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

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6 Protection of natural resources and the environment under international humanitarian law

6.1 Introductory Remarks

The law of armed conflict – or international humanitarian law (IHL) – regulates the conduct of parties to an armed conflict. It limits the methods and means that parties to an armed conflict may use to weaken the adversary and it provides rules that aim to limit the effects of warfare on vulnerable groups, in particular the civilian population as well as persons that no longer take part in hostilities. In other words, IHL primarily regulates the use of violence by parties to an armed conflict.[1] This specific focus of IHL is decisive for the way in which this field of international law addresses activities relating to the exploitation of natural resources by parties to an armed conflict. It also immediately reveals the limits of IHL in this respect.

The exploitation of natural resources by parties to an armed conflict is not an act of war in itself, but rather, an activity that sustains conflict. Natural resources provide parties to an armed conflict with the means to finance their armed struggle. Therefore IHL appears to be ill suited to regulate the exploitation of natural resources by parties to an armed conflict, in contrast with occupation law, which has a different aim, namely to define the rights and obligations for occupants as *de facto* State authorities. This field of IHL does include rules defining the rights of an occupant with regard to the natural resources situated in occupied territory.

The limits of IHL for the scope of this book are also evident from its environmental provisions. The few international humanitarian law provisions which were specifically designed to protect the environment during armed conflict focus on the effects of military operations on the environment.[2] Their

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1 See the following definition provided by the International Committee of the Red Cross (ICRC), which defines IHL as "the branch of international law limiting the use of violence in armed conflicts by: a) sparing those who do not or no longer directly participate in hostilities; b) restricting it to the amount necessary to achieve the aim of the conflict, which – independently of the causes fought for – can only be to weaken the military potential of the enemy". See M. Sassòli; A.A. Bouvier & A. Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, Third Edition, Volume I, Geneva: ICRC (2011), p. 1.

2 Articles 35 (3) and 55, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, *1125 UNTS 3*. Besides these provisions, mention must be made of the Convention

purpose is to prevent "widespread, long-term and severe" damage to the environment resulting from acts of warfare.[3] They were not designed to protect the environment against other threats resulting from the conduct of parties to an armed conflict, such as environmental damage resulting from the exploitation of natural resources by parties to an armed conflict. Furthermore, it should be noted that these provisions were adopted in 1977, when modern international environmental law was at an early stage of development.

Despite all these apparent limitations, IHL is important for the protection of natural resources and the environment during armed conflict. First, it is the only field of international law that contains directly binding obligations for non-state armed groups. In addition, it is the primary field of international law that is applicable to States which occupy or intervene militarily in other States.

Therefore the current chapter examines the few provisions of IHL which are relevant for the protection of natural resources and the environment during armed conflict. These are Article 23 (g) of the 1907 Hague Regulations, containing a prohibition against destroying or seizing the property of the enemy, Article 28 of the 1907 Hague Regulations, Article 33 (2) of the 1949 Geneva Convention IV and Article 4 (2) (g) of the 1977 Additional Protocol II to the Geneva Conventions on the prohibition against pillage, Article 55 of the 1907 Hague Regulations defining the right of usufruct of an occupant, Article 54 of the 1977 Additional Protocol I and Article 14 of the 1977 Additional Protocol II on the protection of objects indispensable to the survival of the civilian

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on the prohibition of military or any other hostile use of environmental modification techniques (ENMOD), concluded on 10 December 1976 in New York (entry into force: 5 October 1978), *1108 UNTS 151*. This convention aims to prevent the environment being used as a weapon.

3 For proposals regarding current Article 55 of Additional Protocol I, see *CDDH/III/60* of 19 March 1974 (Proposal by Australia to insert a new provision Article 49 bis in Additional Protocol I) and *CDDH/III/64* of 19 March 1974 (Proposal by Czechoslovakia, the German Democratic Republic and Hungary to add a new paragraph to Article 48 of Additional Protocol I). For proposals with regard to current Article 35 (3) of Additional Protocol I, see *CDDH/III/108* of 11 September 1974 (Amendment by the German Democratic Republic to Article 33 of Protocol I); *CDDH/III/222* of 24 February 1975 (Amendment by the Arab Republic of Egypt, Australia, Czechoslovakia, Finland, German Democratic Republic, Hungary, Ireland, Norway, Sudan, Yugoslavia to Article 33 of Additional Protocol I) and *CDDH/III/238* and Add. 1 of 25 February 1975 (Amendment by the Democratic Republic of Vietnam and Uganda to Article 33 of Additional Protocol I). *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. III, p. 220, 155-157. For a proposal regarding the insertion of a new paragraph to current Article 14 of Additional Protocol II, see *CDDH/III/55* of 19 March 1974 (proposal by Australia to insert a new provision Article 28 bis in Additional Protocol II). *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. IV, Amendments, p. 91.

population, and finally, Articles 35(3) and 55 of the 1997 Additional Protocol I on the protection of the natural environment.

The current chapter aims to determine to what extent international humanitarian law contains rules that prohibit the illicit exploitation, looting and plundering of natural resources by parties to an armed conflict and address the related environmental damage. Of course, as explained above, IHL was not specifically designed to address instances of natural resources exploitation by parties to an armed conflict. As a specialised branch of international law, IHL is however part of the broader system of international law. This implies that it must be interpreted and applied in the light of the relevant rules of general international law and other specialised branches of international law. International environmental and human rights law in particular can be instrumental in filling the gaps in IHL. This applies particularly for international environmental law, as the standards set by this field of law are more specific and more recent than those set by international humanitarian law.

Before embarking on an in-depth analysis of substantive international humanitarian law, section 2 analyses the classical dichotomy made in international humanitarian law between international and non-international armed conflicts from the perspective of resource-related armed conflicts. Section 3 then discusses the relevant rules of IHL, while section 4 takes a closer look at the Martens clause as a means of integrating rules from international human rights and environmental law in the law of armed conflict. Finally, section 5 assesses the protection provided by IHL to natural resources and the environment.

6.2 QUALIFICATION OF THE LEGAL SITUATION

International humanitarian law makes a fundamental distinction between international and non-international armed conflicts. The classification of a conflict as international or non-international determines which law is applicable to the conflict. Article 2 common to the 1949 Geneva Conventions defines "international armed conflict" as a situation of "declared war or […] any other armed conflict which may arise between two or more of the High Contracting Parties" or a situation of "total or partial occupation of a territory". Article 3 common to the 1949 Geneva Conventions defines "non-international armed conflict" as an armed conflict "occurring in the territory of one of the High Contracting Parties".

Most of the armed conflicts discussed in this chapter are internal in nature. However, some are internationalised through the intervention of foreign States. This intervention is sometimes direct, in the sense that the foreign State sends its army into the territory of another State. This is what Uganda and Rwanda did during the 1990s, when they entered the territory of the DR Congo and even occupied parts of the DR Congo's territory. However, the intervention

can also be indirect, in the sense that a foreign State provides support to armed groups engaged in an internal armed conflict. Again, Rwanda serves as an example. A recent report by the Group of Experts on the DR Congo revealed Rwanda's support for armed groups operating in the DR Congo.[4] Liberia's support for the RUF between 1998 and 2002 is another example of a State providing indirect support to armed groups.

The extent to which foreign States are involved in an internal armed conflict determines whether it is qualified as an international or internal conflict. The current section examines this distinction between internal and international armed conflicts. It looks in particular at the following questions. What constitutes an internal armed conflict? When can such an armed conflict be deemed to become internationalised? What are the legal implications of the distinction between internal and international armed conflicts?

6.2.1 Internal armed conflict

For a long time, internal armed conflicts were not subject to international regulation. These conflicts were considered to fall within the *domaine réservé* of the State concerned.[5] The treatment of insurgents was left to the discretion of the incumbent government, which could freely choose whether or not to

4 Group of Experts on the DR Congo, Addendum to the Interim report of the Group of Experts on the DRC submitted in accordance with paragraph 4 of Security Council Resolution 2021 (2011), *UN Doc. S/2012/348/Add.1* of 27 June 2012.

5 See J. Pictet and O.M. Uhler, *The Geneva Conventions of 12 August 1949: Commentary, Part 4 on the Geneva Convention relative to the protection of civilian persons in time of war*, Geneva: International Committee of the Red Cross (1958), pp. 26-30. There is one early instrument that regulates internal armed conflict, but this is a State's military manual rather than a legal instrument. The *Instructions for the Government of Armies of the United States in the Field (General Orders No. 100)* of 24 April 1863, also known as the 'Lieber Code', contains a section X on 'insurrection, civil war and rebellion'. For reasons of "humanity" rather than out of a sense of legal obligation, this section proposed to apply the rules of international armed conflict to the situation of internal armed conflict. This is reflected in Article 52, one of the key provisions of Section X, which provides as follows: "When humanity induces the adoption of the rules of regular war to ward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgement of their government, if they have set up one, or of them, as an independent and sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgment of the revolted people as an independent power". On this subject, see L. Perna, *The formation of the Treaty Law of Non-International Armed Conflict*, International Humanitarian Law Series, Vol. 14, Leiden/Boston: Martinus Nijhoff Publishers (2006), pp. 31-33 and L. Moir, *The Law of Internal Armed Conflict*, Cambridge: Cambridge University Press (2002), p. 19. The Lieber Code is available through the International Humanitarian Law Database of the ICRC. See <http://www.icrc.org/ihl>.

grant its opponent rights by conferring belligerent status on him.[6] Third States were prohibited altogether from interfering in these "internal affairs", which were subject to domestic regulation.[7]

This gradually changed during the course of the nineteenth century, when the duty of non-interference started to give way to the doctrine of recognition of belligerency. If the hostilities in the armed conflict had attained a certain level, close to that of an international armed conflict, third States declared recognition of belligerency to both parties, thus bringing into effect the corpus of international humanitarian law.[8] Recognition of belligerency required careful consideration, as the legal conditions were stringent and the legal consequences of premature or unfounded recognition could be severe.[9]

This is the background against which the delegations at the 1949 Geneva Diplomatic Conference negotiated a special provision applicable to internal armed conflicts which was to be inserted in all four Conventions. Article 3 common to the 1949 Geneva Conventions offered protection to all persons taking no active part in hostilities – including members of armed groups, whether they were recognised by their government or not.

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6 On the subject of recognition of belligerency, see H. Lauterpacht, *Recognition in International Law*, Cambridge: Cambridge University Press (1947), pp. 175-200; E.H. Riedel, 'Recognition of Belligerency', R. Bernhardt, *Encyclopedia of Public International Law*, Vol. IV, Max Planck Institute for Comparative Public Law and International Law, Amsterdam: Elsevier (2000), pp. 47-50; L. Perna, *The Formation of the Treaty Law of Non-International Armed Conflict*, International Humanitarian Law Series, Vol. 14, Leiden/Boston: Martinus Nijhoff Publishers (2006), pp. 29-30; and L. Moir, The Law of Internal Armed Conflict, Cambridge: Cambridge University Press (2002), pp. 4-11. In most cases, the incumbent government was not willing to grant its opponents belligerent status, because it would give them extensive rights. See L. Perna, *The Formation of the Treaty Law of Non-International Armed Conflict*, International Humanitarian Law Series, Vol. 14, Leiden/Boston: Martinus Nijhoff Publishers (2006), p. 30.

7 Lauterpacht points to a resolution of the Institute of International Law, adopted in 1900, which clearly states that "every third Power, at peace with an independent nation, is bound not to interfere with the measures which this nation takes for the re-establishing of internal peace". See *Resolutions of the Institute*, Carnegie Endowment (1916), p. 156, quoted in H. Lauterpacht, *Recognition in International Law*, Cambridge: Cambridge University Press (1947), p. 230.

8 See H. Lauterpacht, *Recognition in International Law*, Cambridge: Cambridge University Press (1947), p. 175-176 and E.H. Riedel, 'Recognition of Belligerency', R. Bernhardt, *Encyclopedia of Public International Law*, Vol. IV, Max Planck Institute for Comparative Public Law and International Law, Amsterdam: Elsevier (2000), p. 47. Lauterpacht mentions the following conditions (p. 176): "First, there must exist within the State an armed conflict of a general (as distinguished from a purely local) character; secondly, the insurgents must occupy and administer a substantial portion of national territory; thirdly, they must conduct the hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency".

9 Premature or unfounded recognition constituted and internationally wrongful act against the incumbent government. See H. Lauterpacht, *Recognition in International Law*, Cambridge: Cambridge University Press (1947), p. 176.

Article 3 common to the 1949 Geneva Conventions defines internal armed conflicts as armed conflicts "occurring in the territory of one of the High Contracting Parties". There was considerable discussion about this definition during the drafting of common Article 3.[10] According to the Commentary on the Geneva Conventions, some States feared that the term "conflict not of an international character" might be interpreted as covering any act committed by force of arms, including minor insurgencies or even plain banditry.[11] Therefore several delegations proposed inserting amendments containing conditions for the applicability of the Conventions. These amendments were concerned with various aspects, including recognition of belligerency, the form of organization of armed groups and even the recognition by the Security Council that the dispute constituted a threat to international peace, a breach of the peace or act of aggression.[12] Ultimately, none of these amendments were included in the Conventions, leaving a large measure of flexibility for the provision to apply.

Thus what constitutes an internal armed conflict for the purposes of Article 3 is left wide open. However, as was clear from the start, a certain threshold must be met for Article 3 to apply. In this respect the Commentary on the Geneva Conventions states that "it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities […] In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front".[13] The ICRC description indicates that there are specific requirements relating to the organization of the parties to the conflict and the intensity of the violence. Both requirements were identified and elaborated upon in subsequent case law of international criminal tribunals, in particular in the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY).

In this respect the ICTY's *Tadić case*, which defined a non-international armed conflict as "*protracted* armed violence between governmental authorities and *organized* armed groups or between such groups within a State" was a landmark case.[14] This definition was subsequently inserted in Article 8 of the ICC

10 For a full account of the drafting history of Article 3, see A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge: Cambridge University Press (2010), pp. 27-51.

11 See J. Pictet and O.M. Uhler, *The Geneva Conventions of 12 August 1949: Commentary, Part 4 on the Geneva Convention relative to the protection of civilian persons in time of war*, Geneva: International Committee of the Red Cross (1958), p. 35.

12 *Ibid.*, pp. 35-36.

13 *Ibid.*, p. 36.

14 International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-A, Appeals Chamber Decision of 2 October 1995, para. 70. Emphasis added.

