

## **SUMMARY: THE PROTECTION OF WATER DURING ARMED CONFLICT**

Water has been used for military purposes in the past and still continues today, i.e. poisoning of enemy water, attacking enemy water installations, etc. This conduct denies access to water, affects the supply of water, health, supply of electricity, etc.

Public international law, such as treaties (e.g. The 1949 Geneva Conventions), customary international law, etc, regulate the protection of water during armed conflict.

Chapter I of the dissertation analyzes the public international law iro the abovementioned.

The application of public international law, depends on the municipal law of the state concerned. This municipal law is, in the case of South Africa, found in the 1996 Constitution.

The 1996 Constitution contains specific provisions regarding *inter alia* the legal obligations of the South African security services, the legal status of international agreements, as well as the application of customary international law and international law.

Chapter II of the dissertation analyzes the abovementioned wrt the legal obligations of the SA National Defence Force iro the subject matter.

## **KEY TERMS**

Protection of water; Law of Armed Conflict (LOAC); International armed conflicts; Non-international armed conflicts; 1949 Geneva Conventions; 1977 Additional Protocols I and II to the 1949 Geneva Conventions; International customary law; Soft law; Water installations; 1996 South African Constitution.

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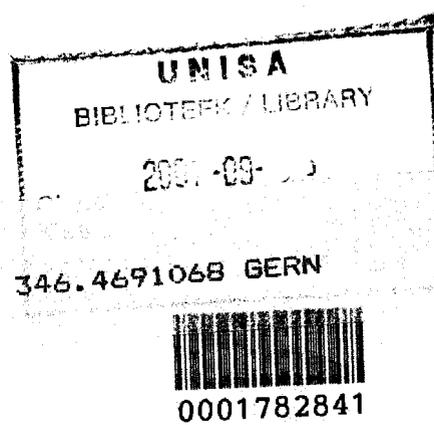
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# CHAPTER I

## THE PROTECTION OF WATER DURING ARMED CONFLICT

### INTRODUCTION

*"As a result of war, you are thirsty; yesterday you took the water supply for granted, but today it is no longer possible to turn on a tap and drink. The water infrastructure where you live was damaged during the fighting.*

*You have walked for days to escape violence unleashed in your own country. Terrified and tired, you cannot carry the water necessary to sustain you on this endless journey.*

*Water supplies are frequently compromised in times of conflict. For those who stay and those who flee, water is the first priority for survival."<sup>1</sup>*

Water has been used for military purposes since time immemorial and this hostile use continues today.<sup>2</sup> The availability of water often proved decisive when a site was chosen for a city, fortress or encampment. The remains of the great ancient civilizations clearly indicate that water-based constructions could be used against enemy troops and there was a definite military advantage to be gained by flooding the fortifications of besieged towns, or poisoning the water resources of the enemy.

Modern examples abound. The British damaged the major German dams during the bombing runs of 1943. During the Korean and Vietnam<sup>3</sup> wars, dams and dykes were not spared by bombs.<sup>4</sup> In Afghanistan, the traditional irrigation system was brought to a standstill in the early years of the conflict. During the Gulf war, the allied bombing raids put Iraq hydroelectric power stations out of action. In January 1993, the Peruca dam in Croatia was seriously damaged by the Serbian militia.

In modern armed conflict, even if the general prohibition under international law on the use of poison is complied with, water could still be contaminated as a direct result of military operations against water installations and works.

In some situations, the party with control over water resources has the upper hand. Gaining that control thus becomes a definite strategy in, for example, cases of occupation

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<sup>1</sup> ICRC (1994) 2.

<sup>2</sup> ICRC (1998) 32.

<sup>3</sup> Centner (1995) 17. Conventional bombs were used by the Americans to alter *inter alia* river courses, since the Vietcong floated supplies down rivers in sealed 55-gallon drums.

<sup>4</sup> Centner (1995) 14. To hinder the Japanese Imperial Army's advance into Manchuria, defending Chinese forces under Chiang Kai-Shek dynamited the Huayankow dyke across the Yello River, inundating an area twice the size of Massachusetts. The action resulted in the drowning of several thousand Japanese soldiers and halted the advance of the Imperial Army in the region. However, approximately 250,000 to one million Chinese citizens also perished, and the dyke remained damaged until 1947. Experts rate the Huayankow dyke destruction as the single most deadly act in all human history.

and internal conflicts.<sup>5</sup> An occupying power may, for instance, expropriate land, thus swallowing up springs and wells, may totally or partially prohibit the people in the occupied territories from irrigating land, from using the water sources and watercourses to grow crops or run or develop their holdings as going concerns; and may impose pumping quotas. All of these do not affect only the population, but also the crops and livestock.

In civil wars, which today account for most of the armed conflicts in the world, the use of water by the belligerent parties constitutes a serious threat to the population concerned. For example, the effect of destroying or rendering useless a source of drinking water or a safe water supply can in very short order deprive the local population of an essential commodity. In the case of a population in an arid region, it is easy to imagine what the outcome would be, for example, in several African countries or regions where water is a very scarce commodity.

While thirst may sap the morale of troops on the battlefield, the lack of a safe water supply may force a population into exile and condemn crops and livestock to wither and die.

### **EFFECT OF HOSTILITIES ON WATER**

To attack water is to attack an entire way of life. Even when water is available, military operations make access to it no easy matter, because hostilities between the parties could have the following effect on the supply and quality of water:

- a. **The denial of access to water.**<sup>6</sup> In this instance for example, civilians are physically prohibited from gaining access to water, for instance when paths leading to water installations or supplies are mined, or where civilians are targeted whilst queuing at public water-collection points.

Humanitarian workers are denied access to water installations to perform repair work. The repair and restoration of water installations, works and facilities require complex operations which involve bringing together the necessary technical expertise, equipment and manpower.

- b. **Effects on the supply and quality of water.**<sup>7</sup> In times of conflict, water supplies may be affected in many ways. Installations and piping may be directly attacked by artillery fire or damaged as a result of indiscriminate shelling. Damage to power distribution can also jeopardise water supplies.<sup>8</sup>

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<sup>5</sup> ICRC (1998) 33. Centner (1995) 102. In 1979, Egyptian President Anwar Sadat signed the peace treaty with Israel, but stated, "*The only matter that could take Egypt to war again is water*". In 1980 he went further by directly threatening Egypt's neighbour when he stated, "*If Ethiopia takes any action to block our right to the Nile waters, there will be no alternative for us but to use force*". In 1990 the Egyptian Minister of Foreign Affairs declared, "*That the national security of Egypt is a ... question of water.*"

<sup>6</sup> ICRC (1998) 33.

<sup>7</sup> ICRC (1994) 4.

<sup>8</sup> In Iraq, most of the important power stations were targeted in the very first days of the Gulf war.

Crippling strikes against the abovementioned installations cut off electricity and prevent pumps and treatment stations running. Fuel is usually extremely scarce in wartime, so back-up generators are rapidly rendered useless. Spare parts are looted or become unavailable due to embargoes or sieges. Repair and maintenance become impossible if the skilled personnel who operate and maintain large and complicated water installations leave or have to participate in the hostilities.

- c. **Urban complexity.**<sup>9</sup> Warfare tends increasingly to occur in urban environments.<sup>10</sup> Water infrastructures in modern cities are particularly vulnerable to attack or disruption, owing to their complexity. Cities are especially vulnerable when their water sources are distant.

People everywhere need water for drinking, cooking, washing, but in the urban areas, the disruption of water distribution has particularly dramatic consequences, such as no supply of drinking water, no waste removal, etc.

- d. **Effects on the civilian population.**<sup>11</sup> Once their water supply is threatened or compromised, people are compelled to leave the safety of their homes to seek water. This may mean that they fall prey to the hostilities taking place, such as bombardment, gunfire or snipers as they queue to collect water.

The pressure on available water supplies becomes intense. Water supplies rapidly become overused and may become saline if situated near the sea. Under this pressure, and because water is so vital to human survival, violence and power struggles may break out within local communities over access to water supplies.

- e. **Agriculture.**<sup>12</sup> In many parts of the world, irrigation systems are used extensively in agriculture. Destruction of irrigation systems, whether accidental or deliberate, deprives people of the means to grow their crops. This leads to malnutrition, starvation and disease.
- f. **Health.**<sup>13</sup> In any water distribution system, leaks occur. However, additional damage to the infrastructure causes the water pressure to drop and become intermittent; as a result, dirty, unsanitary water tends to get sucked into the pipes through leaks.

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<sup>9</sup> ICRC (1994) 4.

<sup>10</sup> It is estimated that by the year 2000, 40% of the world's population will be living in the cities.

<sup>11</sup> ICRC (1994) 5.

<sup>12</sup> ICRC (1994) 5.

<sup>13</sup> ICRC (1994) 6 - 7.

Inevitably, sewage pipes are often broken. As people continue to use their toilets, raw sewage flows into the streets, rivers and watermains. People's health becomes increasingly threatened as the conditions become more and more conducive to the spread of epidemic diseases. Problems of waste disposal and personal hygiene build up, while the high density of the population encourages the spread of disease.

Water-borne diseases are also systematic killers amongst displaced people who have no access to a regular supply of clean water.<sup>14</sup> When sanitation systems deteriorate, cholera and other water-borne diseases can be transmitted rapidly to others. The large number of people and poor medical services found in certain conflict situations increase the potential for epidemics. When there is not enough water for people to wash properly and regularly, there is often a significant increase in parasites such as lice and fleas. These insects are potential carriers of serious diseases such as typhus and plague.

Eye infections and skin diseases such as scabies become prevalent when the general hygiene of the population deteriorates. Water-borne and skin diseases compound the misery of war and have long-term implications for the health of the population once the war is over.<sup>15</sup>

- g. **No electricity, therefore no water.**<sup>16</sup> When armed conflict breaks out, power stations are often put out of action. The high tension power lines are also very vulnerable to bombardment and sabotage. Emergency generators moreover need diesel and this is likely to be in short supply or severely rationed in view of its strategic importance.<sup>17</sup>

## **INTERNATIONAL PROTECTION OF WATER DURING ARMED CONFLICT**

**Introduction.** Water can be seen as link between the traditional and new branches of public international law. Traditionally, armed conflict, whether of international or internal nature, is governed by international humanitarian law, or nowadays commonly referred to as the "*Law of Armed Conflict*" ("*LOAC*"), which is one of the oldest branches of public international law having its roots in both treaties and custom.<sup>18</sup> These laws and customs have arisen from the long-standing practices of belligerents; their history goes back to the Middle Ages when the influence of Christianity and of the spirit of chivalry of that epoch combined to restrict the excesses of belligerents. Since the nineteenth century, the

<sup>14</sup> It has been reported that up to 50% of deaths among displaced populations are caused by water-borne diseases.

