

THE INTERNATIONAL ENVIRONMENT COURT: FILLING THE REMAINING GAP IN THE PROTECTION OF ENVIRONMENT IN NON-INTERNATIONAL ARMED CONFLICT

Grace Dembe Banea*

Abstract

This century is one of the environmental awareness. The environment is suffering a lot from climate change, global warming, waste management, etc. On top of that, armed conflicts, particularly, non-state armed groups, cause serious harms to the environment with long-lasting effects. Given the fact that there is at the present time no international court with the mandate to prosecute and try them for those harms perpetrated against the environment, the need of a court to protect the environment in the international level sounds crucial to end impunity and minimize environmental damage during non-international armed conflict and then prevent future generations from environmental degradation.

Keywords: armed conflict, non-state armed groups, environment damage, international environmental court.

* Teaching Assistant, Université Belgo-Congolaise, Kinshasa, Democratic Republic of Congo. E-mail: gradibanea@gmail.com, ORCID ID <https://orcid.org/0000-0001-6393-5346>

DOI :

Received: 7.07.2021

Accepted: 21.21.2021

Introduction

Natural environment and human-made one is directly and indirectly threatened during wartime. The war industry is significantly responsible for considerable degradation of the environment and depletion of natural resources. Warfare increases air pollution, destroys farmland and forest. These events have forced most of animals to flee, thousands of them have died because of unsuitable living conditions and some species are tending to the extinction. The host communities are exposed to toxic remnants of arms. Also, another consequence of armed conflicts is illegal exploitation of natural resources.

The matter is that the world is already frayed by several environmental issues, inter alia, climate change, global warming, waste management, and armed conflicts just exacerbate them as a result of increasing numbers of armed conflicts in this late century.

The Geneva Conventions (GCs) and the Additional Protocols (AP) are the main set of rules by which situations of armed conflicts are regulated¹. They distinguish two types of armed conflicts, on one hand, the International armed conflict (IAC) and on the other hand the non-international armed conflict (NIAC). In both types of armed conflicts, attacks against civilians or civilian objects are proscribed. Following this idea, the environment is protected by those above-mentioned law

¹ Aurelie Lopez, "Criminal liability for environmental damage occurring in times of non-international armed conflict: rights and remedies", *Fordham Environmental Law Review* 18, no. 2(Spring 2007): 267

instruments as a civilian object. But, one thing must be clarified, the environment is fully protected in IAC because there are several articles in the fourth GC and in AP I that deal with environment damage. States have also adopted another treaty to protect the environment in wartime: “the Convention on the prohibition of military or any other hostile use of the environmental modification technique” called the ENMOD convention. In addition, they are bound by various obligations protecting environment notably the obligation to respect the environment in general¹, the obligation to avoid causing environmental damage beyond their borders², the obligation under which the right of the parties to the conflict to choose methods or means of war is not unlimited³, and one of the most important obligation is the one according to which warfare does not make a termination to the treaty protecting environment⁴. Thus, the environment in IAC is sufficiently protected.

However, the situation is more complex and pathetic for the environment under NIAC which is not subject to any protection under the current international framework. Even the draft principles of International Law Commission on the protection of the environment in relation to armed conflict has, at the present time, adopted no draft

¹ Antoine Bouvier, “Protection of the natural environment in time of armed conflict”, in *International Review of the Red Cross*, no. 285 (December 1991), n.p.

² Note 2.

³ Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 35(1).

⁴ Report of ILC (International Law Commission), Draft articles on the effects of armed conflicts on treaties, 63rd Session, 2011, Art.3.

principle binding non-state armed groups to respect the environmental during conflict, whilst majority of recent armed conflicts are non-international⁵ and cause serious damage on the environment.

Nevertheless, the conventions cited above contain provisions which may afford indirect protection in NIAC notably the ENMOD convention (articles 1 and 2), the fourth GC (articles 4 and 53), and the AP I (articles 13, 14, 15 and 17).

