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**Holding Russia Accountable for its Attacks on Ukraine's
Environment:
An IHL Perspective on Environmental Protection during Armed
Conflicts**

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Abstract: The outbreak of the Russo-Ukrainian War shocked the world and is posing new challenges to Europe from a political and humanitarian point of view. According to many experts, the conflict will lead to severe consequences also from an environmental point of view. This paper seeks to delineate the International Humanitarian Law (IHL) framework devoted to the protection of the environment during armed conflicts and to understand whether it will be enough to establish Russian liability under IHL. As documented by the Ministry of Ecology and Natural Resources, Russian troops have caused more than 2500 environmental incidents since the onset of the conflict. A desire to hold Russia accountable for its action has been shown by Ukraine, non-governmental organisations (NGOs), and international organisations (IOs), which have raised awareness about the inadequacy of the existing legal framework. This paper suggests that there is a need for a more homogenous IHL framework when it comes to the protection of the environment, which can be eventually complemented by the existing International Environmental Law (IEL) framework.

On 24th February 2022, the full-scale Russian invasion of Ukraine shocked the world. Almost two years into the Russo-Ukrainian War, it is clear that the conflict will entail severe humanitarian consequences. Amongst the atrocities that Russian troops are committing during this conflict, one kind has mostly been overlooked by the mainstream media so far: the attack on the environment.

Amidst the general indifference, the Ministry of Environmental Protection and Natural Resources of Ukraine began to collect evidence of environmental damage caused by the Russian invasion. Particularly, the Ministry warned about the major threat posed by Russian attacks on radiologically hazardous facilities located all across the country, the destruction of infrastructure and heavy industry, including chemical and metallurgical functions, and other environmental hazards at sea.¹ Since then, the Ministry has been issuing weekly briefings on the development of Russian-caused environmental damage.²

These efforts have been joined by several NGOs, such as Zoï Environmental Network, Ecoaction, CEOBS, PAX, Environment-People-Law, and Truth Hounds, and also the United Nations Environmental Programme (UNEP) and the Organization for Security and Cooperation in Europe (OSCE). To put together robust evidence, these actors are employing media reporting, satellite photography, government bulletins, and open-source data.³ According to EcoZagroza, a website launched by Ukraine's Ministry of Environmental Protection and Natural Resources to record environmental damages inflicted by Russia, over 2,500 environmental crimes have been committed by Russian troops, as of 20 July 2023. Moreover, the damage inflicted on Ukraine's soil, water, and air resources by the Russian invasion has exceeded 2 trillion Ukrainian hryvnia (more

¹ Yevheniia Zasiadko, 'Polluted to Death: The Untold Environmental Consequences of the Ukraine War,' *ISPI Online*, May 29, 2022, <https://www.ispionline.it/en/publication/polluted-death-untold-environmental-consequences-ukraine-war-35224>.

² Ministry of Environmental Protection and Natural Resources of Ukraine, 'News,' *Ecozagroza.gov.ua*, <https://ecozagroza.gov.ua/news>.

³ Federica Marsi, 'Can Ukraine Hold Russia Accountable for Environmental Crimes?', *Al Jazeera*, May 16, 2022, <https://www.aljazeera.com/features/2022/5/16/can-ukraine-hold-russia-accountable-for-environmental-crimes>.

than \$50 billion).⁴ As declared by the Ministry itself, the efforts to collect evidence and keep a record of environmental damage aim at holding the Kremlin accountable for its actions.

Since Ukraine is a highly industrialised and densely populated country, the environmental impact of the conflict has been immediately visible. As shown by the joint efforts of the Ukrainian authorities, NGOs, and IOs in monitoring the situation and collecting evidence against Russia, there is a growing consensus on the importance of preventing and minimising environmental damage during armed conflicts. However, these new efforts have only shown the weakness and the inadequacy of the legal framework to prevent environmental damage during wartime. While providing some basic rules for the protection of the environment during armed conflicts, the International Humanitarian Law (IHL) framework appears piecemeal and incomplete.

This paper seeks to understand whether the current IHL framework will allow for holding the Kremlin accountable for environmental damage caused by Russian troops in Ukraine. First, this paper will analyse IHL provisions expressly dealing with environmental protection, then assessing whether it is possible to establish Russian liability for environmental damage in Ukraine under the current IHL framework. Moreover, this essay will argue that, since the onset of an armed conflict does not automatically invalidate International Environmental Law (IEL), it is applicable to the Russo-Ukrainian conflict and may be used to hold Russia accountable for its actions.