Statute, dealing with war crimes.[15] The term "protracted armed violence" has become the standard for assessing the intensity of the violence. In order to distinguish armed conflict from internal disturbances, the violence must be carried out over a longer period of time. The violence must exceed sporadic acts of violence, but it does not have to involve sustained military operations.[16] As regards the degree of organization of armed groups, reference can be made to indicators such as the command structure and the operational effectiveness of the group.[17]

All the conflicts discussed in the current book satisfy these requirements. In many resource-related armed conflicts, non-state armed groups even control a portion of State territory, in particular those regions where natural resources are located. Examples include the conflict in Côte d'Ivoire between 2002 and 2007, where the *Forces Nouvelles de Côte d'Ivoire* occupied most of the northern part of the country. The Revolutionary United Front (RUF) in Sierra Leone also exercised control over a region of Sierra Leone bordering Liberia, where most of the diamonds are located.

This means that these conflicts are governed by the rules stipulated in Article 3 common to the 1949 Geneva Conventions. This provision contains a set of fundamental rules for parties to an internal armed conflict regarding the humane treatment of persons taking no active part in hostilities. In the words of the International Court of Justice, these rules reflect "elementary considerations of humanity", which can be interpreted as a recognition of their customary international law status.[18] The rules formulated in Article 3 of the Geneva Conventions apply automatically and without any requirement of reciprocity.[19] Other provisions of the Geneva Conventions apply only to non-

15 Article 8(2)(f) of the ICC Statute defines internal armed conflicts as "armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups". In the case against Thomas Lubanga, the ICC Trial Chamber clarified the concept of 'non-international armed conflict' for the purposes of the ICC Statute. See International Criminal Court, The Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, *ICC-01/04-01/06-2842*, paras. 534-538.

16 For a full discussion of relevant case law and literature, see A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge: Cambridge University Press (2010), pp. 122-133.

17 *Ibid*.

18 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), judgment of 27 June 1986, *I.C.J. Reports* 1986, para. 218.

19 In general, see E.H. Riedel, 'Recognition of Belligerency', R. Bernhardt, *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law, Amsterdam: Elsevier (2000), Vol. IV p. 47-50. See also J. Pictet and O.M. Uhler, *The Geneva Conventions of 12 August 1949: Commentary, Part 4 on the Geneva Convention relative to the protection of civilian persons in time of war*, Geneva: International Committee of the Red Cross (1958), p. 35.

international armed conflicts with the express consent of all parties to the armed conflict.[20]

In order to increase the humanitarian protection offered by the common Article 3 of the 1994 Geneva Conventions, a second Protocol to the Geneva Conventions was adopted in 1977 after extensive negotiations. Today, Additional Protocol II has been ratified by the majority of States, including nearly all States which have been involved in resource-related armed conflicts in the last decades.[21] Based on the rules provided by common Article 3, the more detailed provisions of Additional Protocol II on the treatment of prisoners and civilians significantly raise the level of protection for these categories of persons.

At the same time, Additional Protocol II sets a much higher threshold for application than the common Articles 3. While Article 3 common to the 1949 Geneva Conventions is generally assumed to apply to all internal conflicts, whether the State army is involved or not, Additional Protocol II applies only to situations of armed conflict between governments on the one hand, and non-state armed groups on the other. In addition, the conflict must take place within the territory of the government concerned. Finally, armed groups must be "under responsible command" and "exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations".[22]

This degree of organization of armed groups that is required can pose difficulties in practice. Even if an armed group exercises control over part of the State territory, it may not have an adequate command structure or be unable to carry out "sustained and concerted" military operations.[23] In the DR Congo in particular, many different armed groups are active. Some of these are highly organised, but many do not satisfy the criteria set by Additional

20 The common Article 3 to the Geneva Conventions urges parties to conclude "special agreements" by means of which they bring into operation "all or part of the other provisions of the Geneva Conventions".

21 As of November 2012, Protocol II has been ratified by 166 States. For an overview of the State parties to Protocol II, see <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView> (consulted on 8 November 2012). It must be noted that the United States has not ratified the Protocol, but it did sign it. For its negotiating history, see D. Momtaz, 'Le droit international humanitaire applicable aux conflits armés non internationaux', in *Recueil des cours*, Vol. 292 (2001), pp. 30-33. Momtaz argues that the reason for many states to have ratified the Protocol in recent years is due to the formation of new customary rules which have made the provisions of Protocol II rather obsolete. At the same time, it could be argued that the formation of customary rules similar to the rules incorporated in the Protocol may also confirm the Protocols' legal significance. Its provisions may then to a certain extent be considered an expression of customary law.

22 Article 1, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, *1125 UNTS 609*.

23 Also see D. Momtaz, 'Le Droit International Humanitaire Applicable aux Conflits Armés Non Internationaux', *Recueil des Cours,* Vol. 292 (2001), pp. 49-51.

Protocol II. This leads to confusing situations, where different rules apply in the relationship between the State and different armed groups. The situation becomes even more complex when foreign States are involved. This situation is examined below.

6.2.2 International armed conflict

Article 2 common to the 1949 Geneva Conventions defines "international armed conflict" as a situation of "declared war or […] any other armed conflict which may arise between two or more of the High Contracting Parties" or a situation of "total or partial occupation of a territory". A large body of international humanitarian law applies to these situations, including the 1907 Hague Conventions, the 1949 Geneva Conventions, the 1977 Additional Protocol I to the 1949 Geneva Conventions, as well as a large number of specialised conventions. Some of the rules contained in these instruments apply to international armed conflicts in general, while other rules are specific to the situation of invasion or occupation respectively.

The definition of international armed conflict as set out in Article 2 of the 1949 Geneva Conventions is quite straightforward. An armed conflict is international when two or more States are fighting each other and/or when a State occupies (part of) the territory of another State. However, for the purposes of the present book the definition is not so clear. In the late 1990s, for example, Uganda and Rwanda were invited by the Congolese government to enter its territory in order to fight irregular Ugandan and Rwandese armed groups operating from Congolese territory. However, these States decided to stay in the DR Congo after the government had requested them to leave, and even occupied parts of Congolese territory.

How should this situation be characterised? There are no particular problems as regards the term "occupation". Occupation is a factual situation which is determined on the basis of the transfer of *de facto* State authority.[24] As soon as a State exercises *de facto* authority in a particular region, the law on occupation applies. However, in other parts of Congolese territory, the classical definition does pose some difficulties. Uganda and Rwanda were not actually fighting the Congolese government, but were actually fighting armed groups launching attacks on these countries from Congolese territory. Does this mean that the law on international armed conflict does not apply?

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24 Article 43 of the 1907 Hague Regulations, annexed to Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, determines in this regard: "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country".

The International Court of Justice had the opportunity to pronounce on this issue in the case concerning *Armed Activities in the Territory of the Congo* (hereafter: the Congo-Uganda case), at least in relation to Uganda.[25] In that case, the Court considered whether Uganda was responsible for acts committed by its troops during its military intervention in the DRC. In this respect the Court concluded that "a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces".[26] Therefore it found that Uganda was "internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members in the territory of the DRC".[27] Provisions of IHL mentioned by the Court were all part of the body of law regulating international armed conflict. This case implies that a State intervening in a foreign State is bound by the law regulating international armed conflict, even if the foreign State is not its opponent as such.

An internal armed conflict can also be internationalised as a result of a State providing support to armed groups, either directly, by means of armed intervention on behalf of a non-state armed group, or indirectly, in the form of financial and strategic military support for operations of armed groups.[28] In the case of indirect intervention, a conflict can be qualified as international if it is determined that the armed group is acting on behalf of the foreign State.

There are two different criteria to establish whether an armed group is acting on behalf of a foreign State. To determine the criminal responsibility of individuals, the International Criminal Tribunal for the former Yugoslavia introduced the "overall control' test. In the 1999 *Tadić Case* the ICTY determined that an armed group can be considered to act on behalf of a State when that State exercises general strategic control over the operations of the armed group.[29] This is the case when the foreign State "*has a role in organizing, co-ordinating or planning the military actions* of the military group, in addition to

25 It must be noted that a similar case instituted by the DR Congo against Rwanda was dismissed on the basis of jurisdiction. See International Court of Justice, Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo *v.* Rwanda), Judgment of 3 February 2006, *I.C.J. Reports 2006*, p. 6.

26 International Court of Justice, Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo *v.* Uganda), Judgment of 19 December 2005, *I.C.J. Reports 2005*, para. 214.

27 *Ibid.*, para. 220.

28 See D. Fleck (ed.), *The Handbook of International Humanitarian Law*, Second Edition, Oxford: Oxford University Press (2008), p. 606; and J. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict', *International Review of the Red Cross*, Vol. 85, No 850 (2003), p. 315. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, paras. 402-406.

29 International Criminal Tribunal for the former Yugoslavia, The Prosecutor v. Dusko Tadić, *Case No. IT-94-1-AR72*, Appeals Chamber Judgment of 15 July 1999, para. 131.

financing, training and equipping or providing operational support to that group".[30]

By introducing this test, the ICTY departed from the more stringent "effective control' test introduced by the International Court of Justice in the 1986 *Nicaragua Case*. This test was established to determine the responsibility of a State for the actions of an armed group; in other words, to determine whether an armed group was acting as a *de facto* State organ. According to the "effective control' test, a State is responsible only for those violations of international law committed by an armed group in the course of military operations over which the State exercised effective control.[31]

In the 2007 *Genocide Case* the International Court of Justice pronounced on the relationship between the two tests. The Court considered that the effective control test must be applied in order to attribute responsibility to a State for actions committed by an armed group. However, to determine "whether or not an armed conflict is international', the ICJ stated that the overall control test "may well be applicable and suitable".[32] According to the Court, each test has its own purpose. In this respect it considered that:

> "the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict".[33]

Thus a conflict can be characterised as being international if it is established that a State is exercising overall control over the operations of an armed group, which means that the State has a role in organizing, co-ordinating or planning the military actions.

However, the following question arises regarding the implications for the law that is applicable in a conflict between a government and an armed group that is supported by a third State. In the *Military and Paramilitary Activities in and against Nicaragua* case, the International Court of Justice made a clear distinction between two conflict situations:

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30 *Ibid*., para. 137. Emphasis in original. These criteria have been confirmed in other cases before the ICTY as well. See *e.g.* International Criminal Tribunal for the former Yugoslavia, The Prosecutor v. Dario Kordić and Mario Čerkez, *Case No. IT-95-14/2-A*, Appeals Chamber Judgment of 17 December 2004, paras. 306-308.

31 International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United states), Judgment of 27 June 1986, *I.C.J. Reports 1986*, para. 115.

32 International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, *I.C.J. Reports 2007*, paras. 402-406.

33 *Ibid*., para. 405.

> "The conflict between the Contras' forces and those of the Government of Nicaragua is an armed conflict which is "not of an international character". The acts of the Contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts".[34]

Thus the case implies that indirect third State intervention does not alter the classification of the conflict between the State and the opposing armed group. Arguably, this definition cannot be distinguished from the earlier conclusion reached by the Court that the United States did not exercise effective control over the Contras. If the Court had reached a different conclusion on the issue of control, it might well have reached a different conclusion regarding the classification of the armed conflict.

Case law does not fully clarify the implications of indirect State intervention on the law applicable to the relationship between a State and a rebel group. The Special Court for Sierra Leone, for example, did not deal in any of its cases with the question whether the support from the Liberian President Charles Taylor internationalised the armed conflict in Sierra Leone, although there was sufficient evidence of Taylor's financial and strategic involvement in the operations of the RUF. In these cases it was not necessary to deal with the question of the internationalisation of the armed conflict, because the Statute of the SCSL does not distinguish between crimes committed in the course of an international or an internal armed conflict.

The ICC has dealt with the issue in a few cases, especially in the case against Thomas Lubanga, the leader of a Congolese rebel group that received support from Uganda. In an early decision, the ICC Pre-trial Chamber discussed the issue extensively. The Chamber applied the overall control test of the ICTY to the situation. It also relied on the judgment of the ICJ in the Congo-Uganda case to establish that Uganda had effectively intervened in the armed conflict in the DR Congo, turning it into an international armed conflict. The Pre-trial Chamber decided to apply Article 8(2)(b) of the ICC Statute on war crimes committed in the context of an international armed conflict, to Lubanga's acts committed between July 2002 and June 2003, when Uganda occupied parts of Congolese territory.[35]

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34 International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Merits, Judgment, *I.C.J. Reports,* 1986, para. 219.

35 See International Criminal Court, The Prosecutor v. Thomas Lubanga Dyilo, Pre-Trial Chamber I, Decision of on the confirmation of charges, 29 January 2007, *ICC-01/04-01/06-803-tEN*, paras. 205-226. The Pre-trial Chamber made a similar determination in the cases against Katanga and Chui, more than a year later. See International Criminal Court, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, *Case No. ICC- 01/04-01/07-717*. Also see R. Heinsch, *Yearbook of International Law and Jurisprudence*, Volume I, Oxford: Oxford University Press (2009), pp. 394-403.

However, the Trial Chamber reversed the earlier judgment of the Pre-trial Chamber. Although it stated that the "overall control' test was decisive for establishing whether armed groups were acting under the control of a foreign State, the Trial Chamber decided that it had not been demonstrated that either Rwanda or Uganda exercised sufficient control over the Congolese rebel groups to turn the conflict into an international armed conflict.[36] Arguably the decision of the Trial Chamber can be interpreted as providing support for the thesis that indirect third State intervention changes the relationship between the government and an armed group. In these situations, the law applicable to international rather than internal armed conflicts applies. However, the decision also demonstrates that the evidentiary standards are high.

The last way in which an internal armed conflict can be internationalised is when third States grant recognition to an armed group as a formal belligerent. The theory of recognition of belligerency has become outdated as a result of the adoption of rules regulating the situation of internal armed conflict. Since the adoption of the 1949 Geneva Conventions, internal armed conflicts are no longer considered to be a matter of domestic concern, but are properly regulated under international law. However, even today, recognition of belligerency is more than a theoretical option. Chapter 2 argued that the recognition of the opposition forces as the official representative of the people by a large number of States, both in the recent armed conflict in Libya in 2011 and in the ongoing armed conflict in Syria, can be considered as acts of recognition of belligerency by these States. These examples show that recognition of belligerency is still one of the principal ways in which an internal armed conflict can be internationalised.

6.2.3 The relevance of the distinction between international and internal armed conflicts

The relevance of the distinction between international and internal armed conflict has declined in recent years. Three developments have been instrumental in bridging the gaps between the rules applicable to international and internal armed conflicts. The first development concerns the harmonisation of the treaty rules relevant to both types of armed conflict, especially those relating to the use of weapons in international and internal armed conflicts. Since the 1990s several conventions prohibiting the use of certain weapons have either been amended to encompass the situation of non-international conflict or have been amended with an express provision to this effect. Relevant examples include the 1993 Chemical Weapons Convention and the 1997 Anti-

36 International Criminal Court, The Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, *ICC-01/04-01/06-2842*, paras. 541-542 (on the law) and 552-567 (on the facts).

