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Protecting Cultural Heritage in Times of War: A Case for History

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1.0 Introduction

Historically, war has been one of the greatest catalysts for destruction of cultural property. This destruction often occurs as collateral damage, through the ancient practice of taking plunder and through cultural cleansing, that is, the intentional eradication or destruction of customary or religious artifacts with the intent of exterminating the material symbols of a religious or ethnic group.¹ One of the great scholars recorded to have strongly criticized the desolation of cultural property was Emer de Vattel.² He viewed such destruction as an appalling act of an arch enemy to the human race do deny it the privilege of “*monuments of the arts and models of taste*”.³ Instigating cultural damage deprives future generations of an opportunity to fully comprehend who they are and where their roots or origins lie.⁴ Notably, protecting cultural property has international significance as it plays an

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¹ Neil Broode, ‘Stolen History: looting and illicit trade ‘ in Isabelle Vinson (ed.), ‘Facing history: Museums and Heritage in Conflict and Post-conflict Situations,’ Museum International, Vol LV, n°3-4, December 2003.

² Emer de Vattel was an international lawyer. He was born in Couvet in Neuchâtel in 1714 and died in 1767. He was largely influenced by Dutch jurist Hugo Grotius. He is most famous for his 1758 work *The Law of Nations*.

³ Emer de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (text of 1758) (Carnegie Institution, 1916), book III, 143–4 [173]. Translations by Roger O’Keefe in , ‘Protection of Cultural Property under International Criminal Law,’ *Melbourne Journal of International Law* , Vol 11.

⁴ Hiram Abtahi, ‘The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia,’ *14 Harvard Human Rights Journal* 1, 2001.

important role in encouraging appreciation of cultural diversity and in the attainment of knowledge of human origin.⁵ Destroying the cultural heritage of victims of war negatively the understanding of their identity and consequently how they maneuver their daily lives.⁶

Moreover, according to history, some nations no longer exist while others have had their identity permanently altered.⁷ Additionally, going by the experience of UNESCO in Afghanistan, Cambodia, Middle East, South-Eastern Europe, and East Timor (today Timor-Leste), among other places, further entrenches the need for having in place a programme for the preservation of cultural heritage.⁸

2.0 Evolution of international legal framework for protection of cultural heritage

The inception of the protection and conservation of cultural heritage dates back to the 15th century. Sweden was the first to develop legislation to protect national monuments in 1666.⁹ Subsequently, other European nations developed legislations to protect archeological sites.¹⁰ In the year 1863, the Lieber Code was enacted following the civil war in the United States. The international community codified these rules into the Brussels Declaration of 1874 which did not pass the adoption stage.¹¹ Afterwards, they developed the Hague Conventions of 1899 and 1907. Despite these instruments, the

⁵ Erika Techera, 'Protection of Cultural Heritage in Times of Armed Conflict: The International Legal Framework Revisited,' *MqJICEL* Vol 4L, 2007.

⁶ Abtahi, *Supra* note 4.

⁷ *Ibid.*

⁸ Isabelle Vinson (ed.), 'Facing history: Museums and Heritage in Conflict and Post-conflict Situations,' *Museum International*, Vol LV, n°3-4, December 2003.

⁹ Bassiouni, C. Reflections on Criminal Jurisdiction in International Protection of Cultural Property.: <http://surface.syr.edu/cgi/viewcontent.cgi?article=1148&context=jilc> accessed on 18/03/2021.

¹⁰ Merryman, J. H. Two ways of Thinking about Cultural Property. <<http201://minervapartners.typepad.com/readings/MerrymanTWOways>> accessed on 18/3/2021.

¹¹ Katerina Papaioannou, 'THE INTERNATIONAL LAW ON THE PROTECTION OF CULTURAL HERITAGE' [2017] *IJASOS- International E-journal of Advances in Social Sciences*.

effects of the world wars on cultural heritage were immeasurable.¹² Therefore, UNESCO convened a meeting at Hague in 1954 which culminated in the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (hereinafter referred to as the Hague Convention 1954).

