International law and governance of natural resources in conflict and post-conflict situations

Dam-De Jong, D.A.

Concluding remarks to Part II

This part of the book examined the legal framework governing the exploitation of natural resources in situations of armed conflict. Chapter 5 showed that the foundations of the general legal framework for the governance of natural resources are only partially affected in situations of armed conflict. The ILC draft articles on the effects of armed conflict on treaties show a strong presumption in favour of the continued applicability of both international human rights and environmental treaties. Furthermore, the rules for the suspension of treaties, as well as the circumstances precluding wrongfulness, are sufficiently stringent to preclude any easy ways out. However, there are other factors that affect the operation of international human rights and environmental treaties in situations of armed conflict. First, human rights treaties provide for the possibility of derogating from obligations in situations of public emergency. This means that domestic governments can, for example, derogate from provisions on public participation in these treaties. Secondly, international environmental treaties often contain clauses that are lenient with regard to States implementing their obligations. Such clauses call on States to implement their obligations as far as this is appropriate or depending on their capabilities.

As a minimum requirement, States remain bound by their core obligations under these treaties. These include a prohibition against depriving a people of its means of subsistence under the 1966 Human Rights Covenants, as well as a prohibition against inflicting harm on particular natural resources that are protected under relevant environmental conventions, including the 1972 UNESCO World Heritage Convention and the 1992 Convention on Biological Diversity. Furthermore, States remain bound by their obligations under customary international law. These include the principle of permanent sovereignty and the inherent condition that a government must exercise permanent sovereignty for national development and the well-being of the population, as well as the principle of sustainable use, which qualifies the right of States to exploit their natural resources, even in situations of armed conflict.

One major deficiency of international human rights and environmental law is that these fields of international law do not contain direct obligations for armed groups. Furthermore, their obligations are only partially relevant for the conduct of foreign States in situations of armed conflict. Therefore Chapter 6 has addressed the role of international humanitarian law in providing relevant rules. It demonstrated that on the whole, international humanitarian law does not directly address issues related to the exploitation of natural

resources by parties to an armed conflict. This is different only for the situation of occupation, which does contain express rules for occupants relating to the exploitation of natural resources. The key provision in this respect is Article 55 of the 1907 Hague Regulations, which provides occupants with a right to usufruct on the natural resources situated in occupied territory. According to the right of usufruct, occupants are allowed to exploit natural resources in occupied territory for two purposes: 1) to cover the costs of civilian administration, within reasonable limits and in proportion to the available natural resources; and 2) for other purposes benefitting the population living in occupied territory.

Rules that apply to other States with a military presence on the territory of a foreign State, as well as to armed groups, must be derived from more general provisions relating to the protection of property and civilian objects. Protection of natural resources is provided first of all by the prohibition against pillage, which prohibits the taking of property for personal gain. Furthermore, parties to an armed conflict are prohibited from taking or destroying property that belongs to a hostile party for military purposes, except in situations of "imperative military necessity". Although the categories of situations to which the exception of "imperative military necessity" applies are not expressly listed, an exception can be made only if the following conditions are met: 1) there must be a reasonable connection between the taking or destruction of property and the accomplishment of a military advantage; and 2) there must be a degree of urgency. It is particularly this degree of urgency that is absent in the majority of cases involving the exploitation of natural resources by parties to an armed conflict.

In internal armed conflicts, the international humanitarian law prohibitions mainly focus on armed groups. However, this asymmetry of obligations for armed groups and the government is not a problem when considered in a broader context, and in particular in the light of the view that governments remain bound by the general framework for the exploitation of natural resources. The virtual absence of provisions protecting the environment in international humanitarian law is more problematic.

There are only two provisions that expressly prohibit parties to an armed conflict from causing damage to the environment. They prohibit parties to an armed conflict from causing long-term, widespread and severe damage to the environment. It has been argued that these provisions suffer from two major deficiencies. The first is that they apply only to international armed conflict. The second is that they set a cumulative threshold for environmental damage, which means that the provisions apply only to environmental damage that is widespread, long-term *and* severe. This is a very high threshold, even when it is interpreted in the light of modern developments in international environmental law.

Other provisions that are relevant for the protection of the environment include the above-mentioned prohibition against taking or destroying the

property of a hostile party, except in cases of imperative military necessity, and the prohibition against destroying or rendering useless objects that are considered indispensable to the civilian population. Chapter 6 has demonstrated that the protection provided to the environment by these provisions is far less than what is necessary to prevent environmental degradation.

Two main conclusions can be drawn from these findings to address the challenges involved in resource-related armed conflicts. First, it is necessary to develop clear rules for the commercial exploitation of natural resources in situations of armed conflict. Secondly, there is a need for adequate rules for the protection of the environment in situations of armed conflict, particularly internal armed conflicts. These rules can mainly be based on existing international law, but new rules also need to be developed.