<sup>15</sup> For instance, in Iraq, the incidence of water-borne diseases - and related deaths - is up to three times higher than before the Gulf war.

<sup>16</sup> ICRC (1995) 36; 38.

<sup>17</sup> Mostar, Sarajevo, Aden, Monrovia, Mogadishu, Kigali and Cosovo are just a few examples.

<sup>18</sup> Rogers (1996) 1; Kalshoven (1987) 7.

majority of the rules have ceased to be customary and are to be found in treaties and conventions.<sup>19</sup>

The rules governing protection of water during armed conflict are mainly derived from the LOAC. In order to understand these principles, one should have a clear understanding of what the LOAC is, its purpose, sources, when it applies, etc.

**What is the LOAC?**<sup>20</sup> The LOAC forms a major part of public international law and comprises the rules which, in time of armed conflict, seek to protect persons who are not, or who are no longer taking part in the hostilities, and to restrict the methods and means of warfare employed. In this sense, the LOAC aims to:<sup>21</sup>

- a. spare those who do not, or no longer directly participate in hostilities;
- b. limit the violence to the amount necessary to achieve the aim of the conflict, which can be - independently of the causes fought for - only to weaken the military potential of the enemy.

These rules are international treaties or customary rules specially intended to resolve matters of humanitarian concern arising directly from armed conflicts, whether of an international or non-international nature. For humanitarian reasons, these rules restrict the right of the parties to a conflict to use the method or means of warfare of their choice, and protect persons and property affected or liable to be affected by the conflict.

**The *ius ad bellum* vs *ius in bello*.**<sup>22</sup> The purpose of the LOAC is to limit the suffering caused by armed conflict by protecting and assisting its victims as far as possible. The law therefore addresses the reality of a conflict without considering the reasons for, or legality of resorting to force (my emphasis). It regulates only those aspects of the conflict which are of humanitarian concern. This is known as the ***ius in bello***.

The ***ius ad bellum*** on the other hand, regulates the legal principles regulating the right of states or groups of states to resort to the use of force.<sup>23</sup> These rules mainly derive from the 1945 United Nations Charter, as well as customary international law. For purposes of our discussion, the main focus is on the ***ius in bello*** and not on the ***ius ad bellum***.

**Geneva Law and Hague Law.**<sup>24</sup> The LOAC has two separate branches, namely Geneva Law and Hague Law.

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<sup>19</sup> Starke (1989) 552.

<sup>20</sup> ICRC (1998.1) 4.

<sup>21</sup> Sassoli *et al* (1999) 67.

<sup>22</sup> ICRC (1998.1) 16.

<sup>23</sup> Dixon (1999) 277-306; Dugard (2000) 412 - 430; Starke (1989) 534 - 540; Booysen (1989) 504 - 511.

<sup>24</sup> ICRC (1998) 4; Dugard (2000) 432 - 435.

a. **Geneva Law.** The Geneva Law is designed to safeguard military personnel who are not, or are no longer taking part in the hostilities, as well as persons not actively taking part in hostilities, such as civilians.<sup>25</sup> There are four distinct Geneva Conventions:

- (1) Geneva Convention I (Amelioration of the condition of the wounded and sick of armed forces in the field);
- (2) Geneva Convention II (Amelioration of the condition of the wounded, sick and shipwrecked members of armed forces at sea);
- (3) Geneva Convention III (Treatment of prisoners of war);
- (4) Geneva Convention IV (Protection of civilian persons in time of war).

The two 1977 Additional Protocols to the 1949 Geneva Conventions (hereinafter referred to as "*Additional Protocol I*" and "*Additional Protocol II*"), strengthen the protection of victims of international armed conflicts,<sup>26</sup> as well as offering protection to victims of non-international armed conflicts.<sup>27</sup>

b. **The Hague Law.** The Hague Law establishes the rights and obligations of belligerents in the conduct of military operations, and limits the use of certain means and methods of warfare.

Geneva law and Hague law are complementary. There are also other sources of the LOAC,<sup>28</sup> but for purposes of our discussion, these will not be considered.

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<sup>25</sup> In The Geneva Conventions of August 1949, (Preliminary Remarks), it is stated on p 1 with reference to the four Conventions:

*"Each of these fundamental international agreements is inspired by respect for human personality and dignity; together, they establish the principle of disinterested aid to all victims of war without discrimination - to all those who, whether through wounds, capture or shipwreck, are no longer enemies but merely suffering and defenceless human beings."*

<sup>26</sup> 1977 Additional Protocol I.

<sup>27</sup> 1977 Additional Protocol II.

<sup>28</sup> Such as the 1868 Declaration of St Petersburg (prohibiting the use of certain projectiles in wartime); 1925 Geneva Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods; 1976 Convention on the prohibition of military or any other hostile use of environmental modification techniques (ENMOD Convention); 1980 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; 1993 Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction; 1995 Protocol relating to blinding laser weapons; 1996 Revised Protocol on prohibitions or restrictions on the use of mines, booby traps, and other devices; 1997 Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction; 1998 Rome Statue of the International Criminal Court.

Prior to the Additional Protocols to the Geneva Conventions, no specific, direct protection was afforded to the environment or the protection of water during hostilities in either Geneva or Hague law. The only customary LOAC rule which has developed directly relating to the protection of water, was the prohibition on warring parties from poisoning the water supplies of the opposing party. However, certain other LOAC customary rules affording indirect protection to civilians, civilian objects, and civilian objects indispensable to the survival of civilians, have also developed.

Since the 1970s, the steady deterioration of the natural environment has given rise to widespread awareness of man's destructive impact on nature. International environmental concerns have led to the adoption of a large body of laws and rules for the protection and preservation of the natural environment. These efforts have resulted in the adoption of a substantial and constantly growing body of rules, known as "*international environmental law*".<sup>29</sup> According to Beukes,<sup>30</sup> international environmental law is the part of international law that deals with the conservation and/or management of the environment and the control of environmental pollution.

However, the problem is that most of these rules apply only in peacetime situations and the rules regulating the LOAC unfortunately did not develop so rapidly. It is a fact that the trends that shape legal rules applicable in peacetime often influence the development of the LOAC, in view of the extremely serious environmental damage caused by certain methods and means of modern warfare.

Environmental protection was later raised in the more specific context of *international human rights law*, especially after the severe consequences of environmental warfare were witnessed, for example, during the Vietnam and Gulf wars. It is now recognized that personal growth and happiness - fundamental human rights - cannot be achieved in a severely damaged environment. The right to a healthy natural environment is thus gaining increasingly wide acceptance as a fundamental human right and it is expressly provided for in many international legal instruments<sup>31</sup> and the constitutions of many states.<sup>32</sup>

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<sup>29</sup> Such as "*The Declaration of the United Nations Conference on the Human Environment*" which was adopted in Stockholm, Sweden, in 1972 during the world-wide United Nations Conference on the Human Environment; "*The Rio Declaration on Environment and Development, Agenda 21*", adopted during the Earth Summit held in Rio de Janeiro in 1992.

<sup>30</sup> Beukes (1996) 102.

<sup>31</sup> Shelton (1991) n 4 at 103 - 104.

<sup>32</sup> Shelton (1991) n 5 at 104. According to Shelton, at least forty-four national constitutions as well as some twenty state constitutions contain provisions concerning environmental rights and duties. Furthermore, virtually every constitution revised or adopted since 1960 has addressed environmental issues.

## LOAC PRINCIPLES, APPLICATION AND TERMINOLOGY

### GENERAL PRINCIPLES

The LOAC has certain essential rules which always apply in the event of armed conflict.<sup>33</sup> Some of the most important rules are:

- a. Persons who do not, or can no longer participate in hostilities are entitled to respect for their life and their physical and mental integrity. Such persons must in all circumstances be protected and treated with humanity, without any unfavourable distinction whatsoever. These persons may not be tortured and must be provided with basic necessities such as food, clothing, water, etc.
- b. The wounded and sick must be collected and cared for by the party to the conflict which has them in its power. Medical personnel and medical establishments, transport and equipment must be spared. The red cross or red crescent on a white background is the sign protecting such persons and objects and must be respected. Red cross and medical personnel for example, must be allowed to carry out their humanitarian tasks, such as rendering medical support to the sick and injured, be able to execute repair work to objects and installations which are indispensable to the survival of the civilian population, such as water installations, etc.
- c. Captured combatants and civilians who find themselves under the authority of the opposing party are entitled to respect for their life, dignity, personal rights and their political, religious and other convictions. They must be protected against all acts of violence or reprisal. These persons may not be tortured and must be provided with basic necessities such as food, clothing, water, etc.
- d. Neither the parties to the conflict, nor members of their armed forces have an unlimited right to choose methods and means of warfare. It is forbidden to use weapons or methods of warfare that are likely to cause unnecessary losses or excessive suffering. This is of particular interest to the protection of water, since attacks against dams, dykes and nuclear generating stations are forbidden, unless they regularly, directly and significantly support military operations.<sup>34</sup> However, even then, a military commander is still under an obligation to consider the principle of proportionality, which means that the outcome of the attack/s must be in proportion to the military advantage which is to be gained.<sup>35</sup> In this instance the possible collateral effects of the

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<sup>33</sup> ICRC (1998) 6; Starke (1989) 553.

<sup>34</sup> Article 56 (1) & (2) of Additional Protocol I.

<sup>35</sup> Article 57 of Protocol prescribes certain peremptory measures to be taken by those who plan or decide upon attack, *inter alia*:

planned attack/s must be taken into consideration, for example that thousands of civilians may be drowned if a dam wall is destroyed.