2.1 The Hague Convention 1954

It was adopted because of the extensive destruction of cultural property in the wake of the Second World War. Its scope covered both movable and immovable cultural property, for example, works of art, manuscripts, books, history and scientific collections.¹³ It contains obligations which the state parties are required to observe both during peacetime and wartimes. They apply to both the attacking and occupying states. The Convention in Article 3 provides that, state parties are required to safeguard against the contingent repercussions of armed conflicts on cultural property in their countries by making preparations that they consider appropriate during times of peace.

In Article 4, the Convention sets minimum standards of respect that state parties are required to observe. They are obligated not to attack, misappropriate or remove cultural property from their territory of origin with the exception of “military necessity”.¹⁴ The treaty has been criticized for failing to define ‘military necessity’. The Convention in Article 4(3) also places upon member states the mandate of prohibiting, preventing and stopping any kind of misappropriation, pillage, theft, and vandalism on cultural chattels. Article 5 states that the occupying authorities have the obligation to revere the cultural heritage of the occupied states. They should aid local authorities where possible to help preserve such property and repair them if necessary.

¹² Strati, A. (1995). *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, edit. Martinus Nijhoff Publishers, The Hague/London/Boston.

¹³ Hague Convention 1954, Art 1.

¹⁴ *Ibid*, Art 4(2).

2.2 Protocol 1

This protocol refers specifically to movable cultural chattels. It prohibits the occupying parties from exporting movable cultural property from the subdued territories. Likewise, it mandates the occupying states to put back such chattels to their original territories in case they are moved, once the hostilities end.¹⁵ The offending parties may be required to indemnify the states whose cultural property was taken during hostilities.

2.3 Protocol 2

This protocol broadens the scope of the Hague Convention 1954 to include new developments concerning international humanitarian law and cultural protection. It provides for enhanced protection in chapter three. This means that relevant property shall be protected from destruction the moment they are included in the List of Cultural Property under Enhanced Protection. Article 14 of the Protocol provides that destruction of cultural property which enjoys enhanced protection can only be excused if such property becomes a military objective. Article 1(f) defines military objective as ‘a chattel which effectively contributes to military action and whose destruction at the time offers a military edge’. The protocol establishes individual criminal responsibility. Also, it applies to non-international armed conflicts.

3.0 Systems of Protection

3.1 General Protection

General Protection entails conservation and respect of cultural property.¹⁶ Conservation requires states during peace time to take measures within their jurisdictions to guard against the effects of warfare.¹⁷ Respect of cultural property requiring states firstly, to desist from using cultural property, its nearest environs or instruments installed for its protection in any manner likely to leave cultural property vulnerable to destruction. Additionally, states are required to desist from projecting any hostilities toward cultural

¹⁵ Protocol 1 to the Hague Convention, Art 1.

¹⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, Art.2.

¹⁷ Ibid, Art.3.

property.¹⁸ Further, states are required to outlaw pilfering of cultural property, in addition to desisting from sequestrating cultural property of another state.¹⁹ For cultural property in an occupied jurisdiction, occupying authorities are mandated to assist local authorities to ensure conservation of cultural property.²⁰ Occupying powers are also required to outlaw sequestration of cultural property from the jurisdiction they occupy. However, where this has happened, occupying powers are required to facilitate their return.²¹

Occupying powers are obligated to stop any illegal sale of cultural chattels and archaeological excavation except where it is necessary to conserve cultural property and lastly they have an obligation to prevent any attempts at modifying cultural property with the aim of sabotaging historical evidence.²² However, if any of the aforementioned must be performed by occupying powers in the interest of cultural property, then the convention mandates that the action be performed in collaboration with the local authorities.²³ Military necessity can be asserted in waiving the general protection regime.²⁴ The host state can utilize protected cultural heritage for military intentions where there is no conceivable fall-back option to achieve a comparable military edge.²⁵ The hostile party is permitted to direct militant activity on protected cultural heritage only where it has been converted into a military objective and there is no workable possibility to achieve a comparable military edge.²⁶

3.2 Special Protection

The special protection regime is complementary and is aimed at providing an advanced level of protection to cultural property. This protection level

¹⁸ Ibid, Art.4 (1).