The task of evaluating the existing rules and developing new rules can best be assigned to the International Law Commission (ILC). Despite the lengthy procedures involved in drafting its articles, it is the only international body that combines expertise in all the relevant fields of international law with an official mandate to progressively develop and codify international law. The ILC could undertake this work as part of its study on the 'Protection of the Environment in Relation to Armed Conflicts', a topic which it recently included in its programme of work.[153] Special Rapporteur Marie Jacobsson proposed to include in this study an analysis of the existing rules applicable in situations of armed conflict, with a particular emphasis on internal armed conflicts.[154] As regards the development of new rules, the Special Rapporteur indicated that "it was suggested that it was not the task of the Commission to modify … existing legal regimes [regulating the law of armed conflict]".[155] It is argued however that the task of the ILC includes to progressively develop international law. Therefore, the ILC should not limit its work to an analysis of the existing rules, but should also progressively develop those rules.

This book suggests that the mandate of the ILC should first of all include the clarification of the implications of the existing rules of international humanitarian, environmental and human rights law for the commercial exploitation of natural resources during armed conflict, an issue that has not been systematically addressed in existing legal instruments. The ILC should address several questions, including the meaning of "imperative military necessity" in relation to the prohibition against appropriating or destroying the property of a hostile party under international humanitarian law. What does this exception entail? Does it include the exploitation of natural resources to provide for the basic needs of hostile parties? Arguably, it does not. It is only when natural

153 See International Law Commission, Report on the work of its sixty-fifth session (2013), *UN Doc. A/68/10*, Chapter IX.

154 *Ibid*., para. 136 and 141.

155 *Ibid*., para. 136.

resources can be directly consumed, such as firewood, that the condition of urgency is satisfied.

Furthermore, the ILC should assess the existing rules in their totality, *i.e.*, it should take the existing rules from international humanitarian, human rights and environmental law together. All too often the rules of international humanitarian law are looked at in isolation when assessing activities that take place in situations of armed conflict. However, rules from international human rights and environmental law are equally important, especially when assessing the rights and obligations of domestic governments in relation to the exploitation of natural resources. Chapters 5 and 6 have shown that international humanitarian law primarily creates obligations for non-state armed groups and foreign States, while international human rights and environmental law create obligations for domestic governments and, to a lesser extent, for foreign States as well. For the sake of clarity and comprehensiveness, it is therefore essential to list all the relevant rules, not only those of international humanitarian law.

In addition, the ILC should clarify the position of armed groups in relation to the exploitation of natural resources in situations of armed conflict. The relevant provisions of international humanitarian law applicable to internal armed conflicts formulate an absolute prohibition for armed groups against exploiting natural resources. However, as soon as a conflict is internationalised, armed groups which are recognised as belligerents by third States or acting under the control of a foreign State, become subject to the law applicable to international armed conflict. For those armed groups that control portions of a State's territory, this means that they are granted a limited right to exploit natural resources under international occupation law. From an environmental and human rights perspective, a case could be made for the elimination of this distinction for armed groups that satisfy the criteria of Additional Protocol II. These armed groups should be accorded a right similar to that of occupants, whether or not the armed conflict is internationalised. It is then at the discretion of the UN Security Council to decide whether exploitation activities pose a risk to international peace and security in specific instances and therefore must be prevented altogether.

This position is reflected to some extent in the Kimberley Process Certification Scheme for the Certification of Rough Diamonds, discussed in Chapter 8. This Scheme defines "conflict diamonds" as "rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council resolutions…".[156] This definition implies that the determination of what constitutes "conflict diamonds" is left to the discretion of the UN Security Council.

156 Kimberley Process Certification Scheme, Section I.

Furthermore, the major advantage of taking occupation law as a point of reference for rules regulating the behaviour of armed groups in control of portions of the State territory is that this field of law is well developed and is susceptible to interpretation in the light of relevant human rights and environmental norms. Some rights are accorded to armed groups in this way, but at the same time, these armed groups must also meet stringent obligations. Arguably this balancing of rights and obligations is the best way to provide protection to the environment and the civilian population in territories that are controlled by armed groups. Furthermore, granting armed groups some rights may give these groups a positive incentive to respect the corresponding obligations.

Finally, the ILC should evaluate the existing rules for the protection of the environment in internal armed conflict and formulate proposals to improve these rules. One of the major gaps in the existing rules relate to the absence of binding rules for armed groups in relation to environmental protection. Arguably, governments remain bound by international environmental law, but armed groups are not. Therefore, the ILC should examine the extent to which existing rules of international humanitarian law protect the environment and develop new rules in relation to environmental damage caused by acts of warfare. It is argued that the prohibition against destroying the property of an adversary provides basic protection to the environment, but this protection needs to be improved. The proposals for the adoption of a fifth Geneva Convention on the protection of the environment or of a "green" Additional Protocol could be taken as a starting point for the ILC in this respect.

Most relevant for the purposes of the present study, the ILC should define the implications of existing rules for preventing more serious environmental damage caused by the exploitation of natural resources by parties to an armed conflict, including the provisions of the 1977 Additional Protocols relating to the protection of objects indispensable to the civilian population. For example, do these rules cover situations such as the poisoning of groundwater as a result of irresponsible dumping of chemical substances used in the mining sector? Arguably, they do cover such situations if the poisoning of groundwater results in the starvation or forced movement of people. It is essential that the ILC sheds some light on these issues and develops the law in this field.