From the beginning of recorded history, war has played a major role in shaping the course of events. Though geography changes, nations come and go, vanquished turn into conquerors and victors become victims, one of the constant elements of warfare is its disregarding effects on the Environment. Wars and armed conflicts of all kinds invariably leave a deep and lasting impact on environment. Weaponry, troop movement, landmines, destruction of forests by defoliation or general military usage, poisoning of water sources, target shooting of animals for practice, consumption of endangered species out of desperation etc are just some of the examples as to how wars and armed conflicts harm the environment. Protecting the environment in times of armed conflict is not a new idea. Even in ancient times, rules existed to ensure that natural resources essential for people’s survival, such as clean water, was protected. Unfortunately, the need to protect the environment in the context of armed conflict is more urgent today than ever before. Despite the protection afforded by several important legal instruments, the environment continues to be the silent victim of armed conflicts worldwide. The United Nations Environment Programme (UNEP) has conducted over twenty post-conflict assessments since 1999, to determine the environmental impacts of war. From Kosovo to Afghanistan, Sudan and the Gaza Strip, UNEP has found that armed conflict causes significant harm to the environment and the communities that depend on natural resources. Direct and indirect environmental damage, coupled with the collapse of institutions, lead to environmental risks that can threaten people’s health, livelihoods and security, and ultimately undermine post-conflict peace building. From the Vietnam War in the 1970s to the Iraq-Kuwait war in the 1990s, awareness of the environmental risks and damage grew slowly but surely. In Kuwait, approximately 600 oil wells were set on fire, with some wells burning for more than eight months and causing severe damage to the environment in their wake.

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In stride with the advances in warfare technology, the 1970s saw the birth of modern international environmental law, in particular through the Stockholm Declaration on the Protection of the Environment, concluded in 1972 at the United Nations Conference on the Human Environment. This conference also led to the establishment of the United Nations Environment Programme (UN Environment).

International Humanitarian Law is the first body of law to consider in an analysis of the protection of the environment during armed conflict. International humanitarian law (IHL) is the set of laws that seek, for humanitarian reasons, to regulate war and armed conflict. IHL essentially focuses on two issues: the protection of persons who are not, or are no longer, taking part in the hostilities; and restrictions on the means and methods of warfare, including weapons and military tactics. IHL applies only to armed conflict and does not cover internal-tensions or disturbances, such as isolated acts of violence. In addition, the law applies only after a conflict has begun, and then equally to all sides, regardless of who first engaged in the hostilities. Two types of environmental protections are given by IHL directly and indirectly which are:

1. **Multilateral Environmental Agreements (MEAs):**

These kinds of laws protect environment in times of armed conflict through various international agreements, protocols ratified by the states and these also include four Geneva conventions 1949, Additional protocols 1 and 2 of 1977 and the convention on the prohibition of military or any other hostile use of environmental modification techniques (ENMOD) in 1976 which prohibits, environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, and a number of other specific conventions and protocols dealing with various aspects of warfare, such as limiting or prohibiting biological, chemical or nuclear weapons.

2. **Customary International Environmental Laws (IELs) & Soft law Instruments during armed conflict:**

Shared international rules established through widespread and uniform State practice, under the general belief that particular obligations bind all States which applies only to those States that expressly consent to the respective treaties and laws taken by international organizations such as United Nations including resolutions, decisions, codes
of conduct and guidelines. When UN Security Council adopts any provisions from customary laws will be bound for every state. In this context, customary law includes the norms of *jus cogens* from which no derogation is permitted, and grave breaches of IHL as defined in the Geneva Conventions and Additional Protocol I. Soft law are those norms that arise from actions taken by international bodies such as the United Nations, including resolutions, decisions, codes of conduct and guidelines. By nature soft laws are not binding.

Treaties are written agreements that have been adopted by states, usually after a Diplomatic conference. The relevant provisions of IHL treaty law for the protection of the environment during armed conflict can be divided into three main categories:

- Those that directly address the issue of environmental protection.
- The general principles of IHL which are applicable to environmental protection.
- The provisions that can be considered to provide indirect protection to the environment during times of conflict.