The Protection of the Environment during Armed Conflicts: a Brief IHL Review

Environmental damage has historically been a distinctive feature of armed conflicts. Nonetheless, the environmental consequences of armed conflicts have long been neglected by academia and IHL experts. This has been the case regardless of whether environmental damage was incidental, meaning that it occurred as collateral damage of military activities, or employed as a wartime strategy to gain military advantage.

⁴ Ministry of Environmental Protection and Natural Resources of Ukraine, 'Briefing on the Environmental Damage Caused by the Russia's War of Aggression against Ukraine (July 20-26, 2023),' Ecozagroza.gov.ua., 26 July, 2023, <https://ecozagroza.gov.ua/en/news/126>.

This issue has only gained closer attention in the aftermath of the Vietnam War, during which more than 20 million gallons of herbicides and defoliants were employed to damage the Vietnamese rainforests, wetlands, and croplands. The objective of the operation, known as Operation Ranch Hand, was to deprive the enemy of food, resources, and shelter offered by thick vegetation. A recent study shows that Agent Orange, the particular dioxin-contaminated herbicide employed by American forces, still has an effect on the soil, water, and health of Vietnamese people.⁵

In the 1970s, it was precisely this destructive practice in the Vietnam War that provided an incentive for the international community to consider the establishment of an international instrument concerning the environment and armed conflict. The first set of IHL provisions expressly dealing with environmental preservation in wartime was included in the 1977 Additional Protocol I (API) to the Geneva Conventions along with the approval of the Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques (ENMOD) in 1976.

The ENMOD Convention prohibits parties “*to engage in military or any other hostile use of the environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party*”.⁶ In other words, it prohibits the use of environmental modification techniques as a weapon. In Article II of the Convention, the expression ‘environmental modification techniques’ is defined as “any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth”.⁷

⁵ Stefano Saluzzo, ‘CBRN Weapons and the Protection of the Environment during Armed Conflicts’ in Andrea de Guttry and others (eds), *International Law and Chemical, Biological, Radio-Nuclear (CBRN) Events* (Brill | Nijhoff 2022), 380.

⁶ United Nations, Convention on the Prohibition of Military or Any Other Hostile Use of Environment Modification Techniques (10 December 1976) 1108 UNTS 151 (ENMOD Convention), art. I, https://treaties.un.org/doc/Treaties/1978/10/19781005%2000-39%20AM/Ch_XXVI_01p.pdf.

⁷ See note above, art. II.

With regard to AP I, under Article 35(3), “*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*”.⁸ This provision is complemented by Article 55(1) AP I, which expressly deals with the protection of the natural environment:

*Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.*⁹

Despite similar formulations, the two instruments provide a different scope of protection. The main difference between the ENMOD Convention and API is that the former aims at preventing hostile use of environmental modification techniques against other State Parties, while the latter deals with the prohibition of targeting the natural environment during armed conflicts.¹⁰ Interestingly, it has been noticed that the API protects the “environment as a victim”, while the ENMOD convention prevents the manipulation of the “environment as a weapon”.¹¹ This suggests that, while the provisions enshrined in API only apply in war scenarios, the ENMOD convention apply both in wartime and in peacetime.

Another important difference concerns the threshold set by the two treaties. API takes a cumulative approach, in that the three conditions, “widespread, long-lasting *and* severe” must be satisfied simultaneously to establish international legal liability.¹² On the other hand, in the ENMOD Convention, the phrasing “widespread, long-lasting, *or* severe” suggests that the three

⁸ International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3 (Additional Protocol I), art. 35, <https://ihl-databases.icrc.org/assets/treaties/470-AP-I-EN.pdf>.

⁹ See note above, art 55.

¹⁰ Emily Crawford and Alison Pert, *International Humanitarian Law* (Cambridge University Press 2020), 385.

¹¹ Roman Reyhani, 'Protection of the Environment During Armed Conflict', 14 *Journal of Environmental and Sustainability Law*, (2006), 330, <https://scholarship.law.missouri.edu/jesl/vol14/iss2/3>.