Personnel Mines Convention, which prohibit "in any circumstances" the development, production, stockpiling, transfer and use of chemical weapons or of anti-personnel mines respectively.[37] Both types of weapons are particularly harmful to the environment and seriously hamper post-conflict reconstruction.

Furthermore, in 2001, the scope of application of the 1980 Convention on Certain Conventional Weapons and its five protocols was extended to the situation of non-international armed conflict.[38] The 1996 Amended Protocol II on Mines, Booby-Traps and Other Devices and the 1980 Protocol III on Incendiary Weapons are particularly relevant for the protection of the environment during armed conflict.[39] Protocol III on Incendiary Weapons, for example, includes an express prohibition against making "forests or other kinds of plant cover the object of attack by incendiary weapons".[40]

More relevant to the current study, however, is the second development, viz. the crystallisation of relevant treaty rules into customary international law. There has been increasing recognition in recent years that particular rules applicable to international armed conflicts have also become applicable to internal armed conflicts. An important study by the ICRC on customary international humanitarian law demonstrated that many rules regulating international armed conflict are applied to internal armed conflicts as well.[41] Although the ICRC study is contentious in some respects and therefore cannot be relied upon directly, it provides a wealth of information regarding the application of IHL in practice.[42]

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37 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 13 January 1993, *1974 UNTS 45*, Article 1; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention), 18 September 1997, *2056 UNTS 241*, Article 1.

38 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, 10 October 1980, *19 ILM 1823* (1980).

39 Protocol II to the 1980 Conventional Weapons Convention on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996, 3 May 1996, *35 ILM 1209 (1996)*; Protocol III to the 1980 Convention on Conventional Weapons on Prohibitions or Restrictions on the Use of Incendiary Weapons, 10 April 1981, *1342 U.N.T.S. 171*.

40 Article 2(4) of Protocol III.

41 See J.M. Henckaerts & L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, International Committee of the Red Cross, Cambridge: Cambridge University Press (2005), Vols. I & II.

42 Criticism on the methodology has been voiced notably by the United States. See Joint letter from John Bellinger and William Haynes to Jakob Kellenberger on Customary International Law Study, *46 ILM 514 (2007)*. For critical assessments of the study, see M. Bothe, 'Customary International Humanitarian Law: Some Reflections on the ICRC Study', *Yearbook of International Humanitarian Law,* Vol. 8 (2005), pp. 143-178; E. Newalsing, 'Customary International Humanitarian Law', *Leiden Journal of International Law,* Vol.21(1) (2008), pp. 255-279.

In this respect the case law of international criminal tribunals is especially relevant. This case law has applied and interpreted rules of IHL in the context of particular conflict situations. While the post-war criminal tribunals dealt exclusively with international armed conflict, many of the present day international criminal tribunals deal with internal armed conflicts as well. Examples include the International Tribunal for the Former Yugoslavia (ICTY), the Special Court for Sierra Leone (SCSL) and, of course, the International Criminal Court (ICC).

The interpretation of rules of IHL by these international criminal tribunals is closely linked to the third development that has been instrumental in bridging the gaps between the law applicable to international and internal armed conflicts. This development is related to the evolution of international criminal law as a distinct branch of international law. Not all of the war crimes listed in Statutes of international criminal tribunals that apply to situations of internal armed conflict are directly based on express provisions in international humanitarian law conventions.

One example concerns the war crime of destroying or seizing the property of an adversary, unless such destruction or seizure be imperatively demanded by the necessities of the conflict, as codified in Article 8(2)(e)(xii) of the Rome Statute of the International Criminal Court (ICC Statute).[43] This war crime, which applies to internal armed conflicts, follows from Article 23(g) of the 1907 Hague Regulations, applicable only to international armed conflicts. There is no IHL equivalent for this war crime related to internal armed conflicts. In this way, international criminal law can be said to progressively develop international humanitarian law as well.

6.3 INTERNATIONAL HUMANITARIAN LAW PROTECTION OF NATURAL RESOURCES AND THE ENVIRONMENT

This section assesses the protection afforded by international humanitarian law to natural resources and to the environment against (the effects of) the exploitation and plundering of natural resources. Protection is provided primarily by provisions on the protection of property and civilian objects.

This section starts with the provisions on the protection of property and in particular with the prohibition against pillage, which is the most cited provision in relation to the plundering of natural resources by parties to an armed conflict. It argues that the prohibition against pillage is primarily applicable to the plundering of natural resources for the purposes of self-enrichment. It then turns to the prohibition against destroying or seizing property to see if this provision can fill the gap left open by the prohibition

43 Rome Statute of the International Criminal Court, adopted on 17 July 1998 (entry into force: 1 July 2002), *2187 UNTS 90*.

against pillage. Furthermore, this section discusses the right of an occupant to exploit natural resources on the basis of *usufruct*.

The section goes on to discuss two provisions which provide protection to civilian objects. It looks at the extent to which the prohibition against attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population provides residual protection to natural resources because of their significance to the civilian population. Secondly, it examines to what extent the duty of care with regard to protecting the natural environment includes environmental damage caused by the exploitation of natural resources by parties to an armed conflict.

It should be noted that the rules of international humanitarian law which have a bearing on the exploitation of natural resources are deficient in several respects. The most important deficiency is their lack of precision. They are not specifically designed to address instances of natural resource exploitation by parties to an armed conflict. This is partly due to the fact that most of the rules of the law of armed conflict predate important developments in international environmental law which qualified the right of States to exploit natural resources. It is therefore important to interpret the relevant rules of international humanitarian law in the broader context of public international law and, more specifically, to take more recent developments in international law into account in the interpretation of the provisions.

Therefore the current section interprets the provisions of international humanitarian law in the light of relevant provisions of international human rights and environmental law. The means of interpretation used in this section include a dynamic-evolutionary method to interpret treaty terms, as well as the systemic method of interpretation to interpret the substantive rules contained in the provisions, as described in the introduction to this book.

6.3.1 The protection of property

International humanitarian law conventions contain several provisions aimed at protecting property against unjustified destruction or appropriation by parties to an armed conflict. In international law property can be broadly defined to include movable and immovable, as well as public and private property.[44] In addition, the case law of the Nuremberg Tribunal established that property includes both physical and intangible property.[45] The term 'property' is therefore sufficiently broad to capture all types of natural

44 See Y. Sandoz, C. Swinarski and B. Zimmermann (ed.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht: Nijhoff Publishers (1987), p. 1376.

45 See the *I.G. Farben* case, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, vol. VIII (1952), p. 1134.

resources, whether state owned or privately held, extracted natural resources or natural resources which have not yet been removed, as well as rights relating to the exploitation of natural resources, such as concessions.

The term 'property' is presumed to cover natural resources. Despite the lack of a formal definition, the conventions provide sufficient indications to support this. Article 55 of the 1907 Hague Regulations, for example, expressly defines forests as properties. Moreover, the relevant provisions have all been considered to be applicable to the protection of the environment.[46] *Mutatis mutandis* they must also cover materials which are part of that environment.

The current book proposes making a further distinction between natural resources *in situ* and *ex situ*.[47] As long as the natural resources are not extracted (*in situ*), they are part of the environment and therefore qualify as immovable property. However, as soon as they have been extracted (*ex situ*), natural resources become tangible objects and therefore fall into the category of movable property. This means that the exploitation of natural resources is governed by the rules concerning immovable property, while the rules on movable property regulate the (il)legality of the appropriation of natural resources which have already been extracted.

Prohibition against pillage

The prohibition against pillage is codified in Articles 28 and 47 of the 1907 Hague Regulations, Article 33 (2) of 1949 Geneva Convention IV and Article 4 (2) (g) of 1977 Additional Protocol II. Some of these provisions are aimed at providing protection for particular persons, especially civilians and persons who no longer take part in hostilities, while others have a more general scope.[48] In addition, the prohibition has been recognised as having customary

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46 See the Report of the Secretary-General on the protection of the environment in times of armed conflict, *UN General Assembly Document A/48/269* of 29 July 1993, pp. 5-6; and the Memorandum on International Law Providing Protection of the Environment in Times of Armed Conflict, Annex to a Letter dated 28 September 1992 from the permanent missions of the Hasjemite Kingdom of Jordan and of the United States of America addressed to the Chairman of the Sixth Committee of the General Assembly, *UN Doc. A/C.6/47/3* of 28 September 1992.

47 See the 1956 judgment from the Court of Appeal of Singapore in the Singapore Oil Stocks Case, regarding the exploitation of oil in the Netherlands Indies by the Japanese occupant during the Second World War. In this case, the Court determined that crude oil in the ground constituted immovable property. N.V. De Bataafsche Petrolium Maatschappij & Ors. *v.* The War Damage Commission, Court of Appeal, Singapore, April 13, 1956, reprinted in the *American Journal of International Law*, Vol. 51 (1957), p, 809. For more details, see I. Scobbie, 'Natural Resources and Belligerent Occupation: Mutation Through Permanent Sovereignty', S. Bowen (ed.), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories*, The Hague: Martinus Nijhoff Publishers, International Studies in Human Rights (1997), pp. 235-237.

48 General protection is provided through Article 28 of the Hague Regulations, applicable to international armed conflicts, which provides that "the pillage of a town or place, even when taken by assault, is prohibited" and Article 47 of the Hague Regulations, applicable

international law status, both for international and non-international armed conflicts.[49]

Traditionally the prohibition against pillage was applied to acts of theft during armed conflict, either by individual soldiers or in the form of organized plundering.[50] The main purpose of the drafters of the 1907 Hague Regulations was to ban the practice of rewarding troops for their services by authorising them to loot villages and towns. The Nuremberg Tribunal cast the net much wider. The Tribunal applied the war crime of plunder to all forms of appropriation of public or private property – whether this concerns physical property or rights attached to property[51] – without the consent of the owner, in the context of an armed conflict. The prohibition against pillage is also the most cited provision in relation to the illegal exploitation, looting and plundering of natural resources by foreign troops and armed groups.[52]

The prohibition against pillage is one of the few provisions of IHL that prohibits the appropriation of a State's natural resources by parties acting without the consent of the State. However, despite the broad scope of the prohibition, it is important to remember its original purpose, which was to

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to occupation, which provides that "pillage is formally forbidden". Specific protection is provided to civilian persons through Article 33 (2) of Geneva Convention IV, applicable to international armed conflicts, and to civilians as well as persons who do not actively take part in hostilities through Article 4 (2) (g) of Additional Protocol II, applicable to non-international armed conflicts.

49 For international armed conflict, the customary nature of the prohibition stems primarily from its inclusion in the 1907 Hague Regulations, which have been affirmed to constitute customary law. The customary status of the Regulations has been affirmed by the International Court of Justice in its *Advisory Opinion on the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, *I.C.J. Reports 2004*, p. 172, para. 89, where the Court considered "that the provisions of the Hague Regulations have become part of customary law". For non-international armed conflict, both the Appeals Chamber of the ICTY and the SCSL have expressly held this prohibition to be part of customary law applicable to non-international armed conflict. ICTY, *Hadzihasanovic, Alagic and Kubura* (IT-01-47), Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal, para. 37; SCSL, *The Prosecutor vs. Moinina Fofana and Allieu Kondewa*, Appeal Chamber Judgment of 28 May 2008, para. 390.

50 See Y. Sandoz, C. Swinarski and B. Zimmermann (ed.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht: Nijhoff Publishers (1987), p. 1376; and G. Carducci, 'Pillage', in R.Wolfrum, Encyclopedia of Public International Law, Max Planck Institute for Comparative Public Law and International Law, Oxford: Oxford University Press (2012), Vol. VIII, pp. 299-304.

51 See the *I.G. Farben* case, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. VIII (1952), p. 1134.

52 See, *e.g.*, J.G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources*, New York: Open Society Justice Initiative Publication (2011); M.A. Lundberg, 'The Plunder of Natural Resources During War: A War Crime (?)' 39 *Georgetown Journal of International Law* Vol. 39, Issue 3 (2008, pp. 495-526; and L.J. van den Herik & D.A. Dam-de Jong, 'Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation during Armed Conflict', *Criminal Law Forum*, Vol. 22(3) (2011), pp. 237-273.

prohibit theft. The prohibition therefore contains an important restriction: it applies only to the appropriation of property for personal gain. This restriction is based on the system of international humanitarian law itself, which makes a distinction between "pillage" on the one hand, and "seizure" and "requisition" on the other. While pillage is prohibited in absolute terms, the seizure or requisition of property is permitted under particular circumstances. The ICRC Commentary to Article 33 of Geneva Convention IV explicitly states that the prohibition against pillage "leaves intact the right of requisition or seizure".[53]

This distinction is retained in international criminal law as well. The ICC Statute lists pillage on the one hand, and the destruction or seizure of the property of the hostile party outside a situation of military necessity on the other, as two separate war crimes.[54] Furthermore, the *Elements of Crime* defining the crimes listed in the ICC Statute restrict pillage to appropriation for private or personal use.[55] This interpretation of pillage is confirmed in the case law of the Special Court for Sierra Leone. According to the Appeals Chamber of the SCSL, 'pillage' refers to the appropriation of property for private purposes.[56] It is also in this context that the prohibition against pillage was considered by the International Court of Justice in the case of the DR Congo against Uganda. In that case, the DR Congo claimed that members of the Ugandan army had systematically exploited the DRC's natural resources for their personal benefit.[57] The International Court of Justice concluded that "whenever members of the UPDF were involved in the looting, plundering and exploitation of natural resources in the territory of the DRC", they acted in violation of the prohibition against pillage.[58]

There is no specific case law from modern international criminal tribunals which has determined that the war crime of pillage applies to the exploitation

53 J. Pictet and O.M. Uhler, *The Geneva Conventions of 12 August 1949: Commentary, Part 4 on the Geneva Convention relative to the protection of civilian persons in time of war*, Geneva: International Committee of the Red Cross (1958), p. 227.

54 See Article 8(2)(b)(xiii) and (xvi) and Article 8(2)(e)(v) and (xii) of the ICC Statute.

55 Elements of Crimes, *Official Journal of the International Criminal Court*, available at <www.icc-cpi.int/library/about/officialjournal/Element_of_Crimes_English.pdf> (last consulted on 1 August 2012). *Also see* K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, International Committee of the Red Cross (Cambridge University Press, Cambridge 2002).