- e. The parties to a conflict must at all times distinguish between the civilian population and civilian property. Neither the civilian population as a whole nor individual civilians may be attacked. Attacks may be solely against military objectives, with the proviso as stated in paragraph d above. This rule is of specific importance to the protection of water during armed conflict, because Protocol I to the Geneva Conventions specifically forbids attacks against civilian objects<sup>36</sup> or objects indispensable to the survival of the civilian population, such as drinking water installations and supplies and irrigation works,<sup>37</sup> unless certain conditions apply.<sup>38</sup>

## WHEN DOES THE LOAC APPLY?

The LOAC applies in two situations,<sup>39</sup> namely:

- a. **International armed conflicts.**<sup>40</sup> In such situations the Geneva Conventions and Additional Protocol I apply. The LOAC is intended in principle to apply to the parties to the conflict and protects every individual or category of individuals not, or no longer actively involved in the conflict.

- a. *Article 57(2)(iii): "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relations to the concrete and direct military advantage anticipated;" and*
- b. *Article 57(2)(b): "an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;"*

<sup>36</sup> Article 52 (1) of 1977 Additional Protocol I.

<sup>37</sup> Article 54(3) of 1977 Additional Protocol I

<sup>38</sup> Article 54(3) of 1977 Additional Protocol I states that these prohibitions shall not apply to the objects referred to when used by an adverse party:

- "(a) as sustenance solely for the members of its armed forces; or
- (b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement."

<sup>39</sup> ICRC (1998:1) 18; Dugard (2000) 435 - 437; Starke (1989) 553.

<sup>40</sup> For discussion also see The Geneva Conventions of 12 August 1949. Commentary I Geneva Convention p 27 - 37.

- b. **Non-international armed conflicts.** In the event of a non-international conflict,<sup>41</sup> such as a civil war, Article 3<sup>42</sup> common to the four Geneva Conventions and Protocol II are applicable. Article 3 common to the Geneva Conventions of 1949 is the one and only article in the Conventions especially written for the event of a non-international conflict. This article, which has often been described as "*the mini-convention*" or the "*convention within the conventions*"<sup>43</sup> provides the rules which parties to an internal armed conflict are "*bound to apply, as a minimum.*"

It should be noted that the conditions of application of Protocol II are stricter than those provided for by common Article 3. In such situations, the LOAC is intended for the armed forces, whether regular or not, taking part in the conflict, and protects every individual or category of individuals not, or no longer actively involved in the hostilities.<sup>44</sup>

## TERMINOLOGY

In order to understand the application of the LOAC, it is imperative to understand certain terminology.

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<sup>41</sup> For discussion also see The Geneva Conventions of 12 August 1949. Commentary I Geneva Convention p 49 - 52.

<sup>42</sup> Common Article 3 to the Geneva Conventions reads as follows: "*In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:*

*(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the abovementioned persons:*

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
- (b) taking of hostages;*
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;*
- (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.*

*(2) The wounded and sick shall be collected and cared for..."*

<sup>43</sup> Kalshoven (1987) 59; ICRC (1998.1) 21.

<sup>44</sup> For example wounded or sick combatants; persons deprived of their freedom as a result of the conflict; the civilian population; medical and religious personnel.

- a. **Attack.**<sup>45</sup> In international law, "attacks" are acts of violence against the adversary, whether in offence or defence and in whatever territory conducted by land-, sea- or air forces.

An understanding of the word "attack" is of particular importance with regard to the protection of water, because under certain circumstances, attacks may occur against objects indispensable to the survival of the civilian population,<sup>46</sup> such as drinking water installations and supplies and irrigation works, if certain conditions are met.<sup>47</sup>

- b. **Belligerents.**<sup>48</sup> Belligerents include the armed forces of a party to a conflict consisting of all organized armed forces, groups and units which are under responsible command, even if that party is represented by a government or an authority not recognized by an adverse party. Individual members of such armed forces are combatants (the term which, as applied to individuals, replaces "belligerents").

During armed conflict, these belligerents/combatants will be responsible for the execution of military operations against the adverse party, which could include attacks affecting water installations, water supplies, etc.

- c. **Civilian Population.**<sup>49</sup> The civilian population is made up of civilian persons. During armed conflict, civilians not directly participating in hostilities are protected persons and no reprisal action may be taken against them, for example, by depriving them of water supplies or access to water supplies.

- d. **Combatant.**<sup>50</sup> Members of the armed forces of a party to a conflict (other than medical personnel and chaplains) are combatants.<sup>51</sup> They have the right to participate directly in hostilities. During armed conflict, these belligerents/combatants will be responsible for the execution of military operations against the opposing party, which could affect water installations, water supplies, etc.

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<sup>45</sup> ICRC (1984) 22 - 23.

<sup>46</sup> Article 54(3) of Additional Protocol I *supra* on p 9 n 38.

<sup>47</sup> Article 54(3) of Additional Protocol I *supra* on p 9 n 38.

<sup>48</sup> ICRC (1984) 25 - 26.

<sup>49</sup> ICRC (1984) 31.

<sup>50</sup> ICRC (1984) 32 - 33. Also see definition of "belligerent" *supra* in paragraph b and Article 43 of Additional Protocol I.

<sup>51</sup> Article 43(2) of Additional Protocol I.

- e. **Custom.**<sup>52</sup> Customary international law is the law which has evolved from the practice or customs of states. In order for this practice to become customary law, states must recognise it as binding upon them as law. This belief in the obligatory nature of the practice is called the *opinio iuris*. The laws of war stem from the practice of war. They are adopted because they are necessary and therefore become customs. Customary international law is binding on all states, although they may not be a party to a certain international instrument. Certain customary rules have also developed with regard to the protection of water, which will be discussed later.<sup>53</sup>
- f. **Defence, civil.**<sup>54</sup> A component of national defence consisting of measures and activities to counter dangerous situations caused by armed conflict, such as *inter alia* rescue and relief operations, repair work, distributing food and drinking water to the population, etc.
- g. **International armed conflict.**<sup>55</sup> An international armed conflict between states is a war. It could also constitute acts of national liberation such as peoples fighting against colonial domination, racist regimes, etc. In relation to international armed conflict, specific rules exist regarding the protection of water and the natural environment during armed conflict.
- h. **Military necessity.**<sup>56</sup> This is an essential principle of the LOAC. In its wider sense, military necessity means doing what is necessary to achieve war aims. It is the justification of any recourse to violence, within the limits of the general principle of proportionality.

In its narrow sense, military necessity is recognized by the rules of international law and intended to be applied in the context of those rules and as derogations thereto. In brief, military necessity in its narrow sense may not be invoked unless positive law expressly allows an exception to be made on the grounds of military necessity to a particular prohibition or restriction of the violence of war.

This principle is of extreme importance with regard to the protection of water during armed conflict, because under certain circumstances, the principle of military necessity may be invoked to justify military attacks against, for example, certain objects indispensable to the survival of the civilian population, like drinking water installations, and supplies and irrigation works, if certain conditions are met.

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<sup>52</sup> ICRC (1984) 38. Also see discussion on p 15 - 17.

<sup>53</sup> ICRC (1984) 39.

<sup>54</sup> ICRC (1984) 39.

<sup>55</sup> ICRC (1984) 35. Also see *supra* on p 9.

<sup>56</sup> ICRC (1984) 75. Also see *supra* on p 8, paragraph d.

- i. **Non-international armed conflict.**<sup>57</sup> This is usually a synonym for a civil war. A non-international armed conflict is characterized by fighting between the armed forces of a state and dissident or rebel forces within its own territory.

Article 14 of Protocol II affords certain protection indispensable to the survival of the civilian population, such as drinking water installations and supplies and irrigation works and prescribes a total ban on attacking any of these objects. This is in contrast with the provisions of Art 54(2) of Protocol I, which allows these attacks under certain circumstances during international armed conflict. According to Article 15 of Protocol II, attacks on dams, dykes and nuclear electrical generating stations are also prohibited if such attacks may cause the release of dangerous forces and consequent severe losses among the civilian population.

- j. **Objects Indispensable to the Survival of the Civilian Population.**<sup>58</sup> These include foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works. It is prohibited to attack, destroy or remove such objects or to render them useless for the purpose of denying them, for their sustenance value, to the civilian population, whatever the motive, whether to starve out civilians, to cause them to move away, or for any other reason.

The classification of drinking water installations and supplies and irrigation works afford special protection to them during hostilities, and only under exceptional circumstances and when certain conditions have been met, could they be the object of attack.<sup>59</sup>

- k. **Prisoner of war.**<sup>60</sup> A combatant in an international armed conflict who falls into the hands of the enemy power. Prisoners of war are afforded protected status. These members must be supplied with medical care if necessary, as well as basic necessities such as food, drinking water, etc.
- l. **Proportionality.**<sup>61</sup> The principle that seeks to limit damage caused by military operations by requiring that the effect of the means and methods of warfare used must not be disproportionate to the military advantage sought. Even if a target is a military objective, the attack thereon is prohibited if the collateral effect would be excessive in relation to the concrete and direct military advantage to be gained, for example, if a dyke is solely used in

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<sup>57</sup> ICRC (1984) 35 - 36.

<sup>58</sup> ICRC (1984) 31 and Article 54 of Additional Protocol I *supra*.

<sup>59</sup> Article 54(3) of Additional Protocol I *supra* on p 9 n 38.

<sup>60</sup> ICRC (1984) 87 - 88.

<sup>61</sup> ICRC (1984) 90.

sustenance of military operations and therefore becomes a legitimate military target, but the attack thereon would cause many civilians to die, the attack would be prohibited.

- m. **Reprisals.**<sup>62</sup> Reprisals during hostilities in an international armed conflict are intrinsically unlawful measures used by a belligerent against the enemy to force the enemy to respect the LOAC. Reprisal action against certain groups of people and/or objects is also specifically forbidden, for example wounded, sick or shipwrecked persons, medical or religious personnel, prisoners of war, the civilian population, civilian persons, civilian objects, objects indispensable to the survival of the civilian population, the natural environment, works and installations containing dangerous forces, such as dams, and dykes and buildings used for the protection of the civilian population.
- n. **Starvation.**<sup>63</sup> A forbidden method of warfare consisting in deliberately depriving civilian persons of food. It is, for example, prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, etc.

The abovementioned prohibitions do not apply if the objects covered are used by an opposing party as sustenance solely for the members of its armed forces; or in direct support of military action, with certain provisos. These objects may also not be made the object of reprisals.

## **SOURCES OF INTERNATIONAL LAW**

The sources of international law are laid down in Article 38 of the Statute of the International Court of Justice,<sup>64</sup> which in short, are the following:

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<sup>62</sup> ICRC (1984) 97.

<sup>63</sup> ICRC (1984) 109.

<sup>64</sup> "Article 38.