**PROVISIONS SPECIFICALLY AIMED AT PROTECTING THE ENVIRONMENT DURING ARMED CONFLICT OR SPECIFIC PROVISIONS FOR ENVIRONMENTAL PROTECTION DURING ARMED CONFLICT:**

1. **Additional Protocol I to the 1949 Geneva Conventions:**

   The negotiations of Additional Protocols I and II to the Geneva Conventions took place against the backdrop of various wars of national liberation, including the Viet Nam War that raised serious questions regarding the protection of civilian populations and the environment. The immense destruction during the Vietnam War led to the realization that the law of armed conflict prevailing at the time did not sufficiently address the hazards of modern warfare. Particularly the law’s “blind eye” towards the environment and the insufficiency of the indirect protection through opponent property was recognized as a deficiency. In the aftermath of the Second Indochina War, Additional Protocol-I to the Geneva Conventions was adopted. Growing environmental awareness, as well as concern
over military tactics employed during these wars, led to the inclusion of two provisions in Additional Protocol-I that explicitly addressed environmental harm: Articles 35(3) and 55. These two articles directly protect the environment during armed conflicts in the additional protocol 1 in 1977 as such; Article 35(3) Additional Protocol I read *prima facie* like a rather significant step forward. According to the provision:

“It 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”.

The provision represented a significant improvement compared to the previous legal framework. Notably its scope is significantly wider than that of The Hague and the Geneva Conventions. According to the Additional Protocol I, even non-intentional environmental destruction can represent an illegal method of warfare. As long as the methods or means employed “may be expected” to cause the specified kind of damage, they are prohibited.\(^2\)

Article 35 concerns basic rules regarding the means and methods of warfare. Paragraph 3 stipulates that “It 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.”

So this article is the main rules with a view to the means and methods of warfare. The impact must be widespread and long-term and severe. The Article thus protects the natural environment *per se* which had never been done before\(^3\) and applies not only to intentional damage, but also to expected collateral damage. Importantly, specific intent is not necessary.

Interestingly, the terms “*widespread, long-term and severe*” have not been defined. At the time of drafting of the Protocol, agreement was appeared to exist merely on a clarification of the term “long-term”, which is to be understood as referring to a period of at least ten years\(^4\). Since the meaning of the two other terms was not clarified at all, no authoritative

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\(^3\) Antoine, P.: *Droit international humanitaire et protection de l’environnement en cas de conflit armé*, (Revue Internationale de la Croix Rouge, 1992) at 798.

answer can be given to the question when and where specific damage inflicted upon the natural environment should be deemed to violate the terms of this provision. Putting together the triple standards set forth under Article 35 as a cumulative one, which results from the use of the word “and”, damage has to be widespread and long-term and severe in order to be prohibited. Basing argument on this line will lead to the conclusion that even the most widespread and long-term which for some reason, would not be considered to be also severe, would not be forbidden. For the cumulative triple standard may now render permissible what would before have been forbidden by reference to general legality requirements like military necessity, proportionality, and prohibition of unnecessary suffering. Indeed, it may nullify the relative impact of such general legality requirements as long as there is no clear evidence that environmental damage is widespread, long-term and severe. The provision certainly does not purport to prohibit all activities which may be harmful to the environment, only those causes widespread; long term and severe damages are forbidden.

Article 55 provides specific protection for the environment within the context of the protection granted to civilian objects. It also explicitly prohibits attacks on the environment by way of reprisals. Article 55 which states as follows:

1. Care 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.

2. Attacks against the natural environment by way of reprisals are prohibited.

The use of the phrase, “Care shall be taken” is illustrative of the obligation that States have to take all feasible precautions to avoid (or in any event minimise) damage to civilian objects, including the natural environment. In 1995, the ICRC applied this

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5 ICRC customary law study, Rule 44.
principle in relation to water resources, calling on parties to “take all feasible precautions to avoid, in their military operations, all acts liable to destroy or damage water sources”

Article 55(1) indicates that the prohibition encompasses only one of a very serious nature. The term “includes” might seem to suggest that this provision would prohibit more than what is explicitly mentioned there. The last phrase of this provision entails an additional limitation to the general applicability of Protocol I. It reflects a crucial disadvantage from the perspective of environmental protection because this provision is essentially anthropocentric.