On the other hand, the treaty which created the International Criminal Court (ICC), called Rome Statute, granted the environment with protection in the situation of both IAC and NIAC. Its article 8(2)(b)(iv) straightly addresses environmental question in armed conflict. But as Rome Statute has been applicable since 2002, the article was never been applied despite several intentional destruction of the environment in NIAC – for instance environmental destruction in armed conflict in eastern DRC –. This is not surprising because the Rome Statute focused mainly in the protection of humankind and that article is the only one article that *expressis verbis* concerns environment in the Rome Statute. However, human lives in the environment which is intrinsically related to them, it supports their lives and provides everything essential for their wellbeing. Protecting humans without providing equal protection for their environment is unrealistic. Therefore, the main question is what could be done to protect the environment effectively during NIAC?

⁵ Jeanique Pretorius, "Enhancing Environmental Protection in Non-International Armed Conflict: the way forward", *ZaöRV*, no.78 (2018). 904.

It is crucial to set a *corpus juris* that would criminalize environmental attacks in NIAC and would fill the gaps left by international norms protecting environment so far. A criminal court for the environment is important to minimize, even deter the worst abuses against environment by holding the perpetrators of those acts accountable and inflecting them penal sentences. Thus, future generation will be immune from the degradation of the environment caused by armed conflicts.

We focus on NIAC for three at least reasons, first because the situation is already under control in IAC; secondly, in this late century, most conflicts are NIACs, and thirdly, non-state armed groups sometimes lack clear motivation, want simply to make an echo in the international level and inflect unnecessary suffering to civilians and cause intentional and wanton environment destruction. Yet, it is time to reflect on what matters the most.

The concern here is primarily to have a look at the impacts of armed conflicts on the environment; this is followed by a discussion on which law to apply in the case of environmental abuse in NIAC. Afterwards, a proposition will be given about the creation of the international environment court.

I. What Do the Effects of War on The Environment Look Like?

First and foremost, we need to understand the meaning of environment to look into the protection that International Law grants it.

The word "environment" has no objective and static definition⁶. The definitions vary according the science that is concerned and the object of the study. But in a broad sense, environment encompasses flora, fauna, soil, mineral, rocks, and natural resources. This is the definition implied by International Humanitarian Law (IHL) when it talks about natural environment in API⁷ in the 1970s before the emergence of international environmental law (IEL). But, with the emergence of IEL and the abundance of treaties and conventions related to it, that definition appeared to date inadequate and very limited. Today, the environment encompasses apart from its natural aspect, the man-made environment but also the atmosphere⁸. But as far as this article is concerned, the environment is composed basically by biodiversity and geodiversity. Those two main components are intrinsically related to human being. They constitute a support and shelter for human life without which life is impossible on the earth. But they are destroyed by war which causes long-lasting consequences on them and those consequences endanger human life.

⁶ Laurence Menhinick, "We need to define the environment to protect it from armed conflict", *Conflict and environmental observatory*, February 11, 2016, <https://ceobs.org/we-need-to-define-the-environment-to-protect-it-from-armed-conflict/>.

⁷ Protocol Additional I, Art. 35 (3) and 55.

⁸ Laurence Menhinick, "We need to define the environment to protect it from armed conflict", <https://ceobs.org/we-need-to-define-the-environment-to-protect-it-from-armed-conflict/>.

The biodiversity is composed with living organisms which are plants, animals and micro-organisms and humans⁹. The geodiversity, in its turn, is composed with non-living part notably soil, rocks, water, air, minerals, landforms, active geological and geomorphological processes. Fossil fuels (coal, gas, crude oil) are also part of geodiversity¹⁰.

1. Effects Of Armed Conflict on Biodiversity

Whether it is IAC or NIAC, armed conflict has serious impacts on biodiversity. Those impacts are complex and non-exhaustive. Here are some of them:

- Some animals are shocked to death from the smoke as a result of a big amount of CO₂ released by explosive weapons. This may cause later the extinction of national parks.
- The destruction of farmland due to military activities breaks the food supply chain, intensifying food insecurity for local communities that depend on agriculture. This may end up to mass displacement for the search of arable land.
- Some explosive weapons remnants may be buried in the soil after war for a long time, contaminating the arable land and

⁹Vijayalaxmi Kinhal, "Why is our environment important?", *love to know*, n.d, n.p., https://greenliving.lovetoknow.com/Why_is_Our_Environment_Important/.

¹⁰ IUCN, "Geodiversity, World Heritage and IUCN", n.d, n.p., <https://www.iucn.org/theme/world-heritage/our-work/global-world-heritage-projects/geodiversity-world-heritage-and-iucn.s>

water resources with metals and toxic materials¹¹. This may lead to health problems.