1. *The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
  - (a) *international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;*
  - (b) *international custom, as evidence of a general practice accepted as law;*
  - (c) *the general principles of law recognized by civilized nations;*
  - (d) *subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*
  
2. *This provision shall not prejudice the power of the Court to decide a case ex aquo et bono, if the parties agree thereto."*

- a. International conventions;
- b. International custom;
- c. The general principles of law recognized by civilized nations;
- d. Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means.

Article 38, however, does not provide a *numerus clausus* and unambiguous statement of the sources of international law, but is rather considered as a direction to the International Court of Justice to consider various materials when deciding disputes submitted to it. However, it could still be considered a reasonably clear and precise statement of the available sources.<sup>65</sup>

Additional sources which are also considered as sources of international law are resolutions, decisions or determinations of the organs of international institutions,<sup>66</sup> as well as so-called 'soft law'.<sup>67</sup> Some of these sources will now be discussed in short.

## INTERNATIONAL CONVENTIONS (TREATIES)

According to Dixon,<sup>68</sup> international conventions are the only way states can consciously create international law. Treaties may be concluded between two states (bilateral), or between many states (multilateral) and they are usually the outcome of long and protracted negotiations. A treaty is in essence, a bargain between legal equals and it may cover any aspect of international relations.

The word '*treaty*' is also defined in Article 2 of the Vienna Convention.<sup>69</sup>

## INTERNATIONAL CUSTOMARY LAW

According to Dixon,<sup>70</sup> customary international law is that law which has evolved from the practice or customs of states. It is the cornerstone of the modern law of nations and

<sup>65</sup> Dixon (1990) 21.

<sup>66</sup> Starke (1989) 32; 51 - 54; Booyen (1989) 57 - 58; Dixon (1990) 42 - 44.

<sup>67</sup> Starke (1989) 32; 51 - 54; Booyen (1989) 57 - 58; Dixon (1990) 42 - 44.

<sup>68</sup> Dixon (1990) 23; Booyen (1989) 33 - 34.

<sup>69</sup> "For the purposes of the present Convention:

(a) '*treaty*' means an international agreement concluded between States in written format governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;"

<sup>70</sup> Dixon (1990) 27.

certainly one of the most important sources of international law. In order for a certain rule or principle to be considered customary international law, certain requirements need to be met. Without discussing these in too much detail, they are the following:

- a. **There must be a state practice.**<sup>71</sup> State practice includes, but is not limited to, actual activity (acts and omissions), statements made in respect of concrete situations or disputes, statements of legal principle made in the abstract, etc. According to Starke,<sup>72</sup> further evidence of state practice could also be found in acts or declarations by statesmen, opinions of legal advisors to state governments, press releases or official statements by government spokesmen official books or documents, such as military manuals, the internal regulations of each state's diplomatic and consular services, etc.

The requirement that there should be a state practice has been confirmed in some of the decisions of the ICJ.<sup>73</sup>

- b. **Consistency of practice.**<sup>74</sup> One of the most important factors in the formation of customary law, is that the state practice must be reasonably consistent. In the *Lotus* case<sup>75</sup> the ICJ decided that it must be '*constant and uniform*'.<sup>76</sup> This principle was also confirmed in the *Asylum* case.<sup>77</sup> In the

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<sup>71</sup> Dixon (1990) 28; Booyesen (1989) 48 - 49; Starke (1989) 36 - 37.

<sup>72</sup> Starke (1989) 36 - 38.

<sup>73</sup> See *Nicaragua v United States* 1986 ICJ Reports. The Court stated the following on p 98, paragraph 186:

*"...The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States, should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as an indication of the recognition of the new rule..."*

<sup>74</sup> Dixon (1990) 28; Booyesen (1989) 49; Dugard (2000) 28.

<sup>75</sup> *Lotus Case* (1927) PCIJ Ser. A No. 10.

<sup>76</sup> Dixon (1990) 28.

<sup>77</sup> *Asylum Case* 1950 ICJ Reports 266. On 276 the Court ruled that:

*"The Party which relies on custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Columbian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question..."*

*Nicaragua v United States* case,<sup>78</sup> the Court also confirmed the principle of general consistency.<sup>79</sup>

- c. **Generality of practice.**<sup>80</sup> In order for a universal norm of customary international law to develop, the practice must be fairly general. That means that the practice must be common to a significant number of states. Not all states, though, need to participate before a general practice can become law.<sup>81</sup>

There is no mathematical formula to determine how many states must participate in a practice before it is considered customary law. According to Dixon,<sup>82</sup> the degree of generality will vary with the subject matter. Booyesen<sup>83</sup> states that it will depend on the specific circumstances and the specific rule. However, Booyesen<sup>84</sup> states the general rule seems to be that the majority of states must follow the practice, or that the rule must enjoy such general recognition or application, that it will not be rejected by a civilized state.

It is also, however, a recognized principle that not all states are required to follow a customary rule<sup>85</sup> and that a customary rule could even develop between only two states.<sup>86</sup>

- d. **Duration of practice.**<sup>87</sup> No clear guidelines exist on the time required for the formation of customary law. The *North Sea Continental Shelf Cases*<sup>88</sup>

<sup>78</sup> *Case concerning Military and Paramilitary Activities in and against Nicaragua* 1986 ICJ Reports 14.

<sup>79</sup> See p 98 paragraph 186. "...The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States, should, in general, be consistent with such rules, ..."

<sup>80</sup> Dixon (1990) 28 - 29; Booyesen (1989) 49.

<sup>81</sup> Dixon (1990) 29.

<sup>82</sup> Dixon (1990) 29.

<sup>83</sup> Booyesen (1989) 49.

<sup>84</sup> Booyesen (1989) 49.

<sup>85</sup> Dixon (1990) 29; Booyesen (1989) 49.

<sup>86</sup> Starke (1989) 39; Booyesen 49; *Rights of Passage over Indian Territory Case* 1960 ICJ Reports 6 on p 39 the Court stated:

*"It is difficult to see why the number of States between which a local custom may be established on the basis of long practices must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States."*

<sup>87</sup> Dixon (1990) 30.

suggest that the length of time needed will vary from subject to subject and further, that the passage of only a brief period of time is not necessarily a bar to the formation of customary law.

- e. ***Opinio iuris***<sup>89</sup> It is not enough for the formation of customary law that there is general, uniform and consistent state practice. In order for this practice to constitute law, states must recognise it as binding upon them as law. State practice must be accompanied by a belief that the practice is obligatory, rather than merely convenient or habitual (*opinio iuris*).

In the *Lotus* case,<sup>90</sup> the PCIJ emphasized that the *opinio iuris* was an essential element in the formation of customary law. This was confirmed in the *North Sea Continental Shelf Cases*<sup>91</sup> and the *Nicaragua v USA* case.<sup>92</sup>

**International custom with regard to the law on water.** In general terms, international custom has given rise to a number of important principles with regard to the shared use of water resources.<sup>93</sup> These include:

<sup>88</sup> *Supra* at n 86. The Court stated on page 42 paragraph 73 that:

*"With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected."*

<sup>89</sup> Dixon (1990) 31; Starke (1989) 38 - 39, Booyen (1989) 48; 50; Dugard (2000) 31 - 32.

<sup>90</sup> Dixon (1990) 31.

<sup>91</sup> 1969 ICJ Reports 3. The Court held on page 44 paragraph 77 that:

*"The essential point in this connection - and it seems necessary to stress it - is that even if these instances of action by non-parties to the convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the opinio iuris; - for in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio iuris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation."*

<sup>92</sup> *Supra* n 73. In this case the Court held on page 108 - 109 paragraph 207:

*"In considering the instances of the conduct above described, the Court has to emphasize that, as we observed in the North Sea Continental Shelf cases, for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice", but they must be accompanied by the opinio iuris sive necessitatis."*

<sup>93</sup> ICRC (1995) 54 - 55, and Sironneau (1994) 4.

- a. the obligation to co-operate and negotiate with the intention of reaching an agreement;
- b. the prohibition of water resource developments which may have damaging and lasting consequences to the detriment of other states;
- c. the obligation of prior consultation;
- d. the fair use of shared resources, including groundwater.

If one considers the abovementioned as being customary international law, then the question arises whether these rules will apply to a state which is not a party to a specific treaty or treaties which regulate environmental protection during armed conflict. It is submitted that these principles offer no, or very restricted protection to water during armed conflict, due to *inter alia* the following reasons:

- a. Firstly, these rules will only apply in instances where water resources are shared by countries. In a fair number of cases, countries do not share water resources. These rules will have no application if conflict breaks out between them.
- b. Secondly, these rules do not regulate the protection of water during internal conflict in a country, for example during a civil war. In such a situation, these rules will not be applicable.

However, where countries do share water resources and one or more of these countries is not a party to treaties such as the Geneva Conventions, the state or states not party or parties to treaty law will be bound by the rules of customary international rules regulating the use of water. It would, for example, be prohibited for a warring neighbouring state to cut off water supplies to its neighbouring enemy state. Overall it seems that these customary rules have rather limited application.

The abovementioned customary rules must, however, be clearly distinguished from the LOAC customary international rules applicable to the protection of water, such as the prohibitions on poisoning the enemy's water supplies, indiscriminate attacks, objects indispensable to the survival of the civilian population, etc. Therefore, for purposes of this discussion, the main focus is on the LOAC customary international rules applicable to the protection of water.

## **RESOLUTIONS, DECISIONS OR DETERMINATIONS OF THE ORGANS OF INTERNATIONAL INSTITUTIONS**

Resolutions of international organisations are omitted from the list of materials which the Court may consider when deciding disputes submitted to it. This may be because such resolutions do not usually, of themselves, create binding law<sup>94</sup> and are generally considered

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<sup>94</sup> Booyesen (1989) 57.

to be material or evidential sources.<sup>95</sup> According to Starke,<sup>96</sup> decisions or determinations of the organs of international institutions, or of international conferences, may lead to the formation of rules of international law in a number of ways. One of the most important ones is that they may represent intermediate or final steps in the evolution of customary rules.<sup>97</sup> The decisive criterion, according to Starke,<sup>98</sup> is the extent to which the decision, determination or recommendation has been adhered to in practice.