56 Special Court for Sierra Leone, *The Prosecutor vs. Moinina Fofana and Allieu Kondewa*, Appeals Chamber Judgment of 28 May 2008, para. 392, note 770. The Appeals Chamber departed from the decision of the Trial Chamber on this point, which held that "the inclusion of the requirement that the appropriation be for private or personal use is an unwarranted restriction on the application of the offence of pillage". Special Court for Sierra Leone, *The Prosecutor vs. Moinina Fofana and Allieu Kondewa*, Trials Chamber Judgment of 2 August 2007, para. 160.

57 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, I.C.J., 19 December 2005, Judgment, *I.C.J. Reports* 2005, paras. 222-229.

58 *Ibid.*, para. 245.

of natural resources. Up to now, none of these tribunals has applied the provision to instances of natural resource exploitation. Despite the fact that the war crime could cover them, instances of pillage before modern international criminal tribunals have been limited to the appropriation of personal belongings of civilians, mainly in relation to the raiding of villages.[59] Even in the cases against Charles Taylor and the leaders of the RUF and the AFRC before the Special Court for Sierra Leone, where there was a close connection between the exploitation of natural resources and the committing of other crimes, the pillage of natural resources was not one of the charges.[60]

In the absence of modern case law from international criminal tribunals which may provide more specific guidance for the interpretation of pillage in relation to natural resources, it may be concluded from the judgment of the International Court of Justice in the *Congo-Uganda case* that the prohibition against pillage applies first and foremost to the exploitation of natural resources by members of rebel groups or foreign armies for the purpose of self-enrichment. Arguably, it applies equally to the misappropriation of natural resources or their proceeds by public officials of the domestic State, including members of the government or the State's armed forces, in view of the fact that natural resources belong to the State and not to its representatives. Furthermore, pillage may be interpreted broadly to include all appropriation of property that does not – directly or indirectly – serve a military purpose. As the case law of the Nuremberg Tribunal showed, appropriation of property by a foreign army to benefit the economy of the foreign State therefore also constitutes pillage. However, it seems less appropriate to apply the prohibition against pillage to the exploitation of natural resources for military purposes, including the funding of an armed conflict. In the light of the system of international humanitarian law as a whole, these instances are covered by the prohibition against seizing the property of the adversary, which is discussed in the following section.

Prohibition against destroying or seizing the property of a hostile party

Article 23 (g) of the 1907 Hague Regulations formulates a prohibition against destroying or seizing "enemy property" in situations of international armed conflict "unless imperatively demanded by the necessities of war". In addition, Article 53 of Geneva Convention IV contains an express prohibition for occupants against destroying "real or personal property belonging individually

59 For examples of relevant practice by international criminal tribunals, *see* the *ICRC Customary International Humanitarian Law Database*, Rule 52, available through www.icrc.org/customary-ihl/eng/docs/home (last consulted on 9 June 2013).

60 For a detailed discussion of the crime of pillage and its applicability to the exploitation of natural resources, *see* L.J. van den Herik and D.A. Dam-de Jong, 'Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation During Armed Conflict', *Criminal Law Forum*, Vol. 22(3) (2011), pp. 237-273.

or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations […], except where such destruction is rendered absolutely necessary by military operations".[61]

Although there is no express provision for internal armed conflicts, the applicability of the prohibition against destroying or seizing the property of a hostile party in internal armed conflicts can be deduced from international criminal law, and more specifically from Article 8(2) (e)(xii) of the ICC Statute, which criminalises the destruction and seizure of the property of an "adversary", unless such destruction or seizure be imperatively required by the necessities of the conflict. Both the ICTY and the SCSL also expressly determined that the prohibition against destroying the property of a hostile party is part of customary international law applicable to both international and non-international armed conflict.[62] By analogy, the customary international law status of the prohibition could also extend to the appropriation of property. Furthermore, as the customary international law prohibition addresses parties to an armed conflict in general, it can be interpreted to be binding on non-state armed groups.[63]

These provisions, as well as the system of international humanitarian law as a whole, imply that the prohibition against seizing or destroying the property of a hostile party is aimed at prohibiting the destruction or seizure of property only outside situations of military necessity. *Mutatis mutandis*, the prohibition formulates an indirect right for belligerents to destroy or seize the property of the hostile party when it is imperative from a military perspective.

It is important to note beforehand that the right for belligerents to destroy or seize particular property in cases of imperative military necessity does not depend upon the characteristics of the property itself. Whereas international humanitarian law generally distinguishes between civilian objects and military objectives, determining that civilian objects may not be the subject of attack, this distinction does not affect the application of the current provisions.

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61 One of the main differences between the two provisions is their formal scope of application. Whereas Article 23 (g) of the Hague Regulations applies to international armed conflict in general, including the situation of occupation, Article 53 of Geneva Convention IV applies exclusively to the situation of occupation. Thus the prohibition contained in Article 23 (g) extends to all phases of an armed conflict, while Article 53 of Geneva Convention IV does not bind a party to an armed conflict until he actually takes over the authority in (part of) its enemy's territory. After all, Article 42 of the Hague Regulations determines that "territory is considered occupied when it is actually placed under the authority of the hostile army".

62 International Criminal Tribunal for the Former Yugoslavia, *Kordić and Čerkez* case, Judgment of 26 February 2001, para. 205; Special Court for Sierra Leone, *The Prosecutor vs. Moinina Fofana and Allieu Kondewa*, Appeals Chamber Judgment of 28 May 2008, para. 390.

63 On the binding nature of customary international law in relation to non-state armed groups, see Chapter 1 of this study.

The question whether an object is civilian or military depends on the nature, location, purpose or use of the object. If the object does not make an effective contribution to military action by any of these factors, it may normally not be the subject of attack.[64] However, for the application of the current provisions, it does not matter whether or not the objects make an effective contribution to military action. The decisive criterion is the existence of a situation of imperative military necessity. In these circumstances, belligerents may seize or destroy the property of the hostile party, whether this property is a military objective or a civilian object. In this sense, it must be regarded as an exception to the general rule prohibiting the attack of civilian objects.

Given the exceptional nature of the right that ensues from the prohibition to seize or destroy the property of a hostile party, it is of great importance to carefully delineate the objects covered by the provisions and the circumstances that allow for the exception to be invoked. The first question that arises concerns the interpretation of the terms "enemy property" in international armed conflicts and "property of an adversary" in internal armed conflicts. Although both terms cover all types of property – whether movable or immovable, public or private[65] –there are important differences as regards the scope of the two terms. In international armed conflicts, all property situated within the territory of the "enemy" State is considered to be "enemy property" for the purposes of international humanitarian law. In other words, in international armed conflicts, belligerents are prohibited from seizing or destroying any property found within the territory of their adversary, including both publicly and privately owned property, unless the seizure or destruction is strictly necessary from a military perspective.

In internal armed conflicts, the situation is more complex, as ownership of the property must be determined by national law.[66] Where international law attributes ownership of natural resources to the State on the basis of the principle of permanent sovereignty over natural resources, it is for the State to decide on issues of ownership within the national context. In relation to

64 See section 6.3.2 of this chapter.

65 See Article 53 of Geneva Convention IV, which expressly prohibits the destruction of "real" and "personal" property. Also see the judgment of the Nuremberg Military Tribunal in the *Hostage case*, which determined that Article 23 (g) of the Hague Regulations applied to such diverse objects as "railways, lines of communication, or any other property that might be utilized by the enemy" as well as "private homes and churches". *Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Nuremberg, October 1946-April 1949, Vol. XI, Washington: Government Printing Office (1959), p. 1254.

66 According to Zimmerman, in the context of Article 8(2)(e)(xii) of the ICC Statute, the term "adversary" refers to "any person, who is considered to belong to another party to the conflict, such as the government, insurgents or, as article 8 para. 2(f) of the Statute demonstrates, belongs to an opposing organized armed group". A. Zimmerman, 'article 8 - para. 2 (e)', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999), margin no. 326-327, p. 284.

natural resources, many national constitutions vest the ownership of natural resources in the State, which is formally represented by the government. This means that in internal armed conflicts the prohibition against destroying or seizing the property of an adversary primarily covers natural resources that belong to the State or to private persons affiliated to the State. In other words, the prohibition against seizing or destroying natural resources, except in cases of imperative military necessity, will therefore primarily apply to non-state armed groups, provided that they are actually fighting the government.[67] Conversely, it also means that these armed groups can justify the seizure or destruction of natural resources in cases of imperative military necessity.

The second question that must be addressed concerns the interpretation of "imperative military necessity". The concept of military necessity can be traced back to the American Lieber Code of 1863, which defined military necessity as "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".[68] In other words, military necessity excuses actions that are otherwise prohibited if the relevant provision provides for such an excuse and if the actions would help the belligerent party to gain a military advantage.[69]

Although the concept of military necessity was inserted in all subsequent legal instruments regulating the conduct of hostilities, the definition was not retained. This makes it difficult to determine the precise contents and limits of the exception contained in the prohibition against seizing or destroying the property of the hostile party. Some guidance on the interpretation of military necessity can be found in the case law of the Nuremberg Tribunals. The exception of military necessity to excuse particular behaviour was invoked in several proceedings before the Nuremberg Tribunals. The tribunals also dealt with the interpretation of the phrase "imperative military necessity" as part of the prohibition against destroying or seizing the property of a hostile party.

Reference can be made in particular to the *Hostage case*, which dealt, *inter alia*, with charges against high-ranking officers in the German army for wanton destruction of cities, towns and villages, as well as other acts of devastation.

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67 Since natural resources generally do not belong to armed groups, a right to seize or destroy natural resources in cases of military necessity does not apply to conflicts between armed groups. *Mutatis mutandis*, the prohibition to seize or destroy the natural resources of the adversary does not apply to these situations either.

68 Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863. Available through <http://www.icrc.org/ihl.nsf>.

69 Of course, implicit in the notion of military necessity is further that property of the hostile party can be seized or destroyed solely for military purposes. See Y. Dinstein, 'Military Necessity', in R.Wolfrum, *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law, Oxford: Oxford University Press (2012), Vol. VII, p. 201-207, paras. 25-26. This requirement that the property is appropriated for military purposes is also what distinguishes the qualified prohibition to seize the property of a hostile party from the absolute prohibition of pillage.

In this case the Military Tribunal considered that "[m]ilitary necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations".[70] It also considered that the Hague Regulations require the military necessity to be "urgent" and that there must be a "reasonable connection between the destruction of property and the overcoming of the enemy forces".[71]

Two principal requirements can be derived from this case law. First, the seizure or destruction of property must make an effective contribution to military action.[72] Secondly, whether the seizure or destruction of property is permitted in particular circumstances depends on the urgency of the situation. The requirement of "urgency" concerns both the time element and the existence of alternatives to attain the objective. As regards the time element, reference can be made to the *Caroline* criteria generally used to assess the need for an act of self-defence. According to the *Caroline* criteria, military action can be justified if the necessity is "instant, overwhelming, leaving no choice of means and no moment for deliberation".[73] As regards proportionality, "urgency" means, at the very least, that the belligerent did not have any less injurious alternatives at his disposal to achieve the objective.[74] According to Otto Triffterer, military necessity even implies that "there are no other means to secure military safety".[75]

For the purposes of the present study, the excuse of imperative military necessity is of limited relevance to armed groups seeking to justify the appropriation or destruction of natural resources. The contribution of natural resources to an armed conflict is in most cases indirect, in the sense that they cannot be directly used in military operations or to guarantee the safety or

70 The Tribunal also recognised that destruction as an end in itself is a violation of international law. *Hostage case*, Judgment of 19 February 1948, Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10, Nuremberg, October 1946-April 1949, Vol. XI, Washington: Government Printing Office (1959), pp. 1253-1254.

71 *Ibid*. Also see O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999), margin no. 105, p. 232.

72 See International Criminal Tribunal for the Former Yugoslavia, Strugar Case, *Case No. IT-01-42*, Trial Judgment of 31 January 2005, para. 295. The Chamber defined "military necessity" with reference to the definition of military objects in Article 52 of Additional Protocol I to the Geneva Conventions, discussed in the following section.

73 Correspondence between Great Britain and the United States, respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat Caroline, March, April 1841.

74 See G. Werle & F. Jessberger, *Principles of International Criminal Law*, The Hague: T.M.C. Asser Press (2005), p. 340, margin no. 1003, who argue that military necessity implies that destruction is not permitted if alternative means to achieve the military goal are open.

75 O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Baden-Baden : Nomos (1999), p. 232, margin nos. 154 and 155.

survival of members of an armed group. Rather, they provide the means to finance military operations and to provide food and shelter. Therefore their destruction or appropriation may secure a military advantage, but does not satisfy the requirement of urgency. The *Krupp case* before Nuremberg Military Tribunal III confirms this interpretation. In that case, the Tribunal quoted and approved the following passage from *Garner's International Law and the World War*:

> "...it is quite clear from the language and context of Article 23(g) as well as the discussions on it in the Conference that *it was never intended to authorize a military occupant to despoil on an extensive scale the industrial establishments of occupied territory or to transfer their machinery to his home country for use in his home industries. What was intended merely was to authorize the seizure or destruction of private property only in exceptional cases when it was an imperative necessity for the conduct of military operations* in the territory under occupation. This view is further strengthened by Article 46 which requires belligerents to respect enemy private property and which forbids confiscation, and by Article 47 which prohibits pillage".[76]

In conclusion, the excuse of imperative military necessity is primarily relevant in emergency situations, where there is a reasonable connection between the appropriation or destruction of natural resources and a military purpose. This means that it may be a justification for the appropriation of natural resources that can be directly used to satisfy the basic needs of members of armed groups, such as the poaching of wild animals or the cutting of trees in a State forest for firewood. However, the excuse of imperative military necessity is too narrowly formulated to justify the systematic exploitation of natural resources for the purpose of financing military operations.

Administration of public property in territories under occupation

The most detailed regime for the protection of property is set out for territories under foreign occupation. One of the basic tenets of occupation law is that private property must be respected.[77] An occupant may only appropriate

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76 Trials of War Criminals before the Nuremberg Tribunals under Control Council Law No. 10, Vol. IX, the *Krupp* case, Washington: Government Printing Office (1950), pp. 1344-1345. Author's emphasis added.