¹⁹ Ibid, Art. 4(3).

²⁰ Ibid, Art. 5.

²¹ Protocol for the Protection of Cultural Property in the Event of Armed Conflict 1954, Art. I (3).

²² Second Protocol to the Convention for the Protection of Cultural Property 1999, Art.9 (1).

²³ Ibid.

²⁴ Techera, *Supra* note 5.

²⁵ *Supra*, note 22 Art. 6.

²⁶ Ibid.

grants immunity to cultural property from acts of militancy projected to it and from utilization for any military purposes.²⁷ This protection is granted to safe havens providing safety to cultural property during hostilities. These safe havens must be found at a prudent reach from military objectives and must not be utilized for military intentions.²⁸ However, where a safe haven is located near a military objective, special protection can still be accorded to them if the state seeking its special protection agrees to refrain from using it for military purposes.²⁹ Properties under special protection are identified by a distinctive emblem that is shaped as a shield pointing downward that is repeated thrice.³⁰

3.3 Enhanced Protection

Enhanced protection grants immunity to cultural property from being the subject of hostile attack and both the use and their environs to advance military action.³¹ No exception is acceptable with respect to this duty imposed on state parties.³² This protection is accorded to cultural property that satisfies the following standard: the cultural property must be of substantial cultural significance to mankind, be safeguarded by ample local laws and administrative mechanisms aimed at ensuring greater protection which demonstrates the property's extraordinary cultural and historic significance and lastly that the property is not utilized for any military intentions and further that the state party hosting the property has declared that the property shall not be used for military intentions.³³

Enhanced protection is accorded by the Committee for the Protection of Cultural Property in the Event of Armed Conflict, at the behest of a member state or of the International Committee of the Blue shield or other NGOs with the appropriate competence.³⁴ There is an exception for cultural property

²⁷ *Supra*, note 16 Art. 9.

²⁸ *Ibid*, Art. 8.

²⁹ *Ibid*, Art. 8(5).

³⁰ *Ibid*, Art. 17 (a).

³¹ *Supra*, note 22 Art. 12.

³² ICRC, *Cultural Property fact sheet* (ICRC Advisory service on International Humanitarian Law, 2014).

³³ *Supra*, note 22 Art. 10.

³⁴ *Ibid*, Art.11 (3).

granted special protection on grounds of military necessity.³⁵ Cultural heritage accorded amplified protection lose their protection and consequently be the object of hostile engagement where it is the only workable means to prevent its use for military intentions. However all practicable safeguards must be taken to diminish damage to the property.³⁶

1.0 Shortcomings of the Legal Framework in the Protection of Cultural Heritage

4.1 The Hague Convention 1954

The Convention on the Protection of Cultural Property in the Event of Armed Conflict, 1954 provided an exhaustive legal framework for cultural property preservation and protection during international and civil wars and covered both immovable and movable property. The meaning attributed to Cultural Property is viewed to be narrow as compared to that of Cultural heritage in relation to tangible property. This leaves out spiritual sites like shrines that are neither archeological sites, nor movable or immovable property from protection by the Convention.

Article 8 of the Convention provides for unique protection that is only given to property that are located away from industrial areas and that which is not to be used for any military activities.³⁷ Further, property with special protection should be registered in the International Register of Cultural property under Special Protection. This makes it hard to utilize the protection due to the practical difficulties and stringent requirements. There is also no proper definition of *military necessity* therefore many countries use it as an excuse or defense in case cultural heritage is damaged from the activities of the military.³⁸ The Convention has not provided for an overriding body to ensure the implementation of the Convention. There is no mechanism set by the Convention that makes it possible for the crimes to be brought forward before international courts because it is not a war crime.³⁹

³⁵ Techera, *Supra*, note 5.

³⁶ *Supra*, note 22 Art.13.

³⁷ *Supra*, note 13.

³⁸ Techera, *Supra* note 5.

³⁹ *Supra*, note 13 Article 28.