As a general rule, resolutions of the UN General Assembly are not considered binding, even if they are adopted unanimously. They may, however be evidence of existing customary international law.<sup>99</sup> Dugard is of the opinion that to determine to what extent recommendations of the political organs of the UN play a part in the formation of custom, is an issue of much public debate.<sup>100</sup> He states that a resolution of either the General Assembly or the Security Council categorized as a recommendation is not binding on states *per se*. Dugard suggests that an accumulation of resolutions, a repetition of recommendations on a particular subject, may amount to evidence of collective state practice on the part of states. He recognizes the fact, however, that it may be difficult to indicate the precise point at which such a practice became customary law.<sup>101</sup>

## SOFT LAW

According to Dixon,<sup>102</sup> 'soft law' is a term firstly used to describe different but related phenomena in international law. Dixon describes it as the name given to those rules of international law that do not stipulate concrete rights or obligations for the legal persons to whom they are addressed. Such rules are normative - they are rules of law - but their content is inherently flexible or vague.<sup>103</sup> Secondly, according to Dixon,<sup>104</sup> the term 'soft law' is a description of those values, guidelines, ideas and proposals that may develop into rules of international law but have not yet done so. This is not really law at all, but is another name for principles *de lege ferenda*, or principles which could become normative in the future. Often these principles emerge from the codified conclusions of international conferences or are embodied in non-binding agreements.<sup>105</sup>

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<sup>95</sup> Dixon (1990) 42.

<sup>96</sup> Starke 51 - 53.

<sup>97</sup> Booyesen (1989) 50.

<sup>98</sup> Starke (1989) 51 - 52.

<sup>99</sup> Dixon (1990) 42; Booyesen (1989) 50.

<sup>100</sup> Dugard (2000) 32.

<sup>101</sup> Dugard (2000) 32.

<sup>102</sup> Dixon (1990) 44.

<sup>103</sup> For example, Human Rights Treaties.

<sup>104</sup> Dixon (1990) 45.

<sup>105</sup> Dixon (1990) 45.

Dugard defines the term 'soft law' as being imprecise standards, generated by declarations adopted by diplomatic conferences or resolutions of international organizations, that are intended to serve as guidelines to states in their conduct, but which lacks the status of 'law'.<sup>106</sup>

### DUTIES OF STATE PARTIES TO THE LOAC TREATIES

A state party to the LOAC treaties has specific obligations in terms thereof. With regard to the 1949 Geneva Conventions, Common Article 1 states the following:

*"The High Contracting parties undertake to respect and to ensure respect<sup>107</sup> for the present Convention in all circumstances."*

The abovementioned underlines the shared responsibility of all parties to the Conventions and Protocol I to make sure that the LOAC obligations are implemented by each and every state<sup>108</sup>. Since Protocol I contains specific obligations relating to the protection of the environment and water, it follows that all parties must comply with their treaty obligations.

If states are parties to conventions such as the abovementioned, they are under an international obligation not to violate those obligations. According to Dixon,<sup>109</sup> when a binding international obligation exist for a state, it must fulfil that obligation irrespective of whether its national law permits it to do so or forbids it from doing so. Dixon states that if a change in national law is required in order that a state may fulfil its international obligations, then the state is under an international duty to make that change or otherwise mitigate its international responsibility.<sup>110</sup> Under international law, only in certain specific circumstances would a state be allowed to violate its international obligations, such as *inter*

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<sup>106</sup> Dugard (1990) 36.

<sup>107</sup> Also see also Article 1 of Additional Protocol I, which has a similar provision. According to Commentary I Geneva Convention, p 26 -27, the words "*in all circumstances*" means that the Convention must be respected in peace as well as in war in the case of those provisions which are applicable both in peace and in war and that these words do not relate to civil war.

<sup>108</sup> Article 80 of Protocol I states:

1. *The High Contracting Parties and the Parties to the conflict shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol.*
2. *The High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution."*

<sup>109</sup> Dixon (1990) 79.

<sup>110</sup> Also see Starke (1989) 88 - 89.

*alia*, consent,<sup>111</sup> taking countermeasures in respect of an internationally wrongful act,<sup>112</sup> distress,<sup>113</sup> necessity,<sup>114</sup> self-defence,<sup>115</sup> etc.

## PROTECTION OF WATER ITO LOAC INTERNATIONAL ENVIRONMENTAL LAW

### TREATIES AFFORDING THE ENVIRONMENT INDIRECT PROTECTION<sup>116</sup>

**General Principles.** A clear distinction must be drawn between the so-called international "LOAC Environmental Law", and "International Environmental Law". The aforementioned refers to LOAC treaties affording protection to the environment which apply during international or internal armed conflict. The latter refers to the general environmental treaties which afford limited protection to the environment during hostilities, but mainly apply during peacetime.

Environmental damage in wartime is an inevitable reality. Throughout history, war has always left its mark, sometimes extremely long-lasting, on the natural environment. The rules of the LOAC for the protection of the environment therefore aim not to prevent damage altogether, but rather to limit it to a level deemed tolerable.

The most important general principle of the LOAC is the one in terms of which the right of the parties to the conflict to choose methods or means of warfare is not unlimited. This basic principle which was first set forth in the Declaration of St Petersburg in 1868, has frequently been reiterated in LOAC treaties, such as Art 35 of the 1977 Protocol I Additional to the Geneva Conventions.

The principle of proportionality is another basic principle of the LOAC,<sup>117</sup> and clearly also finds application in protection of the environment during times of armed conflict.

**Treaties affording indirect protection to the environment.** Firstly the term "*indirect protection*" of the environment should be defined. Until the early 1970s, the LOAC was "*traditionally anthropocentric in scope and focus*".<sup>118</sup> Indeed, LOAC texts adopted before then made no reference to the environment as such, as the concept did not exist at the time. Nevertheless, various provisions relating, for example, to private property, or the protection of the civilian population, afforded the environment some form of protection.

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<sup>111</sup> Article 27 of the *ILC Draft Articles on State Responsibility* (1996).

<sup>112</sup> Article 30 of the *ILC Draft Articles on State Responsibility* (1996).

<sup>113</sup> Article 32 of the *ILC Draft Articles on State Responsibility* (1996).

<sup>114</sup> Article 33 of the *ILC Draft Articles on State Responsibility* (1996).

<sup>115</sup> Article 34 of the *ILC Draft Articles on State Responsibility* (1996).

<sup>116</sup> Bouvier (1991) 3.

<sup>117</sup> *Supra* at 13.

<sup>118</sup> Bouvier (1991) 3.

Some of these provisions are found in many international treaties, and have become customary international law.<sup>119</sup> The most important are discussed below.

The importance of the general principles stated in the 1868 St Petersburg Declaration has already been stated.<sup>120</sup> The Hague Convention respecting the Laws and Customs of War on Land<sup>121</sup> in its annexed Regulations contains a provision, namely Art 23 paragraph 1(g), which clearly illustrates the aforementioned anthropocentric approach. The article states that it is forbidden:

*"to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."*

The abovementioned is one of the earliest provisions for the protection of the environment in armed conflict. A question which comes to mind, is what is meant by the word "property"?<sup>122</sup> There is little question that Article 23(g) applies to tangible property such as land, cattle, crops or water supplies. However, its applicability in other environmental contexts might not be such a clear cut case. For instance, could the atmosphere, ozone layer or climate be regarded as "property"? There are no definite answers to these questions.

Several treaties that limit or prohibit the use of certain means of warfare also contribute to the protection of the environment in armed conflict.<sup>123</sup> 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 on 10 October 1980, is of particular interest for two reasons:

- a. It sets up a mechanism whereby it may be revised or amended.<sup>124</sup> This Convention has annexed to it certain protocols prohibiting the use of certain weapons.<sup>125</sup> Article 8 of the Convention provides for the review and amendment of the Convention or the annexed protocols. This procedure

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<sup>119</sup> Such as the 1868 St Petersburg Declaration, *supra* n 28; and Article 23 paragraph 1(g) to the Hague Convention respecting the Laws and Customs of War on Land.

<sup>120</sup> *Supra* at 6 and n 28.

<sup>121</sup> Convention No IV of 1907 reaffirms and expands on those principles.

<sup>122</sup> Schmitt (1996) 30 - 31.

<sup>123</sup> For example the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of warfare, adopted in Geneva on 17 June 1925; The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. Adopted on 10 April 1972.

<sup>124</sup> Art 8.

<sup>125</sup> For example Protocol I on non-detectable fragments; Protocol II on prohibitions or restrictions on the use of mines, booby-traps and other devices; Protocol III on prohibitions or restrictions on the use of incendiary weapons; Protocol IV on Blinding Laser Weapons.

could assist those countries who are parties to the Convention and who are advocating the necessity for a separate protocol for the protection of the environment, to have this protocol adopted.

- b. Certain of its provisions, in particular those concerning the use of mines, booby-traps and other devices and incendiary weapons, contribute to the protection of the environment in time of armed conflict, since the use of these devices in most instances, also causes damage to the environment.

Another treaty, namely the Geneva Convention IV,<sup>126</sup> in particular Art 53, prohibiting the destruction of real or personal property,<sup>127</sup> provides minimum protection of the environment in case of enemy occupation. In terms of this article, *"Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."*

It is clear that the provisions discussed above afford protection to water installations, water supplies, etc, during occupation by the enemy, unless military necessity would justify an attack on them.

As already discussed,<sup>128</sup> states who are parties to the conventions referred to above, are legally obliged to honour these conventions. This means that those provisions regulating the protection of the environment must also be honoured.

States who are not parties to the treaties, are legally bound to honour customary international law LOAC principles, for example the prohibition on poisoning the enemy's water supplies, executing indiscriminate attacks without military necessity, not attacking civilians or civilian property unless the latter is solely used for military purposes, etc. It is clear that by virtue of these, at least some kind of protection is also afforded to the environment during hostilities.

### **TREATIES AFFORDING THE ENVIRONMENT SPECIFIC PROTECTION**

In this regard, two treaties are of major importance:

- a. The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques ("*ENMOD*"); and
- b. The 1977 Additional Protocol I<sup>129</sup> to the 1949 Geneva Conventions.

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<sup>126</sup> *Supra* at 6.

<sup>127</sup> This includes, according to Commentary IV of the Geneva Conventions, p 301, *"the prohibition covers the destruction of all property (real or personal)..."*

<sup>128</sup> *Supra* at 15.

<sup>129</sup> *Supra* at 6.