In addition, Article 55(1) does not apply to means and methods of warfare affecting non-civilians, parts, objects, or assets of the environment, even if they would cause triple standards damage to them, since this provision ranks under Part IV, Chapter III, which is entitled “civilian objects”. Article 55(2), read; Attacks against the natural environment by way of reprisals are prohibited. This provision may be useful in itself but it does not cover military reprisals not directed on purpose against the environment as the object of the attack, i.e., it does not prohibit environment damage occurring in the case of acts of reprisal directed against other objects.

2. UN Convention on the Prohibition of Military or Any Other Use of Environmental Modification Techniques (ENMOD-1976):

The Vietnam War did not only trigger an overhaul of the Geneva Conventions. One year before the Additional Protocols were signed, another important treaty relating to the environment in armed conflict was adopted by the UN General Assembly and opened for signature. The Convention on the Prohibition of the Use of Environmental Modification Techniques (ENMOD) 1977 represents a major advance in the law of war, being the first international agreement which directly addresses the use of the environment as a weapon during armed conflicts. The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) of 1976 was concluded after the Vietnam War and against the background of the severe climate damage in Vietnam. This

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6 ICRC customary law study, Rule 44, citing: e.g., United States, Naval Handbook
Convention was established as a reaction to the military tactics employed by the United States during the Viet Nam War. The Convention was also a reaction to the use of large quantities of chemical defoliants (known as Agents Orange, White and Blue), which resulted in extensive human suffering (death, cancer and other illnesses, mutations, and birth defects) and long-term environmental contamination, as well as very significant destruction of forests and wildlife.

Just like the Additional Protocol I, the Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques (ENMOD Convention) directly protects the environment, albeit only of other States, not the own or stateless environment. ENMOD’s objective was to prohibit the use of environmental modification techniques as a means of warfare. Article (1) stipulates that- “Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.”

Hence, while Article 35(3) of Additional Protocol I aim to protect the natural environment per se, ENMMOD prohibits the use of techniques that turn the environment into a “weapon.” In its Article I the Convention, which is part of disarmament efforts, prohibits the Contracting Parties from engaging in "military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party”.

Article 2 specifies what is meant exactly by the term "environmental modification techniques". It refers to any technique for changing through the deliberate manipulation of natural processes the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.

The environment is directly protected in Article I of the Convention and the concept of ‘environmental modification techniques’ is clarified in Article II. ENMOD doesn’t have a broad scope of protection; the scope of the Convention remains quite narrow. It only applies to damage to other parties of the convention and the effect of the technique must be

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9 Over 55,000 tonnes of chemical defoliants have been targeted to forests and crops in Viet Nam, see Westing, A. H.: Warfare in a fragile world: Military impact on the human environment, (Stockholm International Peace Research Institute. Taylor and Francis, London, 1980) at 79

widespread, severe and long-lasting\textsuperscript{11} the modification must be intentional.\textsuperscript{12} Also, the Convention only protects the environment from being used as a method of warfare. It deals with the use of the forces of the environment as a weapon, not with the damage to the environment.\textsuperscript{13}

3. Convention on certain conventional weapons (CCW):

Another treaty that specifically protects the environment during armed conflict is The 1981 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects\textsuperscript{14} and especially its third Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III).\textsuperscript{15} The CCW (also known as the Convention on Certain Conventional Weapons and the Inhumane Weapons Convention)\textsuperscript{16} states in its Preamble that "It 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 (the triple cumulative standard)."

An amendment to Article 1 of the Convention introduced in 2001 extends its application to situations referred to in common Article 3 to the 1949 Geneva Conventions. i.e., to non-international armed conflict (NIAC). The 1981 Convention’s second important reference to the environment appears in art 2(4) of the Convention’s Protocol III. It prohibits states from making “forests or other kinds of plant cover the object of attack by incendiary weapons.

\textsuperscript{12} SJÖSTEDT, B.: "Protecting the Environment in Relation to Armed Conflict",(Nordic Journal of International Law, 2013) at 76.
\textsuperscript{16} CCW, adopted on 10 October 1980, UN Document A/CONF.95/15.
except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives”.

Given their references to environmental protection, these treaties offer clear and significant legal protection since armed conflicts that have occurred up until today have involved mainly weapons that fall within their scope in particular, incendiary weapons.