4.2 Protocol I and II of the Geneva Convention 1949

Protocol I and II of the Geneva Convention 1949 are also called Geneva P1 and Geneva PII respectively were ratified following the Vietnam War. These Protocols refer to cultural property as civilian property. One of the main setbacks is that they did not give cultural property a better protection as compared to civilian property. The UNESCO and other organizations came up with a report after reviewing the Hague convention. The Boylan Report led to the development of a protocol, *Lauswolt Document* which then became the Second Protocol to the Hague Convention 1954.⁴⁰ The Hague P2 was more precise with the definition of military necessity also established individual criminal responsibilities for those who breach the provisions of the Protocol.

5.0 Special Protection of the Environment

The effects of warfare today go beyond human suffering or damage to infrastructure. While the main focus of IHL is the safety of people during warfare, the environment which is of great importance to everyone is also subject to protection during warfare.⁴¹ The environment is protected during war for various reasons. One, to guarantee the survival and protection of the population, the environment has to be protected too in order to ensure human survival.⁴² Two, for humanitarian law to effectively cater to the protection of the special groups such as the wounded, the sick or the prisoners of wars, the environment has to be safe.⁴³ Thirdly, when the environment and its resources are destroyed during war, peace becomes hard to achieve because people revert to conflicts over the limited resources that remain to be shared among the population.⁴⁴

In war, the environment has always been protected according to customary international humanitarian law in regards to the principles on conduct of

⁴⁰ Patrick Boylan, 'Implementing the 1954 Hague Convention and its Protocols; Legal and Practical implications' pg. 3.

⁴¹ Sharp Walter, 'The Effective Deterrence of Environmental Damage during Armed Conflict: A Case Analysis of the Persian Gulf War', 37 *Mil. L. Rev.* 1 (1992).

⁴² Jahidul Islam, 'The Protection of Environment during Armed Conflict: A Review of International Humanitarian Law (IHL)', 2019.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

hostilities.⁴⁵ The environment has always been regarded as civilian object and as such cannot be the target unless turned into a military objective, and even so the principle of proportionality is applied in military necessity.⁴⁶ Concerns over targeting the environment during war, first peaked during the Vietnam War in 1961/1971. The use of Agent Orange by the USA led to massive deforestation and chemical contamination. The international outcry saw the creation of instruments that sought to protect the environment. The ENMOD Convention of 1977 together with The Additional Protocol I, prohibit the use of warfare that damages the environment.

The massive destruction of over 600 oil reservoirs during the Persian Gulf War called out the implementation of the instruments put in place to protect the environment. Actions by Iraqi army led to extensive pollution, resulting to the largest oil spill in history.⁴⁷ The devastating effects of the oil spill are considered to be ecological terrorism because of the harmful pollutants it left in the environment.⁴⁸ In 1992, after the Persian Gulf War, United Nations General Assembly debated environmental protection during war and concluded countries must put in place necessary measures to guarantee adherence to the provisions of environmental conservation during armed conflict by the military.⁴⁹ After the debate the ICRC issued guidelines in 1994 that were to be incorporated in military manuals and national legislations, to ensure there is adequate awareness on environmental conservation during armed conflict.

In the 21st century, environmental destruction still happens even with the rules that guide environmental protection. The conflict between Israel and Lebanon saw the disposal of approximately 15000 tons of oil into the

⁴⁵ Yoram Dinstein, 'The Conduct of Hostilities under the Law of International Armed Conflict' (3rd edn, Cambridge University Press, 2016).

⁴⁶ Tara Smith, 'Critical perspectives on environmental protection in non-international armed conflict: Developing the principles of distinction, proportionality and necessity. *Leiden Journal of International Law*', 32(4), 759-779.

⁴⁷ Thomas M. Hawley, 'Against The Fires of Hell: The Environmental Disaster of the Gulf War' (Harcourt Brace Jovanovich, 1992).

⁴⁸ Jacqueline Michel, 'Gulf War Oil Spill' in *Oil Spill Science and Technology*, Gulf Professional Publishing, 2010, p.1127.

⁴⁹ United Nations General Assembly 47/37 (9th Feb 1993) UN DOC A/RES/47/37.

Mediterranean Sea.⁵⁰ Lebanon was left facing major long term public health hazards. ⁵¹ Such situations indicate that with existing legal provisions on environmental conservation during armed conflict, enforcement remains an issue.