**ENMOD Convention.** This Convention was adopted under the United Nations auspices, largely in response to fears aroused by the use of methods and means of warfare that caused extensive environmental damage during the Vietnam war. Article 1(1) of the Convention prohibits:

*"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".*

Article 1(2) of the Convention also prohibits a state party from assisting, encouraging or inducing any state, group of states or international organization to engage in activities contrary to the provisions of Article 1.

Article 2 of the Convention describes the term "*environmental modification techniques*" as:

*"any technique for changing - through the deliberate manipulation of natural processes - the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space."*

Although the ENMOD Convention contains specific provisions to protect the environment, the application of the convention is limited by the fact that many countries have not yet become party to the convention. This means that these states will only be bound by customary international LOAC principles as already discussed and not by this treaty.

Furthermore, it is submitted that interpretational problems exist between Article 1(1) and Article 2 of the Convention. Article 1(1) prohibits the hostile use of environmental modification techniques, but refrains to state the degree of fault required, i.e. intent or negligence. It is clear that Article 1(1) should be read in conjunction with Article 2, the latter defining the term "*environmental modification techniques*" as the "*deliberate manipulation of natural processes*" (my emphasis), thus clearly requiring intention as the required degree of fault. The problem is that, widespread, long lasting or severe effects to the environment could occur as a result of the collateral effect of a military operation where there was no deliberate effort to seriously damage the environment. If the strict meaning of the wording of Article 2 is taken into consideration, it means that gross negligence or negligence would be insufficient to found liability for a state party for its actions.

**1977 Additional Protocol I to the 1949 Geneva Conventions.**<sup>130</sup> Protocol I contains two articles pertaining specifically to the protection of the environment in time of armed conflict. These two articles illustrate the growing awareness of the importance of respect for the environment that emerged in the early 1970s.

Article 35, paragraph 3, stipulates the following:

*"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".*

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<sup>130</sup> Bouvier (1991) 4.

The abovementioned article, pertaining to methods and means of warfare, protects the environment as such.

Article 55 provides that:

- "1. 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.
- (2) Attacks against the natural environment by way of reprisals are prohibited."

It should be noted that this article, which is intended to protect the civilian population against the effects of hostilities, is found within the broader context of protection of civilian objects.<sup>131</sup>

Article 55 does more than merely restate Article 35, paragraph 3. It establishes a general obligation to protect the environment during the conduct of hostilities, but the obligation is directed at the protection of civilians, whereas Article 35, paragraph 3, aims to protect the environment as such.

As a logical extension, Article 55 prohibits reprisals against the natural environment in that they would penalize humanity as a whole.

Additional Protocol I contains further provisions contributing indirectly to environmental protection in time of conflict, such as Articles 54<sup>132</sup> and 56.<sup>133</sup>

Only states who are parties to Additional Protocol I would be bound by its ratified provisions. Interesting to note, is that although the USA had signed Protocol I, it has not ratified it. The USA has, however declared that it views Articles 52 (General protection of civilian objects) and Article 54 (Protection of objects indispensable to the survival of the civilian population) as customary international law.<sup>134</sup> This means that the USA is bound to comply with these principles. This is of significant importance with regard to protection of water, because Article 54 specifically affords protection to drinking water installations and supplies and irrigation works. However, regarding protection of the natural environment,<sup>135</sup> the USA specifically objects to Article 55<sup>136</sup> of Protocol I. This means that it is not bound by these provisions of Protocol I, since, as already stated, the USA has not ratified this Protocol.

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<sup>131</sup> Articles 52 - 56, Chapter III, Protocol I.

<sup>132</sup> Protection of objects indispensable to the survival of the civilian population.

<sup>133</sup> Protection of works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations.

<sup>134</sup> Jackson (1997) 18 - 20.

<sup>135</sup> Jackson (1997) 18 - 20.

<sup>136</sup> *Supra* at 25.

## LINK BETWEEN THE PROVISIONS OF PROTOCOL I AND THE RULES OF THE ENMOD CONVENTION<sup>137</sup>

The abovementioned two treaties prohibit different types of environmental damage. While Protocol I prohibits recourse to environmental warfare, i.e. the use of methods of warfare likely to upset vital balances of nature, the ENMOD Convention prohibits what is known as geophysical warfare.<sup>138</sup>

Far from overlapping, these two international treaties are complementary. However, they give rise to tricky problems stemming in particular from the fact that they attribute different meanings to identical terms, such as "*widespread, long-term and severe*". To give but one example of such semantic difficulties, the definition of "*long-term*" ranges from several months or a season for the United Nations Convention, to several decades for the Protocol.

Moreover, the conditions of being widespread, long-term and severe are cumulative in Protocol I, whereas each condition is sufficient in and of itself for the ENMOD Convention to apply.<sup>139</sup>

There is a danger that such discrepancies might hamper the implementation of these rules. Hopefully, due to the growing concern over environmental protection during armed conflict, these two treaties will harmonize in future.

Furthermore, with regard to the protection of the natural environment, Article 55<sup>140</sup> to Protocol I prohibits "*the use of methods or means of warfare which are intended or may be expected to cause such damage to the environment...*" (my emphasis). The wording indicates that not only intentional conduct, but also negligent conduct ("*may be expected*") is sufficient to transgress the provisions of Article 55. As already discussed,<sup>141</sup> Article 2 of the ENMOD Convention, only requires intention as the required degree of fault.

## ROLE OF THE MARTENS CLAUSE IN THE PROTECTION OF THE ENVIRONMENT

The preamble to the Hague Convention IV of 1907 respecting the laws and customs of war on land contains a clause, known after its drafter,<sup>142</sup> as the Martens clause, which provides as follows:

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<sup>137</sup> Bouvier (1991) 4.

<sup>138</sup> This implies the deliberate manipulation of natural processes and may trigger hurricanes, tidal waves, earthquakes, and rain or snow.

<sup>139</sup> Bouvier (1991) 4.

<sup>140</sup> *Supra* at 25.

<sup>141</sup> *Supra* at 24.

<sup>142</sup> Professor de Martens of the University of St Petersburg, legal advisor to the Russian imperial foreign ministry during the Hague conferences.

*"in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule 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."*

The purpose of this clause was not only to confirm the continuance of customary law, but also to prevent arguments that because a particular activity had not been prohibited in a treaty, it was lawful. Humanitarian considerations are therefore guiding principles which put a brake on undertakings which might otherwise be justified by the principles of military necessity.<sup>143</sup>

The question arising is, how useful is this clause in limiting environmental damage during warfare?<sup>144</sup> The benefit of this principle is that it operates during the evolution of prescriptive norms. As the law grapples with how to handle environmental issues, the "*laws of humanity*" and "*dictates of public conscience*" will theoretically serve to ensure a modicum of protection. The problem, however, is sometimes how to determine the meaning of "*moral law and public opinion*", since much of the difficulty will result from the surfacing of cross-cultural and intra-societal differences when determining whether a Martens situation has presented itself or not.

### **SPECIFIC PROHIBITIONS RELATING TO WATER DURING THE CONDUCT OF HOSTILITIES**<sup>145</sup>

Besides the general protection applicable to all civilian objects, certain specific rules exist which apply to the protection of water during armed conflict.

**Prohibition on the use of poison.** This customary rule is enshrined in the Hague Regulations,<sup>146</sup> as well as other documents.<sup>147</sup>

**Prohibition on the destruction of enemy property.** Water may be part of either public or private property. The Hague Rules state that it is forbidden to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.<sup>148</sup>

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<sup>143</sup> Rogers (1996) 6 - 7; Kalshoven (1987) 73.

<sup>144</sup> Schmitt (1996) 31.

<sup>145</sup> ICRC (1995) 2 - 4.

<sup>146</sup> Article 23(a) stipulates that it is forbidden to "*employ poison or poisoned weapons.*"

<sup>147</sup> For example, the 1863 Lieber Code destined for the US armed forces, stipulated that military necessity "*does not admit the use of poison in any way, nor of the wanton devastation of a district.*"

<sup>148</sup> *Supra* at 22.

The same principle appears in the Fourth Geneva Convention.<sup>149</sup> In this case the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" is qualified as a grave breach, and thus a war crime.<sup>150</sup>

**Prohibition on the destruction of objects indispensable to the survival of the civilian population.**<sup>151</sup> The provisions of Protocol I in this regard are very important. It is designed to protect objects indispensable to the survival of the civilian population, quoting as examples "foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works"<sup>152</sup> (my emphasis).

Only imperative military necessity entitles a warring party to destroy indispensable objects, with the proviso that they must be situated within the territory under its control. The words used to designate acts likely to harm such objects are intended to cover all eventualities,<sup>153</sup> including pollution, by chemical or other agents. The same wording is used in Protocol II.

A derogation from the immunity of indispensable objects is allowed only if such objects serve as sustenance only for the members of the armed forces or in direct support of military action. Even in those cases, belligerents have to abstain from any action which may be expected to reduce the civilian population to starvation or deprive it of vital water supplies. Reprisals against indispensable objects are forbidden.<sup>154</sup> This prohibition, however, does not appear in Protocol II.

**Prohibition of attacks on works and installations containing dangerous forces.** In view of the extremely dangerous effects which attacks against "works or installations containing dangerous forces"<sup>155</sup> might have on the lives of the civilian population and their property, the 1977 Additional Protocols prohibit such attacks, even in cases where these objects are military objectives.<sup>156</sup>

Three types of works and installations are specified, to wit dams, dykes and nuclear electrical generating stations. Past experience in armed conflict has shown that these are considered priority targets, the destruction of which can decide the outcome of the conflict. Aware of the dangers inherent in such destruction, which go far beyond the legitimate military objectives of attacks, the authors of Protocol I added further clauses to supplement this special protection as follows.

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<sup>149</sup> Article 53.

<sup>150</sup> Fourth Geneva Convention, Article 147.

<sup>151</sup> Zemmali (1995) 2 - 3.

<sup>152</sup> Art 54(2) of 1977 Additional Protocol I to 1949 Geneva Conventions.

<sup>153</sup> "it is prohibited to attack, destroy, remove or render useless".

<sup>154</sup> *Supra* at 13.

<sup>155</sup> Article 56 Additional Protocol I and Article 15 Additional Protocol II.

<sup>156</sup> Article 56 of Additional Protocol I, and Article 15 of Additional Protocol II.