¹² Letetia Van der Poll and Ashraf Booley, 'In Our Common Interest: Liability and Redress for Damage Caused to the Natural Environment during Armed Conflict' (2011) 15 *Law, Democracy & Development*, 12, <http://dx.doi.org/10.4314/idd.v15i1.5>.

conditions are not cumulative, but alternative.¹³ Consequently, the threshold set by the API is much higher than the one set by the ENMOD Convention, according to which the violation of just one of the requirements would be sufficient to establish liability under IHL.¹⁴

The third crucial difference between these provisions concerns the intent requirement. The ENMOD Convention prohibits the “deliberate manipulation of natural processes,”¹⁵ thus requiring intent.¹⁶ On the contrary, the API expressly prohibits the use of methods or means of warfare that “are intended or may be expected” to cause damage to the environment.¹⁷ This suggests that the prohibition also covers collateral damage to the environment or those situations where the harmful effects on the environment are *foreseeable*.¹⁸

How to hold Russia accountable for its actions?

As observed in the previous paragraph, IHL does provide some instruments for the protection of the environment during armed conflicts. Nonetheless, many scholars and experts have questioned the effectiveness of the current framework when it comes to the prosecution of wrongful acts against the environment. The second question that this paper seeks to analyse is whether the said IHL framework will be sufficient to establish Russia’s liability, as well as if it can be complemented by drawing on other branches of international law, such as IEL.

The Russo-Ukraine conflict is ongoing and, although NGOs and the Ukrainian Ministry of Ecology and Natural Resources are already collecting evidence of environmental incidents caused by Russian troops, only once the conflict is over will it be possible to comprehensively assess the total damages to Ukraine’s natural environment. From a legal perspective, it is first necessary to determine whether ENMOD and API are binding to Russia. Russia signed and ratified both the

¹³ Michael Bothe and others, ‘International Law Protecting the Environment during Armed Conflict: Gaps and Opportunities’ (2010) 92 *International Review of the Red Cross* 569, 573, <https://international-review.icrc.org/sites/default/files/irrc-879-bothe-bruch-diamond-jensen.pdf>. See also Saluzzo, “*CBRN Weapons and the Protection of the Environment*”, 388-389.

¹⁴ Poll and Booley, “*In Our Common Interest*”, 17.

¹⁵ United Nations, *ENMOD Convention*, art. II.

¹⁶ Reyhani, “*Protection of the Environment*”, 325.

¹⁷ International Committee of the Red Cross, *Additional Protocol I*, art. 35(3) and 55.

¹⁸ Reyhani, “*Protection of the Environment*”, 328.

ENMOD Convention, between 1977 and 1978, and the API in 1989. However, in 2019, Putin revoked the Russian ratification of API, thus withdrawing the Protocol.¹⁹

Nonetheless, it has been suggested that “there is ample evidence showing that it has reached customary international law status.”²⁰ As a matter of fact, the prohibition on causing environmental damage has been expressly written into many countries' military manuals. Following this, violations of these articles have been criminalised under domestic law in many states, and submissions on the subject matter have been made before the International Court of Justice (ICJ).²¹ This suggests that governments believe Articles 35(3) and 55 have acquired the status of customary international law. Therefore, API provisions dealing with environmental protection during armed conflicts could be binding to each member of the international community, whether a signatory or not.

Another important issue is that, as described above, the threshold set by the API is very high and difficult to meet. Moreover, unlike the ENMOD Convention, which clarified the meaning of the terms ‘*widespread, long-term, and severe*’ in an Understanding adopted in 1984,²² API does not provide a definition for these terms. As underlined by Richard Desgagné, there is just a general agreement of a high threshold for API as well.²³ This could make it even more difficult to prove Russian liability under IHL. However, a review of the International Committee of the Red Cross (ICRC) has suggested that this high threshold could be falling into disuse, as environmental standards are continually evolving.²⁴ This would be proven by the fact that international tribunals have, at times, favoured a dynamic interpretation of the three requirements.²⁵ For instance, in 1997, the ICJ recognized that, thanks to increasing awareness about the detrimental effects of

¹⁹ International Committee of the Red Cross. ‘States Parties and Signatories to the Additional Protocol (I),’ *International Humanitarian Law Databases*.
<https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties?activeTab=1949GCs-APs-and-commentaries>.

²⁰ Reyhani, “*Protection of the Environment*”, 328.

²¹ Id. See also Jean-Marie Henckaerts and others, *Customary International Humanitarian Law. Volume I, Rules* (Cambridge University Press 2009), 143. See also Poll and Booley, “*In Our Common Interest*”, 13.