6.0 Protection of the Environment during Armed Conflict

Since its early development, the law of war has concentrated on restraining belligerents' conduct to abate human injury and fatalities.⁵² However, the results of war are rarely confined to human fatalities, as evident in the wake of events like the Persian Gulf War.⁵³ As such, since the 20th century, IHL has provided conservation of the environment during war. Crucially, the protection of the natural environment also follows the general obligations of states under international law. As articulated by the ICJ in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, "the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."⁵⁴ Accordingly, this section outlines how the environment is protected during armed conflicts, first by treaty law, then by customary IHL.

6.1 Treaty Law

6.1.1 The Fourth Geneva Convention 1949

The Fourth Convention concerning the Protection of Civilians provides for environmental conservation during armed conflict. Article 53, for example,

⁵⁰ Andriy Shevtsov, "Environmental Implications the 2006 Israel-Lebanon conflict" ICE Case Studies, No. 216, 2007. <http://www1.american.edu/ted/ice/lebanon-war.htm>.

⁵¹ Ibid.

⁵² Arie Afriansyah, 'The Adequacy of International Legal Obligations for Environmental Protection during Armed Conflict' (2013) 1 *Indonesia Law Review* 55.

⁵³ Christopher C. Joyner and James T. Kirkhope, 'The Persian Gulf War Oil Spill: Reassessing the Law of Environmental Protection and the Law of Armed Conflict' (1992) 4 *Case W. Res. J. Int'l L.* 29.

⁵⁴ Roman Reyhani, 'Protection of the Environment During Armed Conflict' (2006) 14 *Mo. Env'tl. L. & Pol'y Rev.* 323.

states that “any destruction by the occupying power of real or personal property belonging individually or selectively to private persons, or to the state, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.” Article 147 also prohibits the “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.” The inclusion of ‘real property’, which includes land and anything affixed to it, as well as collectively owned property like forests, provides some protection for the environment during war.

6.1.2 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (ENMOD) 1977

This Convention protects the environment by proscribing the utilization of environmental modification techniques having ‘extensive, severe or long-lasting effects’,⁵⁵ as a weapon during armed conflict. “Widespread” means a region of several hundred square kilometers; “long-lasting” means a number months or a season; and “severe” means grave or substantial interference or injury to life, or economic or natural resources. Article 2 provides that ‘environmental modification techniques’ are any methods for altering, through the intentional modification of natural processes, the structure, composition or dynamics of the Earth, comprising its outer space, hydrosphere, atmosphere and biota. This Convention’s negotiation and taking effect were triggered by the indignation over the US’s use of chemical herbicides to remove forest and plant cover to enhance visibility and sever enemy supply lines, termed as defoliation, in the Vietnam War.⁵⁶ Even after the Convention, such as in the Persian Gulf War in 1991, belligerents still resorted to using the environment as a weapon through such techniques, which accentuates the Convention’s necessity.⁵⁷ ENMOD, by prohibiting such actions with ‘extensive, severe or long-lasting effects’, provides for environmental protection during war.

⁵⁵ ENMOD Convention 1977, Article 1.

⁵⁶ Reyhani, *Supra* note 54.

⁵⁷ Joyner & Kirkhope, *Supra* note 53.

6.1.3 Additional Protocol I, 1977 to the Geneva Convention

Articles 35(3) and 55 of the Protocol present a positive step in IHL, by expressly forbidding the environment from being a military target for the first time. Article 35(3) forbids the use of means or methods of war which are planned, or are expected, to produce “widespread, long-term and severe” harm to the environment. Article 55 obliges belligerents to take precaution in war to shield the environment from “widespread, long-term and severe” harm. The Article also proscribes attacks “against the natural environment by way of reprisals”.