GENERAL PRINCIPLES OF IHL APPLICABLE TO THE PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT

The general principles of IHL are often referred to as a source of law on their own. They complement and underpin the various IHL instruments and apply to all countries. This type of laws protect environment as this is linked to the “Martens Clause” (Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience) which stipulates the role of norms, customs, and practice as the law of war including the Hague convention on the laws and customs of war in 1899 and 1907 similar to Additional protocol 1 in 1977. This clause broadens the range of applicable norms governing conduct during armed conflict beyond those that are laid out in the treaty instruments by mentioning of two basic principles as such humanity and public conscience. In essence, therefore, where gaps exist in the international framework governing specific situations

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18 Incendiary weapons are “designed to inflict damage on the enemy, his positions, or his environment primarily through the action of heat and flame. Besides these incendiary effects some incendiary agents are poisonous and some produce toxic or asphyxiating effects when burning. Incendiary weapons may be used as air weapons in the form of fire-bombs, in the form of grenades, small rockets, mortar ammunition and artillery projectiles. Other types of ground incendiary weapons include flamethrowers and emplaced devices such as landmines and flame foul gasses. The main categories of agents used are oil-based incendiaries (napalm), metal incendiaries (magnesium), pyrotechnical incendiaries (thermite) and pyrophoric incendiaries (white phosphorus)”. Pertti Joenniemi “Conventional Weapons: A Revived Issue”, (Instant Research on Peace and Violence, Vol. 6,1976) at 30.
19 ICJ Statute, Article 38.
(including, for instance, the relationship between armed conflict and the environment), the Martens Clause stipulates that States should respect a minimum standard as established by the standards of “humanity” and the “public conscience.” The Martens Clause is generally considered to constitute a foundational principle of IHL and a core principle protecting the environment in the absence of other provisions in treaty or customary law.

The core principles underpinning IHL include the principles of distinction, military necessity, proportionality, and humanity, all of which can be considered to have a bearing on environmental protection during armed conflict.

- **The principle of distinction:** Under the principle of distinction, belligerents are required at all times to distinguish between “civilian objects and military objectives and accordingly to direct their operations only against military objectives”. The principle of distinction is a cornerstone of IHL and the first test to be applied in warfare: it distinguishes between military and civilian persons and objects, and prohibits indiscriminate attacks and direct attacks against civilian objects. Article 52(2) of the 1977 Additional Protocol-I defines military objectives as those that “by nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage”. It can therefore be argued that given the non-military nature of most environmentally significant sites and protected areas, targeting such areas would be contrary to the principle of distinction and, subsequently, to Article 52(2).

- **The principle of military necessity:** The principle of necessity determines that an action in warfare is lawful if the weapons and tactics employed are reasonably necessary to achieve military objectives. Furthermore, the principle of military necessity seeks to prohibit military actions that do not serve any evident military purpose. This principle is found in the

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22 With reference to the environment, this principle is affirmed in some provisions of legal instruments and endorsed by an international document such as arts 35(3), 48, 51 and 57 of the 1977 Additional Protocol I, art 2(4) of the Protocol III of the Certain Conventional Weapons Convention, and the 1994 Guidelines for Military Manuals and Instructions on the Protection of the Environment in times of Armed Conflict.

23 The 1977 Additional Protocol I, art 55(2).

1863 Lieber Code, the 1868 St Petersburg Declaration and the International Military Tribunal Charter. It is also found in art 23(g) of the 1907 Hague Regulations concerning protection of enemy property, 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 this construct, “Enemy property” may well encompass protected areas, environmental goods and high-value natural resources, all of which could therefore be granted indirect protection.

- **The principle of proportionality:** The requirement under the principle of proportionality is that “incidental damage affecting the natural environment must not be excessive in relation to the military advantage anticipated from an attack on military objective”. Many instances of environmental damage could be seen as a “disproportionate” response to a perceived threat and therefore considered illegal. This was the opinion shared by most experts in the case of the massive pollution resulting from the burning of oil fields and the millions of gallons of oil deliberately spilled into the Gulf Sea during the 1990-1991 Gulf War. Article 57 of Additional Protocol I, disproportionate attacks are those in which the “collateral damage” would be regarded as excessive in relation to the anticipated direct military advantage gained. Destroying an entire village or burning an entire forest to reach a single minor target, for example, would be considered a disproportionate strategy in relation to the military gain.