-

2. Effects Of Armed Conflict on Geodiversity

Geodiversity is as important as biodiversity. It provides suitable niches upon which biodiversity is dependent¹².

Protracted armed conflicts are often accompanied by illegal exploitation of mineral as a result of collapse of governmental control in conflict zones. Also, intense military activity damage fragile soil and modify its composition which may end up to the degradation of environment.

Also, the explosive arms release a big amount of CO₂ that pollute air not only in the country concerned by armed conflicts but in the neighboring countries.

Some negative consequences are unseen and unknown but will appear over the time.

II. Which Law to Apply?

While the international law has made significant progress by regulating almost all aspects of international relationships either in time of peace

¹¹ Doug Weir, "How does war damage the environment?", *Conflict and environmental observatory*, June 4, 2020, <https://ceobs.org/how-does-war-damage-the-environment/>.

¹² Kevin Kiernan, "Geodiversity also needs protection during armed conflicts", *Conflict and environmental observatory*, May 6, 2020, <https://ceobs.org/geodiversity-also-needs-protection-during-armed-conflicts/>.

or in time of conflict, there is still much to do about environment related to armed conflict. Even if this late aspect is covered by the fourth GC and AP I for IAC, the environment in NIAC is left unprotected. This is because most of those rules were made before the rise of environment awareness in the international community. But we cannot ignore the huge impact of NIAC in the environment.

It should be pointed out here that it is very challenging to find any exhaustive and explicit provision dealing with the protection of the environment in NIAC. The applicability of other branches of law in conjunction with IHL in armed conflict has been laid down in IHL treaties¹³. In this context, several authors have talked about the conjunction of IHL with IEL and with International Human Rights Law but the thing is all of those branches of law are very weak to tackle environment issues in NIAC. Here are the reasons that weaken them:

- IHL do not address any of the fundamental matters for instance biodiversity, fauna, flora, climate change, fresh water resources, atmospheric protection etc.;
- The mechanisms of rehabilitation and remedial measures are inexistent;

¹³ Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art.72; Preamble of Additional Protocol (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978).

- Sanction upon environmental destruction are inexistent: a rule of law is effective when it is followed by a penalty. Without the latter, the former is malleable and ineffective;
- Armed conflict today involves implications that go away beyond the traditional borders and in that sense, it raises the problem of inadaptability of rules of IAC in NIAC: Scholars did not regulate the matter because States were considered as the only one supposed to cause environment damages in armed conflict. That is the position several decades ago, that is not the position today. Today the position is very complicated because of the proliferation of non-state armed groups and their unclear motivations.

Regards to current situation, new codification sounds indispensable, a treaty which will penalize the wanton destruction of the environment in NIAC, determine the personal and territorial scope of the crime and establish the international environmental court.

III. Need of the International Environmental Court

In the remote time, International Law was only a matter of States – primary subject – and international organizations – second subject – but today it extends its application to other actors that might influence international community. An uncontentious example of that is when individuals are prosecuted and tried in a permanent international

court¹⁴, the ICC. The ICC marked a progress of International Law in the protection of human being but that protection appears substantially limited when it comes to the environment.

Over the following lines, we are going to present the limits of ICC and the importance of creating the international environmental court.

1. Failure of ICC to Protect Environment

When we look at the Rome Statute, there are two weaknesses that prevent ICC to prosecute environmental crime effectively.

First, four categories of crime were considered within the ICC jurisdiction notably genocide, crime against humanity, war crime and, depending on ratification, crime of aggression. The crime against the environment were not defined as a stand-alone crime, but the article 8(2)(b)(iv) links the environment damage to war crime with which the protection of environment is supposed to be prosecuted in conjunction. This means it is restricted to the context of an armed conflict. But, as expressed higher, armed conflicts are directed by Geneva Conventions and the two Protocols Additional, yet those instruments do not recognize violation of environment in NIAC. This supposes that if the environmental violations are claimed in charge of an armed group, the prosecutor has firsthand to establish the war crime as a core crime, then to join environmental violation. If war crime is not sufficiently proved,

¹⁴Elzbieta Mikos-Skuza, "Public International Law", in *International Humanitarian action*, (Bochum: Hans-Joachim Heintze and Pierre Thielbörger, 2018), p. 133.

the environmental crime cannot be considered even if there is obvious damage of natural environment in a post-conflict zone.