It suffices to note that the Protocol sets a higher threshold for the environmental damage needed to prohibit certain attacks or methods/means of war.⁵⁸ ENMOD states that techniques causing “widespread, long-lasting or severe” effects are forbidden, while Additional Protocol I uses the terms “widespread, long-term and severe damage”. The use of “and” implies that all 3 elements should be fulfilled for the Protocol to apply, which is alleged to be the reason Iraq’s forces cannot be brought to books for their actions in the Gulf War.⁵⁹ Further, the Protocol also defines ‘long-term’ as 10 years, which is higher than ENMOD’s definition of ‘long-lasting’ as months or a season; while it lacks a clear definition of the terms widespread and severe, unlike ENMOD. Nonetheless, the Protocol is a vital development in international humanitarian law as pertains environmental protection.

6.1.4 Certain Conventional Weapons Convention, 1981 and its Protocols

This Convention’s first mention of the environment is in the preamble, which reiterates, in similar terms to Article 35(3) of Additional Protocol I, the proscription of means and methods of warfare which are planned or expected to produce “widespread, long-term and severe” environmental harm. The similarity in wording suggests that the conservation of the environment during war is emerging as a principle of customary international law as well. Regrettably, the insertion of this obligation in the preamble resulted in two countries, the US & France, to express a reservation to the Convention.⁶⁰ As

⁵⁸ Nils Melzer & Etienne Kuster, *International Humanitarian Law: A Comprehensive Introduction* (International Committee of the Red Cross, 2019) 96.

⁵⁹ Afriansyah, *Supra* note 52.

⁶⁰ Reyhani, *Supra* note 54.

such, this provision in the Preamble, as well as its counterpart in Additional Protocol I, does not apply universally, which is inauspicious for environmental protection. Its Third Protocol, in Article 2(4), also forbids States from making plant and forest cover the objects of “attack by incendiary weapons” unless in cases where the plant/forest cover are used for or are themselves a military objective.⁶¹ This provides an additional measure of environmental preservation in times of armed conflict.

6.1.5 Rome Statute, 1998

The Rome Statute, which outlines the four core international crimes falling under the ICC’S jurisdiction: genocide, war crimes, crimes of aggression and crimes against humanity,⁶² also contains environmental protection provisions during war. Specifically, Article 8 recognizes that deliberately initiating combat knowing that such attack will culminate in “widespread, long-term and severe” environmental harm, which would be manifestly unproportional to the expected military advantage, as a war crime. As such, the Statute imposes individual criminal responsibility for attacks causing environmental harm, thereby providing an enforcement mechanism, through the ICC, for those who violate the provision.⁶³

6.2 Customary IHL

The International Committee of the Red Cross (ICRC) has also identified several rules of customary IHL relating to the natural environment. These include:

6.2.1 Rule 43: Principles on the Conduct of Hostilities to Apply to the Environment

As ICRC notes, state practice indicates that this rule has attained the status of customary international law, in both non-international and international armed conflicts.⁶⁴ The principles on the conduct of hostilities which apply to protect the environment include distinction, necessity and proportionality.

⁶¹ Ibid.

⁶² Rome Statute of the International Criminal Court 1998, Article 5.

⁶³ Reyhani, *Supra* note 54.

⁶⁴ Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law. Volume I: Rules* (Cambridge University Press 2005) 143.

Regarding distinction, this principle obliges belligerents to distinguish military objectives from civilians, and consequently, to target their operations only against military objectives.⁶⁵ The natural environment is to be regarded as a civilian object, and as such, cannot be targeted unless it meets the requirements of a military objective. This is also reflected in the Guidelines on the Protection of the Environment in Times of Armed Conflict, which the UNGA advises all UN member states to integrate into their military manuals.⁶⁶ The obligation not to target or use the environment unless it is a military objective is also reflected in treaties, including Protocol III to the 1981 Certain Conventional Weapons Convention.

