military and political representatives attended, with the aim of discussing the concept's potential, to evaluate the extent to which TRW have already been taken into account by existing rules and what their regulation might look like. The participation of experts from a variety of backgrounds reflected the need for a truly

interdisciplinary approach to TRW in order to address this topic appropriately; with cooperation amongst lawyers and scientists from different fields.

THE POLITICAL AND LEGAL FRAMEWORK

The problem of TRW and more generally of the protection of the environment during armed conflict can be examined through multiple areas of law. The main focus lies in IHL, Environmental Law and Human Rights Law (e.g. Art. 12 of the International Covenant on Economic, Social and Cultural Rights with the right to a healthy environment). In order to not lose sight of the problem, it was considered that a humanitarian-centred approach that links the environmental damage to the situation of the people and the effects on their livelihoods (environment as a "living thing") would be needed.

Considerable importance is attached to customary law. In this respect, it was found that an obligation for conflict parties to consider environmental aspects appropriately (the so called "due-regard" rule) can be derived from Additional Protocol I to the Geneva Conventions. What has now become necessary is to work on detailed scenarios to clarify the due regard principle, for which – together with a so-called duty of care obligation (as to environmental protection during armed conflict) – an approach to TRW might be developed.

All this has to be considered alongside another principles for the evaluation of environmental destruction during war: the precautionary principle, or approach, which can be found both in humanitarian and environmental law. In this context, reference was made to precaution (based on scientific uncertainty) versus prevention (based on scientific predictability). It was also stressed that a precautionary approach would not amount to a



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'zero risk' approach but would highlight the need for making thorough assessments of an action's likelihood of environmental or civilian harm.

During the workshop, the TRW Project presented a broad working definition for TRW for discussion. According to this definition, a TRW is "any toxic or radiological substance used in or resulting from military activities that forms a hazard to human and environmental health". Activities and/or their effects before, during and after conflicts, of an intentional or unintentional nature are all being considered. As such, the focus is not just on post-conflict scenarios – the "jus post bellum" - it is also on prevention, considering the often huge costs of the clearance of residues. There was broad agreement that environmental rehabilitation can, and should, form part of jus post bellum and one might consider TRW regulations as part of peace agreements.

It was also stressed that retrospective assessments of post-conflict scenarios where TRW have been, or continue to prove problematic, should not distract from an analysis of the rules applicable during war and the harms caused during conflict. It was also suggested that the environmental impact of unused remnants – such as stockpiled or abandoned munitions – also be considered within a TRW framework.

In general, the TRW discussion focused on general obligations to help remedy the consequences of the use of certain weapons or practices, and less on specific weapon bans. The focus on consequences reflects the responsibility to protect civilians and the environment, and the responsibility to rebuild. However, the early identification and substitution of toxic or problematic substances during weapons development was also raised.

The proportionality test, which is fundamental to the whole of IHL, should also extend to the health hazards from munitions residues after attacks. However, it was also argued that the existing test of proportionality (under art. 57 Additional Protocol), and any obligation to use the least toxic weapons is currently dependent upon its feasibility and the weapons at hand.

SUBSTANCES UNDER CONSIDERATION

Due to its profile and notoriety, depleted uranium (DU) featured heavily in the debate, although the toxicity of proposed alternatives such as carcinogenic tungsten-nickel-cobalt alloys (HMTAs) was discussed – an early

indication that detailed analysis of the potential risks from a range of materials is required.



Other proposed examples of potential TRW included thorium, white phosphorous, explosives such as RDX and HMX, propellant oxidisers such as ammonium perchlorate and dioxins. Clearly factors such as the quantities of these substances available in the environment and their exposure pathways will influence the risk they pose.

The TRW Project introduced its framework methodology to assess the risks posed by certain substances. It is intended that this will be used to create a preliminary list of 'substances of concern'. The methodology will draw on substance properties and computer models used in toxicological assessments and ultimately be used as the basis for developing case studies for different contamination scenarios.