77 M. Bothe, 'Occupation, Belligerent', R. Bernhardt, *Encyclopedia of Public International Law*, Vol. III, Max Planck Institute for Comparative Public Law and International Law, Amsterdam: Elsevier (2000), p. 766. Article 46 (2) of the 1907 Hague Regulations prohibits the confiscation of such property and Article 47 prohibits pillage of property in general. The Hague Regulations contain only two exceptions to the principle of the inviolability of private property. First, Article 52 of the Hague Regulations permits the occupant to requisition private property against financial compensation in order to satisfy "the needs of the army of occupation", provided such requisitions "shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country". The second exception concerns property which may be qualified as "munitions of war" under Article 53 (2) of the Hague

private property in exceptional circumstances, and providing financial compensation. In contrast, as the principal governmental authority in territory under occupation,[78] an occupant may to a certain extent dispose of public property. First, Article 53 of the 1907 Hague Regulations authorises the occupant to take possession of particular objects, such as State-owned cash, funds and realisable securities as well as all public movable property "which may be used for military operations" and munitions of war.[79] Secondly, Article 55 of the 1907 Hague Regulations grants the occupant a right of usufruct over immovable public property.

The latter provision is key to the occupant's right to exploit natural resources. It reads in full:

> "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct".

The right of *usufruct*, as set out in Article 55 of the 1907 Hague Regulations, grants the occupant the right to administer the immovable properties of the occupied State, including state-owned forests and mines, and to enjoy their proceeds as long as he "safeguards the capital of these properties".

Thus it is clear that the concept of usufruct imposes limits on the right of an occupant to use the property of the territory under occupation. As Lassa Oppenheim noted as early as 1952, the occupant is "prohibited from exercising its right [of usufruct] in a wasteful or negligent way so as to decrease the value of the stock and plant. Thus, for instance, he must not cut down a whole forest,

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Regulations – which applies equally to public property. These properties may be seized without offering immediate compensation, provided the objects are restored and compensation is fixed after the war.

78 This authority is based on *de facto* rather than *de jure* power. See Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge: Cambridge University Press (2009), p. 49; and M. Bothe, 'Occupation, Belligerent', R. Bernhardt, *Encyclopedia of Public International Law*, Vol. III, Max Planck Institute for Comparative Public Law and International Law, Amsterdam: Elsevier (2000), p. 764. Furthermore, according to Bothe, "international law does not grant rights to the occupying power, but limits the occupant's exercise of its *de facto* powers" (p. 764). Also see E. Benvenisti, *The International Law of Occupation*, Princeton and Oxford: Princeton University Press (2004), pp. 5-6. Benvenisti compares the occupant's status to that of a trustee. According to Benvenisti, the occupant administers the territory on behalf of the sovereign.

79 Article 53 of the Hague Regulations reads in full: "An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.
All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made".

unless the necessities of war compel him".[80] This is still the prevailing view in academic literature today.[81]

Arguably, the requirement that an occupant must safeguard the capital of the properties it administers should be interpreted in the light of the relevant obligations of the occupant under customary international law, including customary international law obligations arising from other fields of international law. This would require an occupant to use the natural resources in a sustainable way and to exploit them with respect for the principle of permanent sovereignty over natural resources and the right to self-determination of the people under occupation, meaning that an occupant must exploit the natural resources in occupied territory for the benefit of the occupied territory and its population.[82]

Furthermore, the principle of sustainable use is today one of the basic tenets underlying the obligation of an occupant to safeguard the capital of the State's natural resources. The principle creates a balance between the right of an occupant to use the natural resources in occupied territory to cover the costs of the occupation and the obligation to safeguard these resources for the benefit of future generations.

One long-standing issue in international law concerns the right of an occupant to exploit non-renewable natural resources. This issue received much scholarly attention, especially in relation to Israel's right to exploit oil resources in the occupied Sinaï Peninsula in the 1970s.[83] Nico Schrijver remarks that "while usufruct of renewable resources may give no rise to particular problems, its application to non-renewable resources such as minerals is controversial'.[84]

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80 L. Oppenheim, *International Law: A Treatise,* Vol. II Disputes, War and Neutrality, Seventh Edition, Edited by H. Lauterpacht, London/New York/Toronto: Longmans, Green and Co (1952), p. 398. Obviously the obligation to safeguard the capital of the properties in occupied territory does not impede the right of an occupant to destroy property in occupied territory in cases of military necessity as incorporated in Article 23 (g) of the Hague Regulations and Article 53 of Geneva Convention IV.

81 See, *e.g.,* Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with Human Rights Law*, The Hague: Martinus Nijhoff Publishers (2009), pp. 209-215; Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge: Cambridge University Press (2009), p. 214.

82 For the impact of the principle of permanent sovereignty on the interpretation of the right of usufruct, see Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with Human Rights Law*, The Hague: Martinus Nijhoff Publishers (2009), pp. 215-216.

83 See in particular B. Sloan, 'Study on the Implications, under International Law, of the United Nations Resolutions on Permanent Sovereignty over Natural Resources, on the Occupied Palestinian and other Arab Territories and on the Obligations of Israel Concerning its Conduct in these Territories, *UN Doc. A/38/85*, 21 June 1983; and US Department of State, 'Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez', *17 ILM 2* (1978), pp. 432-444.

84 N.J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge: Cambridge University Press (1997), p. 268.

Indeed, the opinions differ considerably in this respect. An examination of the scholarly debate reveals that the obligation to safeguard the capital of non-renewable natural resources may either be interpreted narrowly to prohibit the exploitation of non-renewable natural resources altogether, based on the idea that exploitation would *ipso facto* reduce their capital, or it may be interpreted broadly to prohibit only excessive exploitation.[85] Based on the principle of sustainable use, this book argues that contemporary international law allows an occupant to exploit the natural resources of occupied territory, including its non-renewable natural resources, insofar as this would not harm the options of future generations to exploit the natural resources for their development.

On the other hand, the principle of permanent sovereignty serves to underline the obligation of occupants to administer the natural resources in occupied territory for the benefit of the people.[86] This implies that the right of usufruct precludes exploitation of the natural resources of a country by an occupant for its own benefit, a prohibition that is also confirmed in the relevant case law of the Nuremberg tribunals.[87] The International Military Tribunal at Nuremberg considered that "the economy of an occupied country can only be required to bear the expense(s) of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear".[88] This judgment should be read in conjunction with the *Krupp case*, decided by a lower military tribunal at Nuremberg. This tribunal considered that an occupied country's economic assets could never be used for military

85 See N.J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge: Cambridge University Press (1997), pp. 268-269; B. Sloan, 'Study on the Implications, under International Law, of the United Nations Resolutions on Permanent Sovereignty over Natural Resources, on the Occupied Palestinian and other Arab Territories and on the Obligations of Israel Concerning its Conduct in these Territories, *UN Doc. A/38/85*, 21 June 1983, in particular pp. 15 and 16; A. Cassese, 'Powers and Duties of an Occupant in Relation to Land and Natural Resources', in E. Playfair (ed.), *International law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, proceedings of a conference organized by al-Haq in Jerusalem in January 1988 (1992), pp. 419-442; E. Benvenisti, *The International Law of Occupation*, second edition, Oxford: Oxford University Press (2013), pp. 81-82.

86 See Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with Human Rights Law*, The Hague: Martinus Nijhoff Publishers (2009), pp. 215-216.

87 See e.g. A. Cassese, 'Powers and Duties of an Occupant in Relation to Land and Natural Resources', in E. Playfair (ed.), *International law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, proceedings of a conference organized by al-Haq in Jerusalem in January 1988 (1992), p. 426, who argues that the principle of permanent sovereignty over natural resources, in the context of belligerent occupation, "tends to support a restrictive interpretation of the occupant's powers to exploit and dispose of immovable property. Even if the occupant has reservations about the 'statehood' of its enemy, this principle should serve to restrain the occupant from exploiting resources in contravention of the rights of an alien people in occupied territory".

88 *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945 – 1 October 1946, Official Documents, Vol. I, Nuremberg (1947), p. 239.

operations against the occupied territory.[89] The International Military Tribunal at Nuremberg also considered that excessive exploitation of natural resources could even amount to plunder. According to the Tribunal, Germany had exploited the occupied territories for the German war effort "in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy". The Tribunal held that this amounted in reality to "a systematic 'plunder of public and private property'".[90]

A modern interpretation of these judgments suggests that an occupant is permitted to use the proceeds from exploiting resources for the purposes of maintaining a civilian administration in occupied territory, but not to cover the costs associated with military operations. This can be illustrated with reference to the Development Fund for Iraq, set up and administered by the US-UK occupying authority in Iraq in 2003 with the specific purpose of meeting "the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq".[91] The Development Fund was primarily funded with the proceeds from the sale of Iraqi oil.[92] Although it may be questioned whether all the stated purposes of the fund are in conformity with the limited powers conferred upon an occupant by the international law on occupation,[93]

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89 Trials of War Criminals before the Nuremberg Tribunals under Control Council Law No. 10, Vol. IX, the *Krupp* case, Washington: Government Printing Office (1950), p. 1341. The tribunal held in relevant part: "Just as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country's allies, so must the economic assets of the occupied territory not be used in such a manner".

90 *Ibid*. Today, as a consequence of the narrow definition of pillage in the ICC *Elements of Crime*, the conduct of Germany would be more likely to fall under the war crime of destruction or seizure of the property of a hostile party, a crime which was not included in the Statute of the Nuremberg Tribunal.

91 UN Security Council Resolution 1483 (2003), especially paragraph 14.

92 UN Security Council Resolution 1483 (2003) determined that "all proceeds from [export sales of petroleum, petroleum products, and natural gas from Iraq] shall be deposited into the Development Fund for Iraq until such time as an internationally recognized, representative government of Iraq is properly constituted".

93 Article 43 of the 1907 Hague Regulations, which sets out the general obligations of an occupant, prescribes an occupant to "take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country". Whether the measures regarding Iraq are in conformity with the law of occupation, depends on the interpretation of Article 43. Does it imply an obligation for the occupant to preserve as much as possible the *status quo ante bellum* or does the obligation to "ensure… public order and safety" also bring about positive obligations for occupants to enact legislation and to set up economic and social policies? See on this issue. *e.g.,* E. Benvenisti, *The International Law of Occupation,* Oxford: Oxford University Press (2013); and A. Roberts, Transformative Military Occupation: Applying the Laws of War and Human Rights, *American Journal of International Law,* Vol. 100 (2006), p. 580-622. On the occupation of Iraq and the relationship between international occupation law and UN Security Council Resolutions, see D.J. Scheffer, 'Beyond Occupation Law',

it is relevant to note that the Development Fund underlines the basic idea that the natural resources in occupied territory must be exploited for the benefit of the people of the occupied territory.

Thus Article 55 of the 1907 Hague Regulations formulates a right for occupants to exploit the natural resources within occupied territory, but only for the benefit of the population. The proceeds from the exploitation of natural resources may therefore be used to cover costs related to civilian administration, but not to cover costs associated with the occupation itself. An occupant cannot escape this restriction by claiming that particular natural resources are "munitions of war" under Article 53 of the Hague Regulations, which would mean that they could be seized by the occupant at all times. In this respect, Elihu Lauterpacht remarks that

> "belligerent occupation is essentially a temporary affair. For that reason, an Occupant is not entitled to diminish or retard the prospects of the economic recovery of the territory by draining it of its resources of minerals and raw materials on the pretext that they constitute *munitions de guerre*. It is this factor which underlies, for example, the limitation of powers of an Occupant in respect of public immovable property to the rights of an usufructuary and no more".[94]

It is generally accepted that the term "munitions de guerre" has a narrow scope and only includes objects which can be of direct military use, in the sense that they can be used for military operations.[95] Precious minerals, such as diamonds, cobalt or tin, are therefore excluded from the definition. After all, these minerals do not have any direct military use, as opposed to oil, which can serve as fuel for military vehicles. In this respect, reference can be made to the distinction made in the often-cited 1956 Singapore Oil Stocks Case between natural resources *in situ* (immovable property) and *ex situ* (movable property).[96] This case implies that only extracted oil – as a movable property – can qualify as *munitions de guerre*. Furthermore, only processed oil can actually be directly used for military purposes and thus qualifies as *munitions de guerre*.

American Journal of International Law. Vol. 97 (2003), p. 842-860; and M. Zwanenburg, 'Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation', *International Review of the Red Cross,* Vol. 86 (2004), p. 745-768. On the management of Iraqi natural resources, in particular oil and water, see E. Benvenisti, *The International Law of Occupation,* Oxford: Oxford University Press (2013), pp. 264-266.

94 E. Lauterpacht, 'The Hague Regulations and the Seizure of *Munitions de Guerre*', 32 *British Yearbook of International Law* 218 (1955-1956), p. 240.

95 See *e.g.* E. Lauterpacht, 'The Hague Regulations and the Seizure of Munitions de Guerre', 32 British Yearbook of International Law 218 (1955-1956), pp. 219-243; Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge: Cambridge University Press (2009), p. 233.

96 Singapore Court of Appeal, N.V. De Bataafsche Petrolium Maatschappij & Ors. v. The War Damage Commission, Judgment of 13 April 1956, reprinted in the *American Journal of International Law*, Vol. 51 (1957), p. 809.

It is also important to note, as indicated in Chapter 5, that occupants have a general obligation to respect the laws in force of the occupied State "unless absolutely prevented".[97] Arguably, this also implies an obligation to respect the treaties to which the occupied State is a party, including relevant environmental and human rights treaties.[98] For example, this implies that an occupant must respect the rights of indigenous peoples over their lands and the resources situated in their lands, ensuing from Article 27 of the ICCPR, provided that the occupied State is a party to this treaty.

Finally, an occupant is not only responsible for its own conduct in occupied territory, but also for the conduct of other actors operating in the territory, including non-state armed groups. Its role as the principal governmental authority in occupied territory entails an obligation for the occupant to prevent other actors operating in the territory from violating international humanitarian law. In the *Congo-Uganda Case*, the ICJ determined that, as Uganda was an occupying power in part of the territory of the DR Congo at the relevant time,

> "Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account".[99]

According to the Court, Uganda was under an obligation to "take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory to cover private persons in the district". Thus the "duty of vigilance" of an occupant seems to entail an obligation to prevent other actors from exploiting, looting or plundering natural resources in occupied territory.

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97 Article 43 of the 1907 Hague Regulations reads in full: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country".

98 Some support for this proposition can be found in T. Meron, 'Applicability of Multilateral Conventions to Occupied Territories', *American Journal of International Law* Vol. 72 (1978), pp. 550-551. He argues that an occupant must respect a Convention ratified by the sovereign authorities of the occupied territory if the authorities have adopted the necessary implementing legislation. If they have not done so, Meron argues that the "ratification should be regarded as determining that the convention is suitable for the local social and economic conditions". However, in these circumstances, he does not consider the occupant bound to apply the Convention. Actually, this position is not very helpful, since it can be argued that a treaty that is implemented through national legislation has automatically become part of "the laws in force". In these circumstances, it is not the treaty that has to be respected by the occupant, but rather the domestic legislation.