As regards necessity, this principle requires belligerents to only undertake actions and use means/methods of war that are reasonably requisite to attain military objectives.⁶⁷ According to state custom, this principle applies similarly to the natural environment, and is reflected in the Guidelines on the Protection of the Environment in Times of Armed Conflict, alongside the national laws and military manuals of numerous states.⁶⁸ Article 53 of the Fourth Geneva Convention, as previously indicated, also contains an identical provision. As regards to proportionality, this principle requires belligerents to avoid attacks causing incidental harm to civilians and/or civilian objects if the damage is manifestly disproportionate to the anticipated military advantage.⁶⁹ As evidence of its practice, this principle is recognized in the Guidelines on the Protection of the Environment in Times of Armed Conflict, and is also contained in treaty law, such as Article 8 of the Rome Statute. Further, in the ICJ's *Nuclear Weapons* Advisory Opinion, the Court stated that States should consider environmental concerns when assessing what is proportionate and necessary in the pursuit of justified military objectives.⁷⁰

⁶⁵ Additional Protocol I 1977, Article 48.

⁶⁶ Henckaerts & Doswald-Beck, *Supra* note 64.

⁶⁷ Melzer & Kuster, *Supra* note 58.

⁶⁸ Henckaerts & Doswald-Beck, *Supra* note 64.

⁶⁹ Melzer & Kuster, *Supra* note 58.

⁷⁰ Nuclear Weapons case, *Advisory Opinion* [1996].

6.2.2 Rule 44: Precautions to Minimize Environmental Harm

State practice indicates that this rule, which applies in both non-international and international armed conflicts, has three components. The first obliges states to ensure that they use means and methods of war with appropriate regard to the preservation and protection of the environment. This obligation's general acceptance is reflected in several military manuals, as well as international agreements like the Rio Declaration, and the Guidelines on the Protection of the Environment in Times of Armed Conflict.⁷¹

The second component requires States to take precautionary measures to reduce environmental destruction in their military undertakings. This principle is also contained in the military manuals of countries like the US.⁷² The third component, termed as the precautionary principle, states that the lack of scientific proof regarding the environmental impacts of specific military operations does not release belligerents from the obligation of implementing appropriate measures to avert unnecessary damage.⁷³ Regarding its practice, in the ICJ's *Nuclear Weapons Case* advisory opinion, the court stated that the precautionary principle applies in armed conflicts, including in the use of nuclear weapons.⁷⁴

6.2.3 Rule 45:

- (i) the use of means/methods of war that are planned or expected to produce "widespread, long-term and severe" environmental harm is proscribed.**
- (ii) destruction of the environment should not be used as a weapon.**

The ICRC notes that this rule has attained the status of customary international law in both non-international and international conflicts. As regards the first part of the rule, it is reflected in Additional Protocol I Article 35(3), and is also incorporated into the military manuals of countries like Argentina, Italy and Spain.⁷⁵ However, certain States, including the US, UK

⁷¹ Ibid.

⁷² Ibid 149.

⁷³ Ibid 150.

⁷⁴ Ibid.

⁷⁵ Henckaerts & Doswald-Beck, *Supra* note 64.

and France, are persistent opposers with reference to the operation of this part of the rule to the usage of nuclear weapons.⁷⁶ Accordingly, they expressed reservations to this provision when ratifying Additional Protocol I, and as such, Article 35(3) of Additional Protocol I is only of a customary status to these states with regard to conventional weapons, but not nuclear weapons.⁷⁷

Pertaining to the second part of this rule, state custom shows that the prohibition of environmental destruction as a weapon has attained customary international law status. This is also reflected in the Guidelines on the Protection of the Environment in Times of Armed Conflict.⁷⁸ This rule is also manifest in the ENMOD Convention, which proscribes the usage of environmental manipulation techniques having ‘extensive, severe or long-lasting effects’,⁷⁹ as a means of harm during armed conflict. While there is no certainty as to whether the Convention’s provisions have attained the status of customary international law, there is enough consensus and uniform practice that destroying the environment as a weapon is prohibited.⁸⁰

7.0 Conclusion

Notably, cultural heritage is at the heart of human existence. Its preservation even in times of war is sacrosanct. Indeed, the culture of a people is the mooring to which their identity is anchored, without which they are lost. Besides, how can a community know where they are going, if they do not know where they are coming from. It is thus critical for states to take positive and tangible steps to ensure environmental conservation and protection during war within the ambit of the existing international legal framework.

⁷⁶ Ibid 151.

⁷⁷ Reyhani, *Supra* note 54.

⁷⁸ Henckaerts & Doswald-Beck, *Supra* note 64.