²² Reyhani, “*Protection of the Environment*”, 331.

²³ Richard Desgagné, ‘The Prevention of Environmental Damage in Time of Armed Conflict: Proportionality and Precautionary Measures’ (2000) 3 *Yearbook of International Humanitarian Law* 109, 111,
<https://doi.org/10.1017/S138913590000060X>.

²⁴ Bothe and others, “*International Law Protecting the Environment*”, 576.

²⁵ Desgagné, ‘*The Prevention of Environmental Damage*’, 112.

environmental degradation on humankind, new norms and standards have been developing, and they should be taken into account and given proper weight.²⁶ While this kind of reasoning could be a pathway forward in holding Russia accountable, it cannot be completely relied upon, as it is not widely accepted.

Another thought process that could be followed to circumvent the difficulties posed by API is to consider the natural environment as civilian property. objects and property enjoy protection under provisions of the Hague and Geneva Conventions.²⁷ This could be a more effective legal basis for the protection of the environment during armed conflicts. The main flaw in this reasoning is the possibility for Russia to argue that environmental damage caused during the conflict is an inevitable result of military activities. In this case, the damage to the environment, even when considered as civilian property, would be classified as collateral damage.²⁸

However, the principle of military necessity is subject to the principle of proportionality. This means that, in any circumstance, the use of force shall be proportionate to the military advantage it could ensure. As a consequence, an attack is unlawful if the collateral damage is excessive in relation to the military advantage.²⁹ As a result, determining whether collateral damage inflicted by military activities is excessive or not in relation to the concrete military advantage is rather difficult, especially in relation to environmental impact. In the case of Ukraine, a prosecutor would need to consider not only the scope of environmental damage inflicted by Russia, but also keep in mind the level of pre-existing pollution.³⁰

One interesting tactic that could be employed to create a more effective legal basis for the prosecution of environmental crimes in Ukraine is the possibility of filling in the gaps of IHL environmental framework through IEL, which normally applies in peacetime. This thought process

²⁶ International Court of Justice, Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, 25 September 1997, p. 75, para. 140, <https://www.icj-cij.org/sites/default/files/case-related/92/092-19970925-JUD-01-00-EN.pdf>.

²⁷ See note above, at 109. See also Bothe and others, “*International Law Protecting the Environment*”, 577. See also Poll and Booley, “*In Our Common Interest*”, 24.

²⁸ Bothe and others, “*International Law Protecting the Environment*”, 577.

²⁹ Desgagné, “*The Prevention of Environmental Damage*”, 13. See also Saluzzo, “*CBRN Weapons and the Protection of the Environment*”, 389.

³⁰ See note above., 578.

is gaining more and more credit amongst experts and academia.³¹ This option does pose some challenges: first, IEL is still a developing and dynamic body of laws; second, it is paramount to understand how IEL and IHL interact during armed conflicts, keeping in mind the principle of *lex specialis*.³² In this regard, the International Law Commission (ILC), clarified that “the outbreak of an armed conflict does not necessarily terminate or suspend the operation of treaties.”³³ Particularly, the ILC provided an indicative list of treaties that still apply during armed conflicts, including treaties concerning environmental protection.³⁴

However, while some multilateral environmental agreements (MEAs) expressly state their continued applicability during armed conflicts, others address the issue only indirectly or do not address it at all. In this regard, an eventual prosecutor could investigate if there are any MEAs between Russia and Ukraine and their status during armed conflicts. To this end, the Ministry for Ecology and National Resources of Ukraine has already pronounced that Russia “grossly violated” the Convention on the Protection and Use of International Watercourses and International Lakes, the Bucharest Convention for the Protection of the Black Sea against Pollution, and the Ramsar Convention.

However the first two conventions do not contain clauses about their applicability during armed conflict and the Ramsar Convention, which provides a List of Wetlands of International Importance, addresses this only indirectly. Article 3 of the Ramsar Convention states that, in case of “urgent national interests,” the parties can redefine the boundaries of the wetlands already on the list. However, it is not clarified whether “urgent national interests” encompasses armed conflict.³⁵

³¹ Dinah Shelton and Isabelle Cutting, ‘If You Break It, Do You Own It? Legal Consequences of Environmental Harm from Military Activities’ (2015) 6 *Journal of International Humanitarian Legal Studies* 201, 213, <https://doi.org/10.1163/18781527-00602002>. See also Bothe and others, “*International Law Protecting the Environment*”, 579. See also Desgagnè, “*The Prevention of Environmental Damage*”, 120. See also Saluzzo, “*CBRN Weapons and the Protection of the Environment*”, 390.