Second, the article 8(2)(b)(iv), besides being the only one provision addressing directly environmental protection under Rome Statute, its wording is full of ambiguity and vagueness. It requires the damage to be simultaneously "widespread, long-lasting and severe" to be heard in the ICC. The threshold to prosecute environmental damage is too high and most of environmental damage during NIAC do not meet the requirement set by this article. So, the article has never been used and the damage remains unpunished¹⁵.

Furthermore, on September 15, 2016, a policy paper were released from the ICC Prosecutor's office in which it was announced that particular consideration would be given to prosecuting Rome Statute crimes which would be perpetrated in conjunction with environment destruction or would end up to that ¹⁶. While this was worth praising by presenting an important shift in the way the ICC looks at environmental harm, this was not followed by concrete actions¹⁷.

Nevertheless, the court was a progress of international community since it is the first permanent court prosecuting and trying individuals in

¹⁵ Ari Bilotta, "should the Rome Statute include the crime of ecocide?", *E-international relations*, August 28, 2019, <https://www.e-ir.info/2019/08/28/should-the-rome-statute-include-the-crime-of-ecocide/>.

¹⁶ Office of the Prosecutor, *Policy paper on case selection and prioritization*, September 15, 2016, p.5, https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf

¹⁷ Jessica Durney, "Crafting a standard: environmental crime as crime against humanity under the international criminal court", *Hastings environmental law journal* 24, no.2, (January 2018): 413.

international level. It tries to reduce atrocities of war by holding accountable those who committed the worst acts against humankind which are of genocide, crime of war, crime against humanity and crime of aggression. But those are not the exhaustive worst acts against mankind. Environmental destruction is also a worst act against human because this latter cannot live without the environment, it being inseparable to them. We cannot pretend to protect them without protecting their environment. This would be unrealistic and utopian. But we cannot blame the ICC for that as the ICC is essentially anthropocentric in focus. In the Rome Statute, it is clear that priority was given to the protection of humans rather than that of the environment.

Given that a healthy environment is indispensable for a healthy humanity, we actually need a new alternative to surmount those obstacles, to make non-state armed groups accountable for their acts against the environment. It is the creation of International Court for the Environment which will protect not only the environment but also complete the protection of mankind and the future generation will be safely living in it for the years to come.

2. Surmounting the Obstacles: The Creation of the International Environment Court

Non-international armed conflicts raise environmental concerns because they are not bound by any rules that restrains their actions

against the environment. Considering such nothingness, the environment is totally left unprotected in NIAC¹⁸.

The idea to raise environmental rights as non-derogatory rights and criminalize the environmental destruction under Rome Statute as war crime is laudable but remain utopian at the present time¹⁹. The non-state armed groups' obligation is problematic. As most of recent armed conflicts are non-international in character²⁰, it is crucial to rethink how to address this issue and grant the environment an adequate protection. The creation of an international court with special jurisdiction is crucial to hinder destruction of environment in NIACs. The court will serve to prevent harms against the environment and then, curtail the progression of climate change.

The jurisdiction of the court will be over the destruction of the environment by non-state armed groups and their illegal exploitation of natural resources. These acts were set forth in the policy paper published by the ICC's prosecutor in 2016 without any follow up. The court can take them, criminalize them as independent crime in NIACs and develop jurisprudence about.

¹⁸ Jeanique Pretorius, "Environmental protection in non-international armed conflicts: finding the way forward", *Conflict and environmental observatory*, March 15, 2019, <https://ceobs.org/environmental-protection-in-non-international-armed-conflicts-finding-the-way-forward/>.

¹⁹ Lopez, "Criminal liability for environmental damage occurring in times of non-international armed conflict: rights and remedies", p.262.

²⁰ Pretorius, "Enhancing Environmental Protection in Non-International Armed Conflict: the way forward", *ZaöRV*, 919.

The court will have the mandate to prosecute and try non-state NIAC actors who abuse environment before and during armed conflicts. The court will focus on the responsibility of these latter because currently, their access to the existing court – either domestic or international – is very limited, that causes impunity and consequently, destruction of environment by their acts is worsening.