99 Armed activities on the territory of the Congo (Democratic Republic of the Congo *v.* Uganda), Judgment of 19 December 2005, *I.C.J. Reports 2005*, para. 179.

6.3.2 The protection of civilian objects

Parts IV of Additional Protocols I and II deal with the protection of the civilian population. Both protocols contain provisions that provide protection for objects that are important for the civilian population. In international armed conflicts, a general provision provides protection for civilian objects. Article 52 of Additional Protocol I provides that hostilities may only be directed at military objectives. It defines civilian objects as "all objects which are not military objectives". According to paragraph 2 of the same provision, "military objectives" are "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".

Thus Article 52 of Additional Protocol I sets a dual standard for determining whether objects are military objectives. They must "make an effective contribution to military action" in relation to one of the factors mentioned in the provision,[100] and in addition, their "destruction, capture or neutralization" must offer "a definite military advantage".[101] If these conditions are satisfied, civilian objects are no longer protected and become military objectives.

It is not difficult to imagine instances where natural resources constitute military objectives rather than civil objects. This is the case particularly when natural resources are exploited by parties to an armed conflict in order to finance their armed struggle. In these cases, natural resources make an effective contribution to military action, both in terms of their use and purpose. In addition, destroying or capturing those natural resources offers a definite military advantage, because such action cuts off the financial means of the hostile party. Thus for the purposes of the current study, the general protection provided by Article 52 of Additional Protocol I to civilian objects is of little relevance.

In addition to the general protection afforded to civilian objects, Additional Protocol I and II also identify particular objects for which special protection is provided, regardless of whether such objects constitute civilian objects or military objectives. Objects that are deemed indispensable for the survival of

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100 According to the Commentary on the Additional Protocols, objects which by their nature make an effective contribution to military action comprise all objects directly used by armed forces, such as weapons, means of transport or buildings used by the armed forces. Objects which by their location make an effective contribution to military action include strategic objects like bridges. Furthermore, according to the commentary, "purpose" refers to "the intended future use of an object", while "use" refers to "its present function". Y. Sandoz, C. Swinarski and B. Zimmermann (ed.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht: Nijhoff Publishers (1987), Art. 52, p. 636.

101 See Y. Sandoz, C. Swinarski and B. Zimmermann (ed.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht: Nijhoff Publishers (1987), Art. 52, p. 636.

the civilian population, are protected under Article 54 of Additional Protocol I and Article 14 of Additional Protocol II, while the natural environment is protected under Article 55 of Additional Protocol I. These provisions are more relevant for the protection of natural resources and the environment than those providing general protection to civilian objects, since they also apply to natural resources or parts of the environment that are considered to be military objectives.

Prohibition against attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population

Article 54 (2) of Additional Protocol I and Article 14 of Additional Protocol II contains a prohibition which states that parties to an armed conflict may not "attack, destroy, remove or render useless objects indispensable to the survival of the civilian population". The provisions are aimed at providing a safety net for the population of a State involved in an armed conflict, ensuring their right to retain access to the basic needs for survival.

The argument for providing protection for objects which are indispensable to the civilian population is therefore to ensure the survival of the population. According to Article 54(2) of Additional Protocol I, parties to an armed conflict may not attack, destroy, remove or render useless such objects "for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party". The provisions are therefore primarily aimed at prohibiting practices such as targeting water supply systems and destroying crops, as the rebel group RUF reportedly did during the conflict in Sierra Leone.[102]

In order to establish whether and to what extent the provisions qualify the right of parties to an armed conflict to exploit natural resources, it is necessary to consider three different issues. The first concerns the limitations related to the objective of the provisions, the second concerns the type of objects that are protected, and the third concerns the exceptions formulated in the provisions.

Both provisions formulate a prohibition against attacking, destroying, removing or rendering useless objects that are indispensable for the *survival* of the population. More specifically, Article 14 of Additional Protocol II makes the protection of such objects subordinate to the all-encompassing prohibition against starving the population as a method of combat.[103] The prohibition

102 UNEP, *Sierra Leone, Environment, Conflict and Peacebuilding Assessment, Technical Report*, February 2010, p. 45.

103 The original draft provision did not subordinate the protection of objects indispensable to the survival of the civilian population to the prohibition to use starvation of the population as a method of combat. It simply prohibited parties to attack or destroy those objects with the intention "to starve out civilians, to cause them to move away or for any other reason". *Official Records of the Diplomatic Conference on the Reaffirmation and Development of*

is formulated more loosely for international armed conflict. Article 54 (2) of Additional Protocol I provides that such objects may not be attacked, destroyed, removed or rendered useless "for the specific purpose of denying them *for their sustenance value* to the civilian population […] *whatever the motive*".[104] In both cases, the provisions imply a certain degree of immediacy, in the sense that the survival of the civilian population must be at stake. Furthermore, it therefore has to be established that parties to an armed conflict have the intention of starving the population (internal armed conflict) or denying the population certain objects for their sustenance value (international armed conflict).

It is not clear to what extent these requirements qualify the prohibition. If a specific intent is required, it must be assumed that the prohibition does not cover the appropriation of natural resources for the purpose of financing an armed conflict or for personal gain, as in these cases the removal of natural resources is not carried out with the specific intent to deprive the population of their means of subsistence. A similar conclusion can be drawn with regard to damage to the environment caused by such activities, if such damage has the effect of destroying objects indispensable to the civilian population. If, however, it is accepted that reckless disregard by a party for an armed conflict for the consequences of its actions can be considered to reflect intent, the provisions may cover the removal of natural resources for economic purposes, as well as environmental damage caused by such activities. From the perspective of protecting the civilian population, a broad interpretation of 'intent' is therefore to be preferred.

Although State practice is not uniform, the customary international humanitarian law study conducted by the International Committee of the Red Cross (ICRC) shows that the majority of military manuals do not state that the prohibition requires a specific intent to starve the civilian population or prevent it from being supplied.[105] Although the extent to which military manuals accurately reflect State practice is still open to debate, these manuals do provide indications arguing in favour of a broad rather than a stringent interpretation of the provisions.

The second issue concerns the types of objects that are covered by the provisions. The ICRC Commentary indicates that the provisions apply to objects that are "of basic importance for the population from the point of view of

International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-77), Vol. I, Part three, p. 16 and 40.

104 Author's emphasis added.

105 See J-M. Henckaerts. & L. Doswald-Beck (ed.), Customary International Humanitarian Law, International Committee of the Red Cross, Cambridge: Cambridge University Press (2005), Vol. I, p. 190.

providing the means of existence".[106] The notion of "basic importance" is not defined in any further detail. The provisions refer to objects like foodstuffs, agricultural areas for the production of foodstuffs, crops and drinking water installations, but this list is by no means exhaustive. The Diplomatic Conference that adopted the Additional Protocols did not want to narrow down the categories of objects to which the provisions should apply, as "an exhaustive list might well have resulted in omissions or in making a somewhat arbitrary choice of objects".[107]

It is evident from the express reference in the provisions to objects such as foodstuffs and drinking water installations that particular natural resources, such as lakes and rivers, which provide for drinking water and fish, should fall within the ambit of the provisions.[108] Arguably, forests, which provide food, timber, firewood, and medicinal plants, may also constitute indispensable "objects" in the sense of the provisions.[109]

One interesting question in this respect is whether the prohibition also covers economically valuable natural resources that cannot be directly consumed, such as diamonds or coltan. Can such natural resources be considered "indispensable to the survival of the population"? Although this may initially seem far-fetched, it must be remembered that many civilians in conflict regions are highly dependent on particular natural resources to generate a basic income. In fact, it seems that the dependency of the local population on artisanal mining in the DR Congo was one of the principal reasons for the

106 See Y. Sandoz, C. Swinarski and B. Zimmermann (ed.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht: Nijhoff Publishers (1987), Art. 14, p. 1458.

107 *Ibid*, Art. 14, p. 1458. It is interesting to note that the original draft provision proposed by the ICRC contained an exhaustive list of objects, consisting of "food stuffs and food-producing areas, crops, livestock, drinking water supplies and irrigation works". *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. I, Part three, pp. 16 and 40.

108 Compare K. Mollard-Bannelier, *La Protection de l'Environnement en Temps de Conflit Armé*, Publication de la Revue Générale de Droit International Public, Nouvelle Série No. 53, Paris : Editions A. Pedone (2001), p. 189. Mollard-Bannelier argues that certain natural resources could clearly be considered to constitute indispensable objects, but she does not provide examples.

109 The Democratic Republic of Vietnam explicitly mentioned the destruction of forests "for the purpose of starving the civilian population and forcing them to become refugees". *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. XIV, CDDH/III/SR.17, p. 143. Furthermore, the Additional Protocols themselves consider objects such as medicines and means of shelter essential to the survival of the civilian population. In this regard, Article 18 (2) of Additional Protocol II mentions medical supplies, while Article 69 (1) of Additional Protocol I also points to clothing, bedding, means of shelter and other supplies. See J-M. Henckaerts. & L. Doswald-Beck (ed.), Customary International Humanitarian Law, International Committee of the Red Cross, Cambridge: Cambridge University Press (2005), Vol. I, p. 193.

Security Council to abstain from imposing commodity sanctions to curb the trade in natural resources originating from the DR Congo.[110]

It should also be noted that the provisions themselves leave ample discretion for the parties to an armed conflict to interpret the objects they consider "indispensable for the survival of the population" in their own way. During the negotiations on the draft text of Article 54 of Additional Protocol I, Egypt and several other oil producing States proposed including fuel reservoirs and refineries in the text of the provision "since fuel concerned the whole international community, which depended on oil in all spheres".[111] Therefore it can be argued that the phrase "objects indispensable to the survival of the civilian population" in Article 54(2) of Additional Protocol I and in Article 14 of Additional Protocol II should be broadly interpreted to cover natural resources that provide a basic income for the local population.

This broad interpretation also follows from the interpretation of Article 54(2) of Additional Protocol I and Article 14 of Additional Protocol II in the light of the identical Articles 1(2) of the ICESCR and the ICCPR. This provision is of particular relevance because it determines that "*in no case*, may a people be deprived of its own means of subsistence".[112] An interpretation of Article 54(2) of Additional Protocol I and Article 14 of Additional Protocol II in the light of Article 1(2) of the ICESCR and the ICCPR would extend the protection provided by the provision to all objects which provide the population with the means of subsistence, including particular natural resources that generate a basic income for the local population. Following this interpretation, parties to an armed conflict may, under certain circumstances, be prohibited from cutting off the civilian population from the mining sites or forests under their control.

The last relevant issue concerns the exceptions formulated in Article 54 of Additional Protocol I. The first exception is formulated in Article 54 (3) of

110 A report prepared by the Secretary-General had warned against the negative impacts of such sanctions on the local population. *See* the *Report of the Secretary-General pursuant to paragraph 8 of resolution 1698 (2006) concerning the Democratic Republic of the Congo*, UN Doc. S/2007/68 of 8 February 2007, paras. 62-63.

111 Egypt and several other oil producing States proposed to include fuel reservoirs and refineries in Article 54 of Protocol I "since fuel concerned the whole international community, which depended on oil in all spheres". *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. III, CDDH/III/63, p. 218 and Vol. XIV, CDDH/III/SR.16, p. 139. Also see K. Mollard-Bannelier, *La Protection de l'Environnement en Temps de Conflit Armé*, Publication de la Revue Générale de Droit International Public, Nouvelle Série No 53, Paris: Editions A. Pedone (2001), pp. 188-189. The interpretation of what constitute "indispensable" objects is largely left to the discretion of the parties to an armed conflict. Besides the major advantage of flexibility, this system has some important drawbacks. Mollard-Bannelier argues that it creates a legal uncertainty for parties to an armed conflict regarding the application of the provision. One could also argue that it gives parties to an armed conflict a loophole with regard to the obligations incumbent on them.

112 Author's emphasis added.

Additional Protocol I and is also implicit in Article 14 of Additional Protocol II. This provision determines that the prohibition does not apply to objects which are used "as sustenance solely for the members of its armed forces" or "in direct support of military action". The latter phrase is particularly relevant for the subject of this book. The ICRC Commentary to the Additional Protocols points to the following examples: a food producing area which the enemy uses as it advances through it, or a food storage barn used by the enemy for cover or as an arms depot.[113] Objects used in these ways lose their immunity unless actions against these objects could "leave the civilian population with such inadequate food or water as to cause its starvation or force its movement". This implies that Article 54 of Additional Protocol I does not prohibit parties to an international armed conflict from destroying areas where natural resources are exploited by the hostile party, unless this could lead to the starvation or forced removal of the population. Of course, it should be noted that such a right should be interpreted consistently with Article 23(g) of the 1907 Hague Regulations, which allows parties to an armed conflict to destroy property of a hostile party only in situations of imperative military necessity.[114]

The second exception concerns the defence of national territory against invasion by a foreign State. In these circumstances, Article 54 (5) of Additional Protocol I allows a party to an armed conflict to derogate from the prohibitions of paragraph 2 on its own territory if "imperative military necessity" so requires. *De facto*, this permits a party to an armed conflict to resort to a "scorched earth" policy.[115] However, the exception is formulated in such a restrictive way as to apply only in exceptional circumstances. It only covers the situation of *defence* of national territory which is under the *control* of the party to the armed conflict against *invasion*.[116] Furthermore, such action may under no circumstances result in the starvation of the population.[117] For the

113 Y. Sandoz, C. Swinarski and B. Zimmermann (ed.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht: Nijhoff Publishers (1987), Art. 54, p. 657. These exceptions were inserted at the proposal of the United States, which wanted to prevent "combatants to seek protection under provisions intended solely for the protection and benefit of the civilian population". *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. XIV, CDDH/III/SR.16, p. 138.

114 As discussed in section 6.3.1, Article 23(g) of the Hague Regulations contains a prohibition to destroy the property of a hostile party, except in cases of imperative military necessity.

115 Y. Sandoz, C. Swinarski and B. Zimmermann (ed.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht: Nijhoff Publishers (1987), Art. 54, p. 659. For an analysis of military necessity, see section 2.3.2 of this study.

116 Emphasis added.

117 The prohibition of starvation is formulated in Article 54(1) of Additional Protocol I, while this provision derogates from Article 54(2). Also see K. Mollard-Bannelier, *La Protection de l'Environnement en Temps de Conflit Armé*, Publication de la Revue Générale de Droit International Public, Nouvelle Série No. 53, Paris: Editions A. Pedone (2001), p. 190.

purposes of the present study, it is hard to imagine a situation where a State would destroy its own natural resources to defend itself against an invasion by a third State.