³² Bothe and others, “*International Law Protecting the Environment*”, 580.

³³ International Law Commission, Effects of Armed Conflicts on Treaties, UN Doc. A/CN.4/L.727/Rev.1, 6 June 2008, art. 3, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_10_2011.pdf.

³⁴ International Law Commission, Report on the work of its Sixty-Third Session, (26 April to 3 June and 4 July to 12 August 2011), A/66/10 and Add.1, para. 100, https://legal.un.org/ilc/documentation/english/reports/a_66_10.pdf.

³⁵ Bothe and others, “*International Law Protecting the Environment*”, 582.

Finally, to hold Russia accountable for its attacks on Ukraine's environment, it could be easily argued that the IHL principle of precaution also applies to attacks against the environment.³⁶ The principle of precaution imposes specific responsibilities on the parties engaged in a conflict, which include the obligation to employ all viable methods to differentiate between civilian and military targets and to refrain from launching attacks likely to result in excessive collateral damage.

In this regard, it is interesting to observe how the ICRC has attempted to construe such precautionary duties in line with IEL traditional approaches. Particularly, in its Study on Customary Law, the ICRC has enshrined the principle of "due regard" (or due diligence) in rule 44, which deals with potential environmental damages in the conduct of military operations.³⁷ The principle of due regard is a generally accepted principle in International Environmental Law, which requires states to act in a manner that guarantees the prevention of any environmental harm in other States or regions stemming from activities within their authority and oversight. This example suggests that when it comes to environmental protection during armed conflicts, IEL is becoming more and more used in complementing the insufficient IHL framework.

Conclusion

This article sought to analyse the IHL framework on the protection of the environment during armed conflicts and understand whether it will provide an effective legal basis to establish Russian liability for crimes committed in Ukraine. As stated above, the IHL framework appears inadequate when it comes to the protection of the environment during wartime. The main instrument provided by IHL, namely API Articles 35(3) and 55, sets a high threshold for establishing liability for environmental damage under IHL.

Two main questions arise from the present analysis and necessitate further investigation. First, how and to what extent it will be possible to complement the IHL framework through the still-evolving IEL body of laws? Second, how will Ukraine hold Russia accountable for its actions

³⁶ Saluzzo, "*CBRN Weapons and the Protection of the Environment*", 390.

³⁷ Jean-Marie Henckaerts and others, *Customary International Humanitarian Law. Volume I, Rules* (Cambridge University Press 2009), rule 44, at 147.

and can the unprecedented attention that the issue is receiving will encourage the international community to take action and create a more homogenous framework for the protection of the environment during armed conflicts?

With regard to available methods for holding Russia accountable for its actions, a number of options are on the table. However, according to Micheal Bothe, former president of the International Humanitarian Fact-Finding Commission, “the use of foreign state assets to pay compensation appears to provide the most promising mechanism for holding Russia accountable.”³⁸ The Ministry for Ecology and Natural Resources of Ukraine, assisted by civil society organisations, NGOs, and IOs, is meticulously monitoring the situation and collecting evidence of environmental damage caused by Russian troops in Ukraine.

Although environmental concerns may seem a minor issue compared to other more severe problems such as displaced peoples, civilian casualties, and infringement of democratic state sovereignty, it should be taken in mind that environmental damage in Ukraine will have severe repercussions for decades to come. Such damage will affect not only the natural environment itself, but also the life and wellbeing of the Ukrainian people. The international community has the unprecedented opportunity to take action on the issue of environmental damage in wartime, and it should not neglect to seize upon it.

³⁸ Ministry of Environmental Protection and Natural Resources of Ukraine, ‘How to Take Russia Accountable for Environmental Damage in Ukraine? Opinions of International Experts,’ *Official Website of the Ministry of Environmental Protection and Natural Resources of Ukraine*, April 30, 2022, <https://mepr.gov.ua/yak-prytyagnuty-rosiyu-do-vidpovidalnosti-za-znyshhennya-dovkilliya-v-ukrayini-dumky-mizhnaro-dnyh-ekspertiv/>.

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