Some may think about the jurisdiction of domestic courts of each State fits to fix that problem but the fact is that the damage goes beyond the national boundaries, then requires the consideration of all States in an international sphere. Also, given the consequences of the damage which may be long lasting in character and indirectly have negative effects in the whole world, a State cannot address this issue *uti singuli*, a suitable international legal framework to assess the environmental damage and hear cases related to it is of the paramount importance.

Conclusion

The article has shown that non-states armed groups are devastating environment through their vicious activities during warfare. They still remain unpunished as there are no rules, neither in the GCs nor in Rome Statute, that expressly impose them a conscientious conduct toward environment during war. This means that little concern has been given to the protection of the environment in NIAC. However, damage to the environment has long lasting effects and its effects in turn may endanger human life. On the other hand, State actors are bound by several environmental treaties regulating their conduct in battlefield but

the gap remains for non-state armed groups' conduct. So, given the environmental challenges (scarcity, extinction of species, climate change, global warming, etc.) that the planet is going through, it is important to bring in the table the question of the accountability of non-state armed groups for damage against environment during wartime. The international criminal law appears more effective than IHL because of its coercion power and the capacity of deterring criminality by inflecting the perpetrators penal sentence. To this end, the idea of the creation of a criminal court for the protection of environment sounds interesting to prevent wanton and egregious attacks on environment and protect it during armed conflict. The ICC sets up the first stone; through the article 8 of its treaty it qualifies war crime attacks against environment. Therefore, we need a special court for the environment which will have the mandate to prosecute and try non-states armed groups, make a stride in jurisprudence on assessing damage to the environment, and then end impunity.

Bibliography

Antoine Bouvier, "Protection of the natural environment in time of armed conflict", in *International Review of the Red Cross*, no. 285 (December 1991), n.p.

Ari Bilotta, "should the Rome Statute include the crime of ecocide?", *E-international relations*, August 28, 2019, <https://www.e-ir.info/2019/08/28/should-the-rome-statute-include-the-crime-of-ecocide/>.

Aurelie Lopez, "Criminal liability for environmental damage occurring in times of non-international armed conflict: rights and remedies", *Fordham Environmental Law Review* 18, no. 2 (Spring 2007): 267.

Doug Weir, "How does war damage the environment?", *Conflict and environmental observatory*, June 4, 2020, <https://ceobs.org/how-does-war-damage-the-environment/>.

Elzbieta Mikos-Skuza, "Public International Law", in *International Humanitarian action*, (Bochum: Hans-Joachim Heintze and Pierre Thielbörger, 2018): 133.

IUCN, "Geodiversity, World Heritage and IUCN", n.d, n.p, <https://www.iucn.org/theme/world-heritage/our-work/global-world-heritage-projects/geodiversity-world-heritage-and-iucn>

Jeanique Pretorius, "Enhancing Environmental Protection in Non-International Armed Conflict: the way forward", *ZaöRV*, no.78 (2018): 904.

Jeanique Pretorius, "Environmental protection in non-international armed conflicts: finding the way forward", *Conflict and environmental observatory*, March 15, 2019, <https://ceobs.org/environmental-protection-in-non-international-armed-conflicts-finding-the-way-forward/>.

Jessica Durney, "Crafting a standard: environmental crime as crime against humanity under the international criminal court", *Hastings environmental law journal* 24, no.2, (January 2018): 413.

Kevin Kiernan, "Geodiversity also needs protection during armed conflicts", *Conflict and environmental observatory*, May 6, 2020, <https://ceobs.org/geodiversity-also-needs-protection-during-armed-conflicts/>.

Laurence Menhinick, "We need to define the environment to protect it from armed conflict", *Conflict and environmental observatory*, February 11, 2016, <https://ceobs.org/we-need-to-define-the-environment-to-protect-it-from-armed-conflict/>.

Office of the Prosecutor, *Policy paper on case selection and prioritization*, September 15, 2016, p.5, https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf

Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 35(1).

Report of ILC (International Law Commission), Draft articles on the effects of armed conflicts on treaties, 63rd Session, 2011, Art.3.

Vijayalaxmi Kinhal, "Why is our environment important?", *love to know*, n.d, n.p.,

https://greenliving.lovetoknow.com/Why_is_Our_Environment_Important/.