- **The principle of humanity:** The principle of humanity prohibits inflicting unnecessary suffering, injury and destruction. It requires that any weapons and tactics employed in warfare not cause superfluous suffering to victims by way of “prolonged or painful death” or by being in a “form calculated to cause severe fright or terror”. Thus a Party cannot use starvation as a method of warfare, or attack, destroy, remove or render useless such objects

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25 Article 14 states: “military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war”. “Instructions for the Government of Armies of the United States in the Field (Lieber Code 1863)” in Leon Friedman (ed) *The Law of War - A Documentary History* (Random House, New York, 1972) at 158.

indispensable to the survival of the civilian population. According to this principle, the poisoning of water wells and the destruction of agricultural land and timber resources that contribute to the sustenance of the population, as seen in the ongoing conflict in Darfur, could be considered “inhumane” means of warfare. In this respect, it should be noted that the Martens Clause also refers to the “laws of humanity.”

INDIRECT PROVISIONS FOR ENVIRONMENTAL PROTECTION DURING ARMED CONFLICT

The rules of IHL treaty law that can be considered to indirectly protect the environment during armed conflict can be clustered into the five following categories:

- Limitation on means and methods of warfare.
- Protection of civilian objects and property.
- Protection of cultural heritages.
- Protection of industrial installations containing dangerous forces.
- Limitations based on targeted area.

- Limitation on means and methods of warfare: Many weapons have the potential to cause serious and lasting damage to the environment. Limiting the development and use of these weapons can therefore indirectly protect the environment during armed conflict.

The following sources, regulating the use of various types of weapons, are relevant in this context:

I. The Hague Convention IV (1907)27

II. The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925).

III. The 1949 Geneva IV Convention relative to the Protection of Civilian Persons in Time of War.28


27 Available at http://www.opbw.org/int_inst/sec_docs/1907HC-TEXT.pdf accessed on 03/05/2017

• Protection of cultural heritages:
Under this heading the following sources, regulating the use of various types of weapons, are relevant in this context:

• Protection of industrial installations containing dangerous forces:
   I. Additional Protocol I to the 1949 Geneva Conventions, Article 56.
   II. Additional Protocol II to the 1949 Geneva Conventions, Article 15,

• Protection of civilian objects and property
The provisions that govern the protection of civilian objects and property could provide a more effective legal basis for protecting the environment during armed conflict than those protecting the environment per se, at least under existing IHL treaty law. Relevant provisions are as follows:
   I. The Hague Regulations (1907).

Customary International Environmental Laws (IELs) & Soft law Instruments during armed conflict
In addition to treaty rules, the environment is also protected during times of war by customary international laws of war. Recognition of customary law within IHL is crucial because of the possibility that belligerent states are not party to relevant treaty laws. Customary law normally binds all states that have not persistently objected to its development and violation of the rules of

customary law is recognized as having legal consequences for the states responsible. Thus, both sides of an armed conflict will be bound by customary law, without exception.

Despite the absence of any specific provision for environment protection within the text of the four Geneva Conventions, there is scope for protection found within the scope of IHL, through the application of General Principles of IHL and customary rules of IHL that have been identified. These general principles and customary rules will be discussed below.

- **Applicable General Principles and Customary Rules of IHL**

The ICRC 2005 multi-volume explanation of customary IHL discusses 161 “rules” that the authors consider representing customary international humanitarian law. The International Committee of the Red Cross (“ICRC”) published a comprehensive Study on customary international humanitarian law, within which it identified three rules specifically relevant to protection of the natural environment. These three rules include:

- Rule 43.
- Rule 44.
- Rule 45.

Rule 43 notes that the General Principles of IHL on the conduct of hostilities apply to the Natural Environment, specifically:

I. *No part of the natural environment may be attacked, unless it is a military objective.*

II. *Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.*

III. *Launching an attack against a military objective which may be expected to cause incidental damage to the environment that would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.*

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30 According to the International Law Commission (ILC), a breach of an international obligation is “when the act in question is not in conformity with what is required by that obligation ‘regardless of its origin’. They apply to all international obligations of states, whatever their origin may be. International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order”, Commentary to draft art 12, paragraph 3, Draft Articles on Responsibility of States for Internationally Wrongful Acts and Commentaries. Report of the International Law Commission to the General Assembly on the Work of its Fifty-third session A/56/10, 200 at 126.

