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## Legal Regulation of the Effects of Military Activity on the Environment

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# **Legal Regulation of the Effects of Military Activity on the Environment**

by

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## Executive Summary

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1. While armed conflicts have historically tended to cause acute and localized environmental damage, modern weapons and their potential industrial targets (such as nuclear power plants or petrochemical facilities) have the potential to cause destruction on a much vaster scale. To date, no systematic studies have been undertaken to assess the overall scale of environmental damage resulting from warfare. Thus, it is difficult to compare such damage with that caused by routine, peacetime activities.
2. Existing international law provides limited protection against the contemporary threats posed by war to the environment:
  - ▶ The provisions of the law of armed conflict that focus specifically on environmental protection address a narrow range of cases, which involve such unusual means of warfare or such high levels of environmental damage that they are largely irrelevant to the ordinary conduct of hostilities.
  - ▶ Although the more general principles of international humanitarian law – including necessity, distinction, proportionality and humanity – articulate appropriate standards, which could be applied in a manner that limits environmental damage, they give states a wide degree of discretion and permit them to justify most environmental harms. Only wanton destruction like the oil pollution caused by Iraq during the 1990-1991 Gulf War, which served no military purpose, is clearly prohibited.
  - ▶ The extent to which the rules set forth in international environmental treaties and custom continue in force during wartime is unclear. However, even if they technically remain in force, they may not set forth appropriate standards, since they were developed to address peacetime issues, not the types of needs and trade-offs that arise during wartime.
  - ▶ The legal norms applicable during non-international conflicts are even less protective of the environment than those applicable to international conflicts.
  - ▶ Existing legal norms – limited though they are – are not universally accepted and have never been enforced, even when manifestly violated (such as during the 1990-1991 Gulf War).
3. The prospects are slim for significant reform of the law to provide greater environmental protection. Indeed, even the massive environmental destruction resulting from the First Gulf War proved insufficient to catalyze legal change. Two factors in particular inhibit reform:

- ▶ Environmental protection generally requires a long-term perspective, while warfare is usually dominated by short-term exigencies. Thus, wartime needs tend to trump environmental values even for people acting in good faith.
  - ▶ Moreover, the tremendous human toll inflicted by war has tended to overshadow its environmental consequences. Future efforts to develop and implement international humanitarian law will likely continue to focus on the alleviation of human suffering.
4. Options for change include the following:
- ▶ Broader application of existing rules of international humanitarian or environmental law.
  - ▶ New procedural requirements.
  - ▶ New substantive norms.
5. *Broader application of existing rules* – Although existing rules are far from perfect, they at least provide a basic framework of relevant principles, together with specific rules focusing on particular threats such as the bombing of dams and the destruction of agricultural lands. Extending their application to all armed conflicts would be desirable, including:
- ▶ *Non-international conflicts* – Recently, the Second Review Conference on conventional weapons adopted an amendment to extend the application of the Conventional Weapons Convention (CWC) to non-international conflicts. This is consistent with the policy of the International Committee of the Red Cross (ICRC) and many states (including the United States) to apply the same rules of armed conflict to both international and non-international conflicts. The recent CWC experience suggests that the time may be ripe to extend other rules of international humanitarian law to non-international conflicts.
  - ▶ *NATO and UN actions* – Because not all NATO or UN member states are parties to the relevant international agreements, the applicability of existing rules to NATO and UN actions remains variable. To address this matter, decisions authorizing NATO and UN actions could provide for the application of existing rules regarding the environment.
  - ▶ *Military manuals and training* – The more the existing rules are incorporated into national military manuals and training programs, the greater prospect that they will be implemented.
6. *Procedural requirements* – New procedural requirements are likely to prove acceptable to more states than new substantive requirements, since they impose less of a constraint on the military's flexibility in the conduct of warfare.
- ▶ Procedural requirements relating to assessment of potential environmental impacts and reporting on the rationale for targeting decisions seek to



enhance the quality of decision-making, rather than to impose substantive constraints on possible outcomes.

- ▶ Military commanders already are required to engage in targeting analysis to ensure that a potential target is a military objective (as required by the principle of distinction) and that the attack would not cause excessive collateral damage (as required by the principle of proportionality). The purpose of additional procedural requirements would be to help ensure that environmental considerations are taken into account in this targeting analysis, for example, by requiring military decision-makers to examine whatever information is readily available about potential environmental consequences, and to provide a statement of reasons as to why they concluded that the concrete and direct military advantage anticipated from an attack justified the expected environmental damages.
- ▶ Although procedural requirements would involve additional burdens for the military, these could be kept low through appropriate standards. Moreover, the burden of some requirements (such as a statement of reasons regarding proportionality analysis) could be deferred until after the hostilities cease.
- ▶ For these reasons, procedural requirements would seem to represent a reasonable compromise: They allow military decision-makers to retain their flexibility in applying the broad principles of distinction and proportionality, but impose some procedural regularity in order to ensure that military decision-makers exercise their authority in a reasonable manner.

7. *New substantive requirements* – By comparison, new substantive requirements – such as a prohibition against the intentional infliction of air or marine pollution as a method of warfare, or against attacks on oil facilities – would likely encounter greater resistance.

- ▶ The same objection raised by some states (including the United States) to existing environmental norms – namely that what is permissible depends on the circumstances and cannot be specified in absolute rules – applies with equal force to many proposed new norms. If the heavily-qualified prohibition in Geneva Protocol I against attacking dams and nuclear power plants has proven controversial, then proposals to prohibit attacks on oil tankers or chemical factories would be even more problematic.
- ▶ Although such requirements are unlikely to gain widespread acceptance in the near term, they might be pursued by a “coalition of the willing” with the aim of influencing the longer-term evolution of cultural and legal norms. This has been the approach pursued in the land mines context. Whether it will actually prove successful in modifying the behavior of non-participating states remains uncertain.

8. *Longer-term cultural change* – Given the difficulties in adopting new legal norms, an alternative approach is to focus on raising public and military consciousness about the environmental effects of war, so that military decision-makers give greater weight to environmental factors. Recent history suggests that changes in

consciousness (for example, about the acceptability of civilian casualties) can have a profound effect on the conduct of hostilities – perhaps even greater than legal change itself.