Even military objectives located at, or in the vicinity of such installations, shall not be made the object of attack *"if such attack may cause the release of dangerous forces from the installations and consequent severe losses among the civilian population"*.<sup>157</sup> The special protection against attack provided for the two types of installations (dams, dykes and nuclear electrical generating stations on the one hand, and military objectives located at or in the vicinity of such installations on the other) is waived only when any of these works is used *"in regular, significant and direct support of military operations"*<sup>158</sup> and if such attack is *"the only feasible way to terminate such support"*.

Paragraph 3 of the same article calls upon belligerents to take precautionary measures to ensure that the *"civilian population and individual civilians"* receive the protection accorded to them by international law. Nothing is said of the precautions that must be taken for civilian property, but it may legitimately be concluded that this is covered by the second sentence of the paragraph.

Reprisals against such installations and military objectives are prohibited,<sup>159</sup> while the general prohibition on locating any military objectives in the vicinity of such works is tempered by permission to erect purely defensive installations to protect such works. The conclusion of special agreements to provide extra protection or for identification, using the sign indicated in Protocol I,<sup>160</sup> is left to the initiative of the parties. From the point of view of repression, *"launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii)"* is regarded as a grave breach of the Conventions and the Protocol I. It should be noted that this provision also covers civilians and civilian objects.

Observance of these rules governing the conduct of hostilities is sufficient to ensure effective protection of water resources and installations which are indispensable to the survival of the civilian population. Parties to the conflict are also under further obligations with regard to the protection of victims. One of these is the provision of water.

**Water as an indispensable resource for the survival of protected persons.**<sup>161</sup> The LOAC seeks to ensure at least minimum normal living conditions for the persons it is intended to protect. One practical way of ensuring this, is by satisfying basic human needs, such as supplying the need for water.

Assistance and care for the wounded and sick are inconceivable without water. To be able to do their work, medical staff need water. The same applies to medical equipment and

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<sup>157</sup> Art 56(1) Additional Protocol I *supra*.

<sup>158</sup> Article 56(2) Additional Protocol I *supra*.

<sup>159</sup> *Supra* at 12; 13.

<sup>160</sup> (Annex I, Article 17).

<sup>161</sup> Zemmali (1995) 4.

installations as well as the hygiene and maintenance of any place where there are protected persons.<sup>162</sup>

### **ROLE OF THE CIVIL DEFENCE ORGANIZATIONS**

One of the particular humanitarian tasks of civil defence organizations, whose rights and duties are laid down in the provisions of Protocol I, is the emergency repair of indispensable public utilities.<sup>163</sup>

Even though civil defence personnel are active only within the national territory, whether it is occupied or not, these provisions strengthen the protection accorded to civilian objects and, if faithfully observed, can make a valuable contribution to the assistance provided to the civilian population. The role of civil defence organizations in protecting water storage and other supply systems must be stressed and respected.<sup>164</sup>

These relevant rules clearly show that the protection of water in times of armed conflict is an integral part of the LOAC. It also shows that this law, in its most recent codification, has taken account of the impact of modern warfare on water installations and reserves of drinking water, for indeed the damage caused to water as a result of hostilities could jeopardize the fauna and flora of a region, force entire populations to leave their homes, and eliminate any sign of life. Humanitarian aid agencies have witnessed such effects in various situations and have important tasks to accomplish in this domain.

### **ENVIRONMENTAL PROTECTION DURING NON-INTERNATIONAL ARMED CONFLICTS**

The international law that protects victims of non-international armed conflict is less well developed than the LOAC governing international armed conflict.

Common Article 3 to the Geneva Conventions,<sup>165</sup> does not state anything specific about protecting the environment from attack in civil war. It only addresses humanitarian issues in the strictest sense.

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<sup>162</sup> This is so obvious it has not been considered necessary to formulate specific rules. In some contexts, however, an explicit reference has been made thereto. Article 20, paragraph 2 of the Third Geneva Convention stipulates that prisoners of war who are being evacuated must be supplied by the Detaining Power with sufficient food and potable water, and with the necessary clothing and medical attention. The same obligation is laid down in Article 46, paragraph 3 of the said Convention, for the transfer of prisoners of war, and in Article 127, paragraph 2 of the Fourth Geneva Convention, for the transfer to internees. Drinking water is also referred to in a separate paragraph of the common article to the two Conventions and concerning the daily food rations of prisoners of war and civilian internees (Third and Fourth Geneva Conventions), Article 26, paragraph 3 and Article 89, paragraph 3, respectively.

<sup>163</sup> Other explicitly mentioned tasks in aid of the civilian population include fire-fighting, provision of emergency supplies and the preservation of objects essential for survival.

<sup>164</sup> 1977 Additional Protocol I, Article 61(a)(vii), (x) and (xiv) in particular.

<sup>165</sup> *Supra* at 9 and n 42.

The 1977 Additional Protocol II to the Geneva Conventions, contains no provisions directly concerning the environment. However, Article 14, on the protection of objects indispensable to the survival of the civilian population, has a direct impact on warfare and the environment, with its prohibition of attacks on agricultural areas, irrigation works, etc.

### **DIFFICULTIES IN ENFORCING RULES TO PROHIBIT THE USE OF WATER AS A WEAPON OF DESTRUCTION**<sup>166</sup>

Until fairly recently, there appears to have been no treaty-based or customary regulation of any kind which specifically prohibits the use of water as a weapon of destruction. More particularly, there was no actual ban on the destruction of hydraulic installations, the cutting of water supplies to civilian populations, the use of water for military purposes to make survival impossible, etc.

Neither the Hague Convention,<sup>167</sup> nor the Geneva Protocol of 1925 contained provisions destined to safeguard water and hydraulic installations in the event of armed conflict. It has been necessary to wait for Additional Protocol I to the 1949 Geneva Conventions.<sup>168</sup>

Many states, however, have not ratified Additional Protocol I. Destroying a strategic target such as an electricity power plant is enough to disrupt the production of water. Certain rules laid down in the conventions can, nevertheless be applied to water.<sup>169</sup>

Drawn up at the instigation of the International Law Association, the so-called "*Helsinki Rules*" of 1966, relating to the use of international waterways, are intended to prohibit the poisoning of water essential for the health and survival of civilian populations or the act of making it unfit for human consumption. The Rules further seek to ban the diversion of waterways where such action would cause disproportionate suffering to the civilian population or substantial damage to the environment. Moreover, water supply installations which are indispensable for the maintenance of the minimum conditions for survival must not be disrupted or destroyed,<sup>170</sup> and "*the destruction of hydraulic installations presenting risks, such as dams and dykes, is forbidden*".<sup>171</sup> However, these rules can be categorized as so-called "*soft law*".<sup>172</sup> Soft law is not considered legally binding on states and is considered as normative, but it could give direction to states on their course of action, and these rules could over time also develop into customary international law.

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<sup>166</sup> ICRC (1995) 61 - 62.

<sup>167</sup> No IV of 1907. See *supra* at 22 and n 121.

<sup>168</sup> *Supra* at 25 and n 132.

<sup>169</sup> For example, Article 23 of the Hague Convention No IV (*supra*) prohibits the use dispersion of poison, while the Geneva Protocol forbids not only asphyxiating or poisonous gases, liquids or other products, but also bacteriological weapons.

<sup>170</sup> Article 2.

<sup>171</sup> Article 5.

<sup>172</sup> *Supra* at 20.

Finally, in the wake of the Gulf War, United Nations General Assembly Resolution No A/47/37 shows a new tendency to prohibit any destruction of the environment which cannot be strictly justified by military ends.<sup>173</sup> Resolutions of the General Assembly are also not considered legally binding on states. These resolutions could, however, develop into customary international law.<sup>174</sup>

All these measures are intended to apply not only during military operations, but also during territorial occupation. But it is obvious that a wide gap exists between legal rules and their enforcement, all the more in case of armed conflict. The population explosion, the multiplication of water uses arising from urban development, industry and agriculture, and the gaps in international law with regard to the use of water as a weapon of destruction, all make this approach inadequate. An integrated approach to water uses should therefore be adopted.

Although there has in recent decades been a promising development towards an integrated approach, everything possible must still be done to accelerate the process if international law on water is to provide support in the resolution of conflicts over use.<sup>175</sup>

### **A FIFTH GENEVA CONVENTION ON THE PROTECTION OF THE ENVIRONMENT?**

The Gulf war served to refocus international attention on the environmental impact of warfare. After the war, many non-governmental groups and other interest groups felt that the rules of international law did not afford sufficient protection to the environment.

As the protection of the environment in times of armed conflict is part of international humanitarian law, it is of particular concern to the International Committee of the Red Cross (hereinafter the "ICRC"). The major challenge facing international humanitarian law today, is implementation. There is a blatant contrast between these highly developed rules, many of which enjoy universal acceptance, and their repeated violation in conflicts around the world.<sup>176</sup> These violations have included *inter alia* long-lasting chemical pollution on land, despoliation of land by mines and other dangerous objects and threats to water supplies and other necessities of life.

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<sup>173</sup> This Resolution states the following :

1. *Urges States to take all measures to ensure compliance with the existing international law applicable to the protection of the environment in times of armed conflict;*
2. *Appeals to all States that have not yet done so to consider becoming parties to the relevant international conventions;*
3. *Urges States to take steps to incorporate the provisions of international law applicable to the environment into their military manuals and to ensure that they are effectively disseminated."*

<sup>174</sup> Booyen (1989) 57; Starke (1989) 51; Dugard (2000) 32.

<sup>175</sup> ICRC (1994.1) 62.

<sup>176</sup> ICRC (1997) 1 - 2.

In the wake of the Rio Declaration on Environment and Development, in particular Principle 24,<sup>177</sup> and at the request of the General Assembly, the ICRC has consulted with world experts on the course to be followed to improve environmental protection in times of armed conflict.

The option recommended by these experts was not to develop new law - the proposed Fifth Geneva Convention did not come into existence - but rather to emphasize better knowledge and respect for existing law. Some countries expressed their view against the adoption of a Fifth Geneva Convention.<sup>178</sup> They argued - certainly not without merit - that the drafting of a new convention would raise many problems, one of them being the danger of regarding the environment as a single entity about which legislation could be enacted. Moreover, other violations of the LOAC had been perpetrated, and violations of human rights were at least as serious as those of environmental law.