Principles I and II outlined above provide the same protections for biodiversity hotspots as all other areas of “natural environment”, principle III may carry more weight in the context of a biodiversity hotspot:

Rule 44 identifies a requirement for due regard for the natural environment during military operations, it provides:

“Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions.”

Rule 45 identifies a prohibition in relation to means and methods of warfare intended or expected to cause “widespread, long-term and severe damage to the natural environment”, by providing:

“The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon.”

The ICRC rules offer an articulation of the principles of distinction, proportionality and military necessity in relation to the natural environment, and emphasize the importance of taking a precautionary approach in the absence of scientific certainty about the likely effects of a particular weapon on the environment. In addition, the rules expressly prohibit the use of means of warfare that are intended or can be expected to cause significant damage to the environment, requiring Member States to consider the likely environmental repercussions of their military methods.

IEL principles and soft-law instruments may apply, although they do not address armed conflict directly. So-called soft-law instruments are not legally binding unless they rise to the level of customary IEL. The Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)\(^2\) of 1972 articulated an overarching principle that may bear on IEL applicability during armed conflict. Principle 21 provides that ‘States have the responsibility to

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ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.

The Declaration on Environment and Development (Rio Declaration) of 1992 stated in Principle 24 that: ‘Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.” While the intent to protect the environment is clear, the provision’s precise meaning is less so; it may mean that IEL applies during conflict, or it may simply reiterate required state adherence to relevant IHL provisions.

The Rio Conference adopted similar language in the Program of Action for Sustainable Development (Agenda 21) in Article 39(6), detailing the means of implementation. It states that measures in accordance with international law should be considered to address, in times of armed conflict, large-scale destruction of the environment that cannot be justified under international law’. The Article specifies that the UN General Assembly and Sixth Committee should handle such efforts, with ICRC consideration.

Similarly UN General Assembly resolution 47/37, adopted in 1993, urges states to take measures for complying with international law protecting the environment during armed conflict. Although it also encourages incorporating such international law into military manuals, the precise import of these provisions remains unclear. Its reference to provisions ‘applicable to the protection of the environment’ may refer to relevant provisions within IHL, or to IEL. The resolution led to the ICRC’s development of Guidelines for incorporating environmental protection into military manuals.

The provisions of IHL governing environmental protection during armed conflicts constitute a disparate body of treaty law, customary law, soft law and general principles that have developed over decades to respond to a wide range of practical problems and moral concerns. A number of

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significant gaps and difficulties remain to be reconciled if the protection of the environment is to be enhanced within the IHL framework. First, while most recent and ongoing conflicts are internal, the body of IHL treaty and customary law governing non-international armed conflict (NIAC) is relatively limited. There is no treaty norm that explicitly addresses the issue of environmental damage during NIAC, and obligations applicable in this context are generally far less restrictive than for international armed conflicts (IAC).

Second, many rules contained within treaties are not universally applicable to all States (particularly to those States that are not a Party to them) unless they have entered the corpus of customary international law. This is a major limitation for the practical relevance and effectiveness of the treaties highlighted above, particularly in light of the fact that many have not been ratified by some of the major military powers, resulting in disagreement regarding their implementation and enforcement. It is therefore essential that all States be encouraged to become signatories to the major treaties and to ratify them with haste to ensure that IHL protection for the environment is real and effective. Thirdly, few norms of IHL explicitly address the issue of environmental protection, and in most cases the environment is better protected indirectly by other norms regulating the means and methods of warfare or protecting civilian persons and objects.

Finally, aside from the International Criminal Court and ad hoc criminal tribunals, there are few effective mechanisms for enforcing provisions of IHL, particularly relating to damage to the environment. A key solution to these issues involves the codification of environmental protection into a coherent and practical instrument that considers both IAC and NIAC. Such an instrument could be developed on the basis of updated ICRC guidelines on protecting the environment during armed conflict, and with the expertise of the International Law Commission (ILC).