The TRW Project will also cross check existing lists of substances that have already been identified internationally as hazardous. Similar lists exist in other areas of arms control (e.g. the Chemical Weapons Convention) or from international environmental law. A useful example is the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal of 1989. Some of these materials may also be used within a military context and lead to the generation of TRW.

Proving a causal link between a substance and a risk to human health could prove challenging, particularly where field access for environmental and health assessment might be constrained by post-conflict insecurity. Naturally there was a debate on the role of precaution and the presumption of harm, especially where substances have been identified as highly problematic.

Still on definitions and terms, there was discussion on whether toxic might be too narrow or too broad a notion; similarly, the need for clear differentiation between the intrinsic toxicity of a material and contamination – its unwanted presence within a geographical area. Nevertheless, the fundamental question is and remains: what constitutes a hazard?

International Environmental Law, including existing "soft-law", is of particular relevance for the TRW-problem. Here, the principles of the Stockholm Declaration of 1972

have to be considered: No. 6 prohibits the discharge of toxic substances, which lead to serious and irreversible damage to nature. Principles 21 and 22 cover the responsibilities of states and their obligations to ensure that activities under their “jurisdiction and control” do not lead to environmental damage in areas outside their national jurisdiction.

Unfortunately, due to time constraints, domestic environmental law and its applicability could not be discussed extensively. But in considering different TRW scenarios, either the domestic laws of the country where TRW are present could be applied or, perhaps more controversially, the laws of the country that is responsible for the generation of TRW. If that is the case, the issue of extraterritoriality must be evaluated. If considering the toxic footprint of military bases and firing ranges on foreign soil, one could argue for such an approach as it fits with the aforementioned concept of “jurisdiction and control”.

RECOMMENDATIONS

The development of solutions for the TRW issue was beyond the scope of the workshop; however some general steps were outlined. Three key principles were identified that could provide the basis of a framework approach to reducing and managing TRW. The framework should be based on the principle of intergenerational equity.

PRINCIPLE 1 - REDUCTION

The development of rules to avoid the generation of TRW. This would review methods and means of warfare, targeting and assess best practice for reducing the toxic footprint of military activities.

PRINCIPLE 2 - RESPONSIBILITY

Balancing the responsibility to protect and remediate between the state affected by TRW and the obligations on those responsible for generating TRW, even where they no longer exercise territorial control; this would also consider the means through which international assistance could be provided and focused.

PRINCIPLE 3 - ASSISTANCE AND COMPLIANCE

To promote assistance, capacity building and best practice for the transparent assessment, monitoring, decontamination and rehabilitation of affected sites. This would require some means of governance, or “compliance” structure to ensure transparency and information sharing.

REFLECTIONS AND NEXT STEPS

The consensus in the room was that the TRW approach was a timely development and worth pursuing further. Crucially it offers an opportunity to scrutinise what environmental protection during armed conflict really means and how environmental damage can be prevented in the future. It was also apparent that this topic has the potential to be both politically sensitive and extremely broad in scope.

Next steps were discussed, including a declaration on TRW. This would serve the purpose of boosting the profile of the issue and be seen as a political and conceptual signpost, which in turn could help persuade states and civil society to accelerate the search for solutions to this important and most practical problem. Ultimately this could be achieved through national legislation, or through developing a new and specific international TRW instrument, perhaps modelled on Protocol V of the Convention on Certain Conventional Weapons (CCW) regarding ERW.

Although no stranger to problems and complexities, the CCW setting could at least be used for initiating processes. It would certainly accelerate data gathering and analysis of the scope of the TRW issue.

Considering the tremendous scientific, legal, philosophical, financial and political challenges involved in resolving the TRW issue, it is fair to say that it has the potential to remain stimulating for some time. These challenges and the need for an approach that improves the protection for human health and the environment from the toxic legacy of military activities add impetus and urgency to the development of solutions to the problem of TRW.

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