With the assistance of the experts consulted, the ICRC therefore developed guidelines for military manuals and instructions<sup>179</sup> on the protection of the environment in times of armed conflict. Without formally adopting these guidelines, the General Assembly has invited all states to "*disseminate widely*" the Guidelines developed by the ICRC and to "*give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel*".<sup>180</sup>

Subsequent efforts have been made to spread knowledge of these Guidelines, concentrating in particular on helping states to promote broad circulation of their content and to consider the possibility of incorporating them in their respective military instruction manuals as invited by the General Assembly Resolution.<sup>181</sup> It is therefore not inconceivable that over time these rules could develop into customary international law.

These Guidelines must be taken for what they are intended to be: a tool for making the existing international legal rules on the protection of the natural environment in times of armed conflict better known to those who must comply with them in the course of military operations. The Guidelines are neither an international treaty nor the draft in a codification exercise. As a summary of applicable law, they deserve the widest dissemination and scrupulous respect. It is therefore quite possible that these rules could develop into customary international law.

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<sup>177</sup> Principle 24 states that "*warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate in its further development, as necessary.*"

<sup>178</sup> ICRC (1992) 32.

<sup>179</sup> The Guidelines have been published as an Annex to UN Doc A/49/323(1994).

<sup>180</sup> General Assembly Resolution 49/50 on the United Nations Decade of International Law (9 Dec 1994).

<sup>181</sup> *Supra* at 32 and n 173.

During 21 to 23 November 1994, the ICRC also organized an international symposium on water in armed conflicts in Montreux.<sup>182</sup> The symposium was the first step in an effort to draw the attention of the international community to the problems related to the protection of water, and to seek solutions. The initiative's main objective was to help achieve more effective protection of the victims of war, especially where water installations and supplies are affected by hostilities.

At the close of the symposium, some important principles were agreed upon,<sup>183</sup> most notably to:

- a. aim for absolute protection of water supplies and systems, and to extend legal protection to include engineers attempting to restore water supplies in times of armed conflict;
- b. explore ways to involve the private sector in helping, on a humanitarian basis, to restore complex water systems during armed conflict;
- c. raise awareness of the devastating effects of war on water supplies as well as on public health, at the international and national levels;
- d. prepare, in peacetime, for the predicted problems of water shortages and environmental degradation during armed conflict;
- e. call for measures to be taken to disseminate the rules governing the protection of water supplies and installations, as well as to inform and to educate the public on water issues, in peacetime as well as wartime.

With a view to finding further ways to improve implementation of existing law, the Intergovernmental Group of Experts for the protection of War Victims and the 26th International Conference and Red Crescent invited the ICRC to prepare, with the assistance of experts representing various geographical regions and legal systems, and in consultation with experts from governments and international organizations, a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts. At this stage, the main body of research for the report has been completed and consultations have been held with academic and governmental experts. The ICRC is in the process of drawing up its final report to be ready in the spring of 2000.<sup>184</sup> This is an extremely important document, since it will contain a codification of the customary rules of international humanitarian law. The report will contain three elements, as well as an annex thereto containing a summary of collected state practice. The three elements of the report will be:<sup>185</sup>

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<sup>182</sup> ICRC (1994.1); ICRC (1994.2) 1 - 2.

<sup>183</sup> ICRC (1994.2) 1 - 2.

<sup>184</sup> Henckaerts(1999) 1.

<sup>185</sup> Henckaerts (1999) 5.

- a. A description of the methodology , including an explanation of how the customary law status of rules was established.
- b. The rules of international humanitarian law which were found to be customary together with a commentary, including an explanation as to why this conclusion was reached.
- c. As recommended by the experts consulted, an indication of trends in the development of customary international law where uncertainty exists whether a certain rule has already crystallised into customary international law.

Also of great importance, is the outcome of the recent 27th International Conference of the Red Cross and Red Crescent held from 31 October to 06 November 1999, in Geneva, Switzerland. During this international conference which was attended by delegates from most countries in the world, a Plan of Action was drafted and adopted by the members for the coming four years in order to, *inter alia*, improve the care and protection of victims of armed conflicts. Members will implement the actions set out in the Plan of Action in accordance with their respective powers, mandates and capacities. This Plan of Action has specific implications for the protection of the environment and water. The final goals of the Plan of Action are the following:<sup>186</sup>

- a. **"Full compliance by all parties to an armed conflict with their obligations under international humanitarian law to protect and assist the civilian population and other victims of the conflict and to respect protected objects."** This is an important provision with regard to the protection of water during armed conflict, because sub-paragraph (g)<sup>187</sup> of the Plan states that *"every possible effort is made to provide the civilian population with all essential goods and services for its survival; rapid and unimpeded access to the civilian population is given to impartial humanitarian organisations ...in order that they can provide assistance and protection to the population..."*. Water is essential to the survival of the civilian population and when access to water, or the installations essential for the provision of water are damaged or destroyed, this principle re-enforces the right of humanitarian aid workers to gain access to those civilians affected, or to do the necessary repair work to those installations.

Paragraph 2<sup>188</sup> under this goal is also of extreme importance in relation to the protection water during armed conflicts, since objects necessary for the survival of the civilian population are protected. Paragraph 2 states that *"States stress the provisions of international humanitarian law prohibiting the use of starvation of civilians as a method of warfare and on attacking, destroying, removing or rendering useless, for that purpose, objects*

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<sup>186</sup> ICRC (1999) 1 - 19.

<sup>187</sup> ICRC (1999) 4.

<sup>188</sup> ICRC (1999) 4.

*indispensable to the survival of the civilian population.*" This goal re-affirms the principles as already discussed that water installations and water works, for example, are objects indispensable to the survival of the civilian population.

- b. **"An effective barrier against impunity through the combination of relevant international treaties and national laws concerning the repression of violations of international humanitarian law, and the examination of an equitable system of reparations."**

Paragraph 13<sup>189</sup> under this goal, states that "States adopt the necessary implementing measures, in particular national legislation for the repression of war crimes, genocide and crimes against humanity and for the protection of the Red Cross and Red Crescent emblems." This is also of specific importance to the protection of the environment and objects indispensable for the survival of the civilian population, since attacks which cause widespread long-term damage to the environment as well as attacks against objects indispensable for the survival of the civilian population, such as water installations, water works, etc, when not used solely for military purposes, are considered as war crimes.

- c. **"Integration by States, of their obligations under international humanitarian law in relevant procedures and training. Promotion of this law among relevant persons and bodies."**

Paragraphs 16 and 17<sup>190</sup> of this goal place an obligation on states to examine their educational and training curricula to ensure that international humanitarian law is integrated in their training programmes for the security forces and relevant public servants. Furthermore, states must ensure that the rules of international humanitarian law are incorporated into the operational procedures of their security forces and applied by their forces when they are engaged in operations to which the rules apply.

- d. **"Conformity of weapons with international humanitarian law, the establishment of effective controls on the availability of arms and ammunition, and an end to the human tragedy caused by anti personnel landmines."** This means *inter alia* the use of weapons which will not cause widespread, long-term damage to the environment.

The 28th International Conference will evaluate the results achieved by the Plan of Action over the next four years.<sup>191</sup>

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<sup>189</sup> ICRC (1999) 6.

<sup>190</sup> ICRC (1999) 7.

<sup>191</sup> ICRC (1999) 2.

## CHAPTER II

### SOUTH AFRICA'S LEGAL POSITION IRO THE LOAC

#### NATIONAL LAW AND INTERNATIONAL OBLIGATIONS: GENERAL PRINCIPLES

The application of public international law, including the LOAC and the role of water during armed conflict, depends on the municipal law of the state concerned. This municipal law is, in the case of South Africa, found in the 1996 Constitution.<sup>192</sup>

However, before these provisions are discussed, it is imperative to analyse the relationship between national law and international obligations.<sup>193</sup> As already stated,<sup>194</sup> a state cannot plead the provisions of its national law as a valid reason for violating international law. Conversely, a state cannot plead before an international court that its national law authorises it to do something which amounts to an unlawful international act. If a change in national law is required in order that a state may fulfil its international obligations, then the state is under an international duty to make that change, or otherwise mitigate its international responsibility.

The use of international law in national courts is often explained in terms of the doctrines of incorporation (monism) and transformation (dualism). According to Dixon,<sup>195</sup> under the doctrine of incorporation, a rule of international law becomes part of national law without the need for express adoption. The rule of international law is incorporated in national law simply because it is a rule of international law. This "automatic" adoption takes place unless there is a clear provision of national law, such as a statute or judicial decision, which precludes the use of the international law rule by the national courts.

The doctrine of transformation (dualism),<sup>196</sup> on the other hand, stipulates that rules of international law do not become part of national law until they have been expressly adopted by the state. International law is not *ipso facto* part of national law. Therefore, a national court cannot apply a particular rule of international law until that particular rule has been deliberately "transformed" into national law in the appropriate manner, as by legislation. Consequently, international law and national law are kept separate by the state. According to Starke,<sup>197</sup> a strong trend towards the dualist view developed during the nineteenth and twentieth centuries, partly as a result of philosophic doctrines emphasizing the sovereignty of the state-will, and partly as a result of the rise in modern states of legislatures with complete internal legal sovereignty.

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<sup>192</sup> South Africa. 1996. *Constitution of the Republic of South Africa*, No 108 of 1996. Government Printer, Pretoria.

<sup>193</sup> Dixon (1990) 79 - 82.

<sup>194</sup> *Supra* at 21 - 22.

<sup>195</sup> Dixon (1990) 81 - 82; Booysen (1989) 62 - 65; Starke 73 - 74; Dugard (2000) 43.

<sup>196</sup> Dixon (1990) 82; Booysen (1989) 65; Starke (1989) 73; Dugard (2000) 43.

<sup>197</sup> Starke (1989) 72.

Under the doctrine of incorporation as discussed above, customary international law may form part of the law of a specific state. This means that unless there is a contrary statutory provision, rules of customary international law may be operative in the national legal system.<sup>198</sup>

National courts could be authorized by their national law, for example the constitution, to apply substantive provisions of international law.

## **1996 SOUTH AFRICAN CONSTITUTION**

### **LEGAL OBLIGATIONS OF THE SOUTH AFRICAN SECURITY SERVICES**

The 1996 Constitution, contains very specific provisions regarding, for example, the legal obligations of the South African security services, the legal status of international agreements, the application of customary international law and international law.

The legal basis on which international law operates in the South African security services is mainly derived from Chapter 11 of the 1996 Constitution.

The South African security services are defined in Section 199(1) of the Constitution as being "a single defence force, a single police service and any intelligence services established in terms of the Constitution."

The following sections