⁷⁹ *Supra*, note 55 Article 1.

⁸⁰ Henckaerts & Doswald-Beck, *Supra* note 64.

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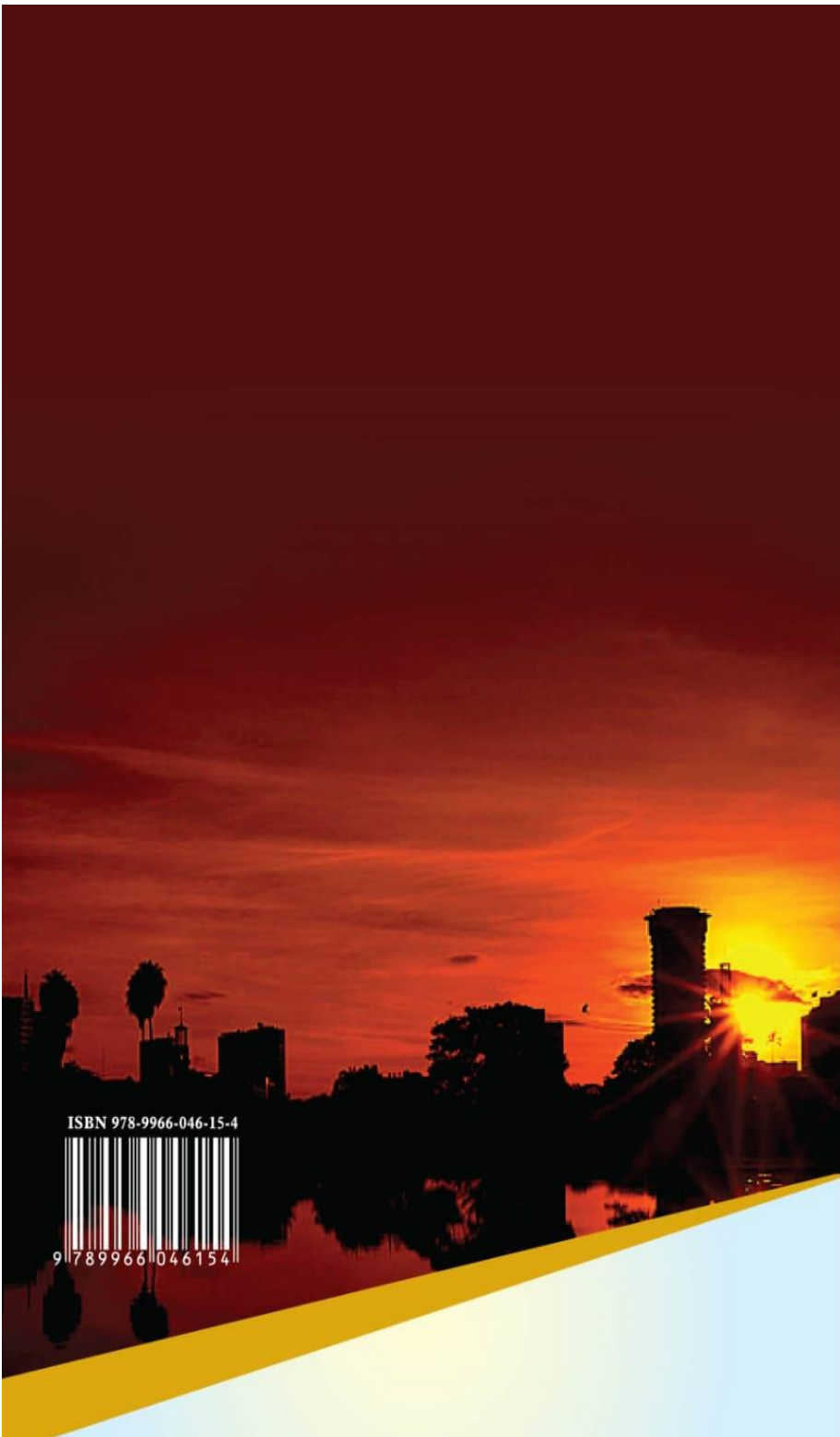
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