Prohibition to cause widespread, long-term and severe damage to the environment
Articles 35 (3) and 55 of Additional Protocol I formulate a prohibition against causing widespread, long-term and severe damage to the environment.[118] Article 35 (3) of Additional Protocol I provides 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", while Article 55 provides that "care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage". In addition, Article 55 specifies that "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". It also prohibits attacks against the environment in the form of reprisals.

The prohibition against causing widespread, long-term and severe damage to the environment applies exclusively to the situation of international armed conflict. A proposal from Australia to introduce a similar provision to Articles 35 (3) and 55 of Additional Protocol I in Additional Protocol II relating to internal armed conflicts met with resistance from several delegations.[119] For example, Canada considered the provision superfluous, as it considered that both the government and rebels would have a good reason not to risk alienating the population by causing ecological damage.[120]

Furthermore, it is doubtful whether the prohibition can be considered to apply to internal armed conflicts as a matter of customary international law, as argued by the ICRC in its customary international humanitarian law study.[121] The prohibition is referred to in only two other international human-

118 Only Article 55 on the protection of the natural environment is actually part of Chapter III on the protection of civilian objects. Article 35, on the other hand, lays down the basic rules of armed conflict and is part of Section I of Part III on the "Methods and means of warfare". However, despite these different perspectives, the two provisions both incorporate the prohibition to cause widespread, long-term and severe damage to the environment. Therefore this study deals with both provisions.

119 The amendment provided: "It is forbidden to despoil the natural environment as a technique of warfare". *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. IV, Amendments, p. 91, Doc. CDDH/III/55, 19 March 1974.

120 For this and other comments, see *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. XIV, CDDH/III/SR.12, pp. 176-179 and CDDH/III/SR.18, p. 153.

121 See J-M. Henckaerts. & L. Doswald-Beck (ed.), Customary International Humanitarian Law, International Committee of the Red Cross, Cambridge: Cambridge University Press (2005), Vol. I, pp. 151-155. The ICRC customary law study argues that, for international armed conflicts, the prohibition has attained customary law status and posits that a similar

itarian law conventions, of which only one applies to the situation of internal armed conflict.[122] In addition, in its 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice expressly stated that Articles 35 (3) and 55 were "powerful constraints for all the States *having subscribed to these provisions*".[123] This is indicative of the Court's belief that neither of the provisions has attained customary international law status, not even for international armed conflicts. At most, there are indications that the prohibition expresses an emerging custom.[124]

Thus Articles 35 (3) and 55 of Additional Protocol I are the only provisions which formulate the prohibition against causing widespread, long-term and severe damage to the environment. They do so in different ways. While Article 35 (3) sets limits on the means and methods of warfare, Article 55 provides protection to the environment because of its importance to human beings.[125]

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conclusion can be drawn for internal armed conflicts. It should, however, be noted that for a rule to become part of customary international law, there should be, in the words of Article 38 of the Statute of the International Court of Justice, "a general practice accepted as law". The ICRC study argues that the prohibition has been inserted in many military manuals of States, but, as argued before, insertion in a military manual does not prove that States consider themselves legally bound by the prohibition. On the contrary, the United States, for example, has inserted the prohibition in its military manual, but it has also explicitly stated that it does not consider the prohibition to be part of customary international law.

122 See the 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, adopted in Geneva on 10 October 1980, *1342 UNTS 163*, as amended in 2001, which recalls 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". See also, for the situation of international armed conflict only, the Convention on the prohibition of military or any other hostile use of environmental modification techniques (ENMOD), concluded on 10 December 1976 in New York (entry into force: 5 October 1978), *1108 UNTS 151*. Article 1 of this convention determines 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". Author's emphasis added.

123 International Court of Justice, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, para. 30, *I.C.J. Reports 1996*. Author's emphasis added.

124 E.V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, Oxford: Hart Publishing, p. 235. For an extensive analysis regarding the status of the prohibition, see pp. 177-197.

125 It must be noted that this does not imply that the environment is protected only in so far as damage would prejudice the health or survival of the population, as argued by some authors. See, *e.g.*, W.D. Verwey, 'Protection of the Environment in Times of Armed Conflict: In Search of a New Legal Perspective', *Leiden Journal of International Law*, Vol. 8, No. 1 (1995), p. 13, who argues that the reference to the health or survival of the population in the second part of Article 55 must be read as a limitation to the protection afforded to the environment under this provision. However, the official records of the diplomatic conference that adopted the provisions note that "the first sentence enjoining the taking of care lays down a general norm, which is then particularized in the second sentence. Care must be taken to protect

Most importantly, Article 55 formulates a general duty of care for the environment.[126] In this sense, Article 55 is broader in scope than Article 35 (3) of Additional Protocol I, because it encompasses all activities that cause "widespread, long-term and severe damage" to the environment, not only damage caused by the means and methods of warfare. Furthermore, it includes a positive obligation to protect the environment.[127] This makes this provision more relevant for the purposes of the current study.

One important question that arises with respect to Article 55 of Additional Protocol I is what this "duty of care" for the environment actually implies. In this respect, Karen Hulme argues that the duty of care first and foremost serves as "a lasting reminder of th[e] recognition that humankind must continue to protect the environment in armed conflict".[128] From this perspective, the duty of care formulated in Article 55 of Additional Protocol I should be achieved on the basis of the general standards of care formulated in international environmental law. The principles of prevention and precaution are most relevant in this regard. Both require States to exercise due diligence in the activities they undertake.[129] As indicated in Chapter 4 of this book, "due

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the natural environment against the sort of harm specified even if the health or survival of the population is not prejudiced". See the *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. XV, Report to the Third Committee on the Work of the Working Group, Committee 3, April 1975, CDDH/III/275, p. 4. Also see E.V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, Oxford: Hart Publishing (2008), p. 148, who argues that the prohibition formulated in the second sentence of Article 55 (1) "is illustrative and exemplary for the duty of care of Article 55 (1), first sentence"; Y. Sandoz, C. Swinarski and B. Zimmermann (ed.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht: Nijhoff Publishers (1987), Art. 55, p. 663, who note that "the expression "care shall be taken" is not used in Article 35 paragraph 3, which is therefore more stringent"; and Y. Dinstein, 'Protection of the Environment in International Armed Conflict', Max Planck Yearbook of United Nations Law, Vol. 5 (2001), pp. 531-532, who argues that the first phrase of Article 55 is not reduced to cases in which damage to the natural environment prejudices human health or survival. In his opinion, "the injury to human beings should be regarded not as a condition for the application of the injunction against causing environmental damage, but as the paramount category included within the bounds of a larger injunction".

126 See K. Hulme, 'Taking Care to Protect the Environment Against Damage: a Meaningless Obligation?' *International Review of the Red Cross,* Vol. 92, No. 879 (2010), pp. 675-691. Also see E.V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, Oxford: Hart Publishing (2008), p. 148; and Y. Dinstein, 'Protection of the Environment in International Armed Conflict', *Max Planck Yearbook of United Nations Law*, Vol. 5 (2001), p. 530.

127 K. Hulme, *War Torn Environment: Interpreting the Legal Threshold*, Leiden: Nijhoff, International Humanitarian Law Series (2004), p. 73.

128 See K. Hulme, 'Taking Care to Protect the Environment Against Damage: a Meaningless Obligation?' *International Review of the Red Cross,* Vol. 92, No. 879 (2010), p. 677.

129 See K. Hulme, *War Torn Environment: Interpreting the Legal Threshold*, Leiden: Nijhoff, International Humanitarian Law Series (2004), pp. 80-88.

diligence" implies that States are to "use all the means at [their] disposal' or "to take all appropriate measures" in order to prevent damage.[130] Of course, what is considered "appropriate" in situations of armed conflict can differ significantly from what is expected in situations of peace.

The next question is whether this provision applies to the exploitation of natural resources by parties to an armed conflict, and if so, what this entails. First, it is relevant to note that Article 55 provides that "care shall be taken *in warfare*…".[131] The exploitation of natural resources by parties to an armed conflict for financial purposes cannot in itself be considered to constitute an act of warfare. However, the exploitation of the natural resources that belong to the hostile party could be regarded as a form of economic warfare aimed at strengthening its own military capacity, while weakening the capacity of the enemy with economic measures.[132] Thus Article 55 arguably covers instances of resource exploitation. This means that a party to an armed conflict that engages in the exploitation of the natural resources of the enemy must take appropriate measures to prevent "long-term, widespread and severe" damage to the environment.

The last relevant question concerns the kind of standard implied by the terms "long-term, widespread and severe". At the very least, the cumulative criteria rule out the possibility that the prohibition applies to incidental damage resulting from conventional military operations.[133] However, there is no general understanding regarding the threshold that does apply. Neither the provision itself nor the *travaux préparatoires* give any further indication of how the criteria are interpreted. The *travaux* merely indicate that the term "long-term" refers to damage lasting several decades.[134]

Only ENMOD provides some indications, although the *travaux* do indicate that the threshold for damage envisaged for Protocol I was to be higher than

130 Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), *I.C.J. Reports 2010*, para. 101; and Article 3 of the *ILC Draft articles on Prevention of Transboundary Harm from Hazardous Activities*. See also Article 194(2) of the United Nations Convention on the Law of the Sea, 10 December 1982, *1833 UNTS 3*, which indicates an obligation for States to "take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment".

131 Author's emphasis added.

132 On the notion of economic warfare, see V. Lowe and A. Tzanakopoulos, 'Economic Warfare', in R. Wolfrum (ed.), *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law, Oxford, Oxford University Press (2012).

133 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. XV, CDDH/215/Rev.1, para. 27, pp. 268-269. It should be noted that Articles 35 (3) and 55 of Additional Protocol I both embody to a certain extent the precautionary principle, by allowing a degree of latitude as to the actual occurrence of damage. See Chapter 4 of this study for a more comprehensive discussion on this principle.

134 *Ibid.*

that for ENMOD.[135] The *Understandings* which States adopted regarding certain provisions of the ENMOD Convention defined "widespread" as "encompassing an area on the scale of several hundred square kilometres" and "severe" to involve 'serious or significant disruption or harm to human life, natural and economic resources or other assets".[136]

Thus if these definitions can be considered to provide a minimum threshold for the prohibition contained in Additional Protocol I, as a minimum the prohibition seems to require damage that covers a considerable area, encompasses serious damage and lasts for several decades.[137] These requirements limit the scope of application of the prohibition against causing widespread, long-term and severe damage to the more extreme cases of environmental damage. Therefore Phoebe Okowa, amongst others, argues that "the so-called natural resource/ environmental protection provisions in AP I, in particular Articles 35 (3) and 55, are set at such a high threshold with a wide margin of discretion during military operations, making them of marginal relevance as effective constraints in most conflicts".[138]

On the other hand, they do not rule out that certain damage caused by natural resource exploitation, such as large-scale deforestation and loss of biodiversity caused by timber extraction or the poisoning of groundwater in a region caused by the extraction of minerals, may be included in the scope of this prohibition. This applies particularly if the damage threshold is interpreted in a dynamic and evolutionary way. Arguably, a correct interpretation of the provision and its damage threshold would take into account modern views on environmental protection, calling for the adoption of an ecosystem approach. The starting point for this is that damage to components of an ecosystem can disrupt the balance of the ecosystem as a whole. From this perspective, environmental damage can be considered to be widespread, long-term and severe if it seriously upsets the balance of an ecosystem that

135 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. VI, CDDH/SR.39, Annex, pp. 113-118. Also see K. Hulme, *War Torn Environment: Interpreting the Legal Threshold*, Leiden: Nijhoff, International Humanitarian Law Series (2004), pp. 89-91.

136 Report of the Conference of the Committee on Disarmament, Volume I, General Assembly Official records, Thirty-first session, Supplement No. 27, Doc. *A/31/27*, New York, United Nations, 1976, pp. 91-92.

137 The terms have also been incorporated in Article 20 (g) of the 1996 *Draft Code of Crimes against the Peace and Security of Mankind* of the International Law Commission and in Articles 8 (2) (b) (iv) of the *ICC Statute*. Unfortunately, the preparatory works of these instruments fail to clarify the meaning of the threshold. It should further be noted that the protocol does not define the meaning of the term 'damage'. It is therefore not clear what constitutes 'damage' for the purposes of the protocol and whether 'damage' includes alterations to the environment. For a thorough analysis of the damage criteria, see K. Hulme, *War Torn Environment: Interpreting the Legal Threshold*, Leiden: Nijhoff, International Humanitarian Law Series (2004), pp. 17-40.

138 P.N. Okowa, 'Natural Resources in Situations of Armed Conflict: Is there a Coherent Framework for Protection?' *International Community Law Review* 9 (2007), p. 250.

encompasses a considerable area in such a way that the damage lasts for several decades.

Of course, this still is a fairly high threshold. Therefore Article 55 of Additional Protocol I cannot be expected to provide meaningful protection to the environment against damage resulting from the commercial exploitation of natural resources in situations of armed conflict. Moreover, since the provision does not apply to internal armed conflicts, its use is relatively limited. In view of these limitations, the provision can be considered of relatively little use for the purposes of this study.

6.4 THE MARTENS CLAUSE

The previous section showed how standards in international human rights and environmental law impact upon obligations of parties to an armed conflict under international humanitarian law. In addition, reference can be made to another way of incorporating external norms in international humanitarian law treaties, *i.e.,* by way of express provisions in the treaty itself. In this respect the so-called "Martens Clause" is of particular interest. It was named after the Russian delegate at the 1899 Hague Peace Conference who introduced the clause in order to break a deadlock in the negotiations concerning the right of populations in occupied territories to rebel against the occupying forces.[139] Since then it has been inserted in a number of international humanitarian law treaties.

The original clause, as included in the preamble of the 1899 Hague Convention, states as follows:

> "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience".[140]

Over time, the Martens clause has been used to avoid a legal vacuum in the protection of human beings in cases not dealt with in international humanitarian law conventions and to prevent these cases being left – in the words of the 1899 Hague Convention – to "the arbitrary judgment of the military

139 For a thorough analysis of the genesis of the Martens Clause, see A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' *European Journal of International Law,* Vol. 11 (2000), pp. 187-216.

140 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.

commanders".[141] The clause was mainly interpreted in this way by the Nuremberg Military Tribunal III in the *Krupp* case. The Nuremberg Tribunal used the Martens Clause to reject the argument of the defence that certain provisions applicable to occupied territories did not apply in cases of "total war", referring to a conduct of war that leaves no room for considerations of humanity. With regard to the Martens Clause the tribunal stated:

> "It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Conventions […] do not cover specific cases occurring in warfare, or concomitant to warfare".[142]

Although this passage of the judgment does not specifically refer to the protection of human beings, it is clear from the context of the passage that the Nuremberg Tribunal did not intend to apply the Martens clause to all cases occurring in or concomitant to warfare. The Martens clause was invoked directly in relation to the protection of private property.

Providing protection to the civilian population was also the rationale for the International Court of Justice to apply the Martens clause in its *Nuclear Weapons* Advisory Opinion. In this Advisory Opinion, the International Court of Justice referred to the Martens Clause to interpret the humanitarian law principles of distinction and necessity in the light of new technological developments in warfare not dealt with in the relevant conventions. The Court considered that the Martens clause "has proved to be an effective means of addressing the rapid evolution of military technology".[143] In other words, the Court used the Martens Clause to justify a dynamic-evolutionary interpretation of two of the core principles of international humanitarian law.

Furthermore, the Martens clause has been relied on in case law in order to confirm the applicability of customary international law principles alongside treaty law. It is in this sense that the Martens clause was relied on in the *Nicaragua* case. The Court referred to the version of it inserted in the Geneva Conventions, dealing with the legal effects of denunciation of the conventions.[144] In this case, it was principally called upon to confirm that the core

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141 *Ibid*.

142 Trials of War Criminals before the Nuremberg Tribunals under Control Council Law No. 10, Vol. IX, the *Krupp* case, Washington: Government Printing Office (1950), p. 1341.

143 See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *I.C.J. Reports* 1996, p. 226, para. 78.

144 See Article 158 of Geneva Convention IV: "The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue 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".

principles of international humanitarian law can be applied, even when the conventions of which they are part cannot.[145]

However, the primary significance of the Martens clause is not so much its confirmation of the applicability of customary international law in situations of armed conflict in general. Today it is generally accepted that armed conflicts are regulated not only by treaty law, but also by customary international law. Many rules that were codified in the 1907 Hague Regulations and the 1949 Geneva Conventions have been recognised as reflecting customary international law in international case law. In addition, modern criminal tribunals have confirmed the existence of principles of customary international law applicable to situations of international and internal armed conflicts.

The primary significance of the Martens clause is rather its reference to "the laws of humanity" and "the requirements of the public conscience" – or, in their modern formulations, "the principles of humanity" and "the dictates of the public conscience", as foundations of the principles of international law that provide protection to populations and belligerents in cases not covered by treaty law.[146] The question is what is meant by these terms. The wording of the Martens Clause as a whole clearly shows that the principles of humanity and the dictates of public conscience are not to be considered as "new" or additional sources of international law. Rather, their purpose is to help shape the content of the customary international law principles to be applied whenever a particular situation is not covered by the existing treaty rules – either because the treaty rules are imprecise or incomplete or, as in the case of the Geneva Conventions, because a party to an armed conflict has denounced the treaty in question.

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145 International Court of Justice, Case concerning Military and Paramilitary Activities in and against Nicaragua, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14, para. 218.

146 See Article 1 (2) of Additional Protocol I and the preamble of Additional Protocol II. It is further to be noted that Additional Protocol II contains a shortened version of the Martens clause. It simply states that "in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience". The Commentary to Additional Protocol II indicates that the absence of a reference to custom "should not be interpreted as a rejection on the part of the Conference, as the ICRC had not made a proposal to that effect in its initial draft". See Y. Sandoz, C. Swinarski and B. Zimmermann (ed.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht: Nijhoff Publishers (1987), p. 1337. The reasons for the absence of such a proposal in the draft Convention are not entirely clear. They could be related to the particular nature of internal armed conflicts as compared to the one-sided focus of the process of international customary norm creation on *State* practice and *State opinio juris* or there could be other reasons. In any case, the absence of a reference to established custom should not be interpreted as a rejection of the applicability of international customary law to internal armed conflicts.

The emphasis placed by the Martens Clause on the moral foundations of legal principles has two significant implications.[147] First, as argued by both Meron and Cassese, the emphasis in the Martens Clause on the moral foundations of legal principles raises the conceptual element of the customary international law process to a higher level, while relaxing the requirements prescribed for state practice.[148] In addition, these authors argue that the reference to the "law" or "principles" of "humanity" denotes a strong presumption in favour of applying international humanitarian law consistently with human rights norms, as well as using human rights law to fill the gaps in international humanitarian law treaties.[149]

It is for these reasons that the Martens clause retains its relevance in modern armed conflicts. The Martens clause recognises the paramount importance of providing protection to human beings in situations of armed conflict, even in cases where the law of armed conflict is silent. Most importantly, it applies to international as well as internal armed conflicts. The body of international humanitarian law is much less developed for internal armed conflicts than for international armed conflicts. Therefore the Martens clause can play an important role in ensuring basic protection to the civilian population in internal armed conflicts in addition to the protection provided by Article 3 of the 1949 Geneva Conventions and, if applicable, the provisions of 1977 Additional Protocol II. At the very least, the Martens clause clearly shows that even though they are not formally bound by international human rights law, armed groups may not abuse gaps in the law of armed conflict in order to commit human rights violations.

The Martens clause could also be relevant for a coherent reading of international humanitarian law. For example, one issue that is not adequately addressed in current international humanitarian law applicable to internal armed conflicts concerns the protection of private property. In the law applicable to international armed conflicts, private property has a special status. This is most apparent in international occupation law, which prohibits the taking of private property altogether. In contrast, in internal armed conflicts, private

147 For a discussion of the moral imperatives of the Martens clause, see also M. Salter, 'Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause', *Journal of Conflict & Security Law,* Vol. 17(3) (2012), pp. 433–436.

148 Cassese argues that the Martens Clause "*loosens* the requirements prescribed for *usus*, while at the same time *elevating opinio (iuris* or *necessitates*) to a rank higher than that normally admitted". See A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' *European Journal of International Law,* Vol. 11 (2000), p. 214. Meron argues that the Martens Clause "reinforces a trend, […], toward basing the existence of customary law primarily on *opinio juris* (principles of humanity and dictates of public conscience) rather than actual battlefield practice". See T. Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', *American Journal of International Law,* Vol. 94, No. 1, p. 88.

149 Cassese further argues in favour of deducing the principles of humanity from existing international human rights standards. See A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' *European Journal of International Law,* Vol. 11 (2000), p. 212.

property is only expressly protected by the prohibition against pillage, which, as argued above, does not apply to the taking of property for military purposes. The prohibition against seizing the property of an adversary, which does apply to the taking of property for military purposes, is however more difficult to apply to the protection of private property in internal armed conflicts because one needs to determine that the owner is somehow affiliated to a party to the armed conflict. A consistent reading of international humanitarian law would result in the assumption that taking private property is not permitted for military purposes either, regardless of any particular affiliation to a party to an armed conflict, except in situations of imperative military necessity. It is in these cases that the Martens clause is useful, in the sense that the dictates of public conscience prescribe that the law applicable to the protection of private property in internal armed conflicts is interpreted consistently with the relevant provisions relating to the protection of private property in international armed conflicts.

In conclusion, the Martens clause provides protection to human beings in situations not dealt with by international humanitarian law treaties. Its purpose is to provide basic protection to civilians and combatants in the conduct of hostilities, where such protection is not provided by relevant international humanitarian law treaties. The question arises whether the Martens clause could be used to fill other gaps in the law of armed conflict.

Certainly some authors propose using the Martens clause as a tool to protect the environment and natural resources. Iain Scobbie, for example, refers to the seemingly broad interpretation given to the Martens clause by the Nuremberg Tribunal in the *Krupp* case, quoted above, in order to support his argument that the Martens clause "is a dynamic mechanism by which general international law is imported into the [Hague] Regulations in matters 'concomitant to warfare'". Therefore, in his opinion "[g]eneral international law regarding natural resources, as it has developed since 1907, must now accordingly form part of the provisions set out in Section III of the Regulations [relating to the law of occupation]".[150] However, as argued above, the relevant passage in the *Krupp* case should not be interpreted as an attempt to broaden the application of the Martens clause. Moreover, such an overly broad interpretation would run counter to a textual interpretation of the Martens clause, as inserted in both prior and subsequent legal instruments.

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150 See, *e.g.*, Iain Scobbie, who argues that general international law regarding natural resources, as it has developed since 1907, must be inserted through the Martens clause into the section of the 1907 Hague Regulations covering occupation. I. Scobbie, 'Natural Resources and Belligerent Occupation: Mutation Through Permanent Sovereignty', in S. Bowen (ed.), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories*, The Hague: Martinus Nijhoff Publishers, International Studies in Human Rights (1997), p. 247. Also see Simonds, S.N., 'Conventional Warfare and Environmental Protection: A Proposal for International Legal Reform', Stanford Journal of International Law Vol. 29 (1992-1993), p. 188.

The Martens clause cannot be seen as a magic wand which can be used to fill all the gaps in international humanitarian law. The principal objective of the clause is to provide protection to human beings during an armed conflict against unnecessary suffering or abuse in cases not dealt with in relevant treaties. This is also clear from the emphasis placed by the clause on the laws of humanity and the dictates of public conscience, both of which have a strong humanitarian connotation. Thus, insofar as general natural resources law provides protection to human beings where international humanitarian law does not, it can be applied by virtue of the Martens clause. However, in general, it should be concluded that the Martens clause is not the appropriate mechanism for the introduction of norms other than those with a humanitarian character in international humanitarian law.

6.5 Preliminary conclusions

International humanitarian law contains a number of obligations for parties to an armed conflict which are applicable to the exploitation and plundering of natural resources in situations of armed conflict. These obligations follow from provisions which afford protection to property and to civilian objects. However, upon closer examination, three problems immediately become apparent. The first concerns the general ability of international humanitarian law to regulate the exploitation of natural resources, which is principally a commercial activity and not an act of warfare. International humanitarian law is not designed to address these types of activities. This is only different for occupation law, which regulates the position of an occupant as a *de facto* authority. Most importantly, the right of an occupant to exploit natural resources is limited to a right of "usufruct" to cover the costs of civilian administration in occupied territory.

The second issue that immediately becomes apparent concerns the enormous range of obligations under international humanitarian law. Although there are actually not many rules that apply to the exploitation of natural resources in situations of armed conflict, different rules apply to different conflict situations. Moreover, some of the rules target only one party to the conflict. This asymmetry of obligations for parties to an armed conflict is most apparent in situations of internal armed conflict. For example, the prohibition against seizing or destroying the property of an "adversary" restricts its application to the exploitation of natural resources by non-state armed groups, while the prohibition has no direct relevance for governments.

The final problem that is apparent is the failure of IHL to provide adequate protection to the environment in situations of armed conflict. The prohibition against causing widespread, long-term and severe damage to the environment applies only to situations of international armed conflict. Moreover, it has such a high threshold that it would only cover the most extreme cases of environmental damage resulting from the exploitation of natural resources. The mass-

ive pollution of a river caused by the use of chemicals or the cutting down of a forest encompassing at least several hundred square kilometres are examples of this. More general provisions regarding the protection of property or of objects that are indispensable to the civilian population could fill some of the gaps, but these provisions do not primarily serve environmental purposes.

Some possibilities for the reform of international humanitarian law have been proposed in order to provide better protection to the environment. Michael Bothe et al., for example, propose the creation of protected zones and non-defended localities under Articles 59 and 60 of Additional Protocol I in order to provide protection to the environment in situations of armed conflict.[151] Such protected zones may not be the subject of attack. However, this does not seem to be a viable option in areas of high economic importance, which form the subject matter of this book.

Other options include the adoption of a new legal instrument to protect the environment during armed conflict. Reference can be made to specific calls for the adoption of a fifth Geneva Convention on the protection of the environment or of a "green" Additional Protocol.[152] Although these proposals focus mainly on the effects of warfare on the environment, their scope could be broadened to encompass environmental damage caused by parties to an armed conflict by other activities as well. In this sense it could be construed as a legally binding code of conduct for parties to an armed conflict with regard to the environment.

However, it remains to be seen whether the adoption of a new legal instrument to protect the environment in situations of armed conflict is a viable option. Discussions on this subject date back to 1991, when a round table debate was organized by the London School of Economics. Since then, the subject has remained on the agenda, but the debate has been confined to academic and civil society circles.

Apart from these policy considerations, a more fundamental objection can be made to this sort of legislative effort in relation to the subject matter of this book. A Convention focusing on the protection of the environment in situations of armed conflict could be very useful in providing better protection to the environment in these situations. From this perspective, the initiative is to be applauded. However, it does not solve the other problems identified in this chapter, in particular the lack of clarity with regard to the existing rules for the exploitation of natural resources by parties to an armed conflict. A convention focusing on the protection of the environment is not an appropriate instrument to address issues related to an essentially economic activity. Fur-

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151 M. Bothe; C. Bruch; J. Diamond; and D. Jensen, 'International law protecting the environment during armed conflict: gaps and opportunities', *International Review of the Red Cross,* Vol. 92, No. 879 (2010), p. 577.

152 G. Plant, *Environmental Protection and the Law of War: A 'Fifth Geneva' Convention on the Protection of the Environment in Time of Armed Conflict*, London: Belhaven Press (1992).

thermore, what is needed is not so much a codification of relevant rules belonging to the field of international humanitarian law relating to the exploitation of natural resources, but rather a reassessment of the existing rules from all relevant fields of international law. This issue is explored in greater detail in the final conclusions to this part of the book.

Finally, it can be argued that international humanitarian law contributes to the protection of natural resources in two important ways. First, it contains an elaborate regime for the situation of occupation which explicitly deals with the exploitation of natural resources in occupied territories. Secondly, it is the only field of international law that contains binding obligations for non-state armed groups, including rules that are relevant for the exploitation of natural resources. According to these rules, armed groups are not allowed to exploit natural resources, except in cases of imperative military necessity. However, in reality it is difficult to imagine situations where the exploitation of natural resources could ever satisfy the criteria of imperative military necessity, in particular the "urgency" requirement. Although these restrictions are understandable from the point of view of the States that have negotiated the relevant treaties which embody these rules, the question arises whether these restrictions are effective. If there is a quasi- prohibition against armed groups exploiting natural resources in order to finance their armed struggle, why should they then bother to abide by the law at all? From the point of view of environmental protection, it may therefore be more useful to provide those armed groups that satisfy the criteria of Additional Protocol II with a qualified right to exploit natural resources in territories under their control. This point is taken up in greater detail in the concluding remarks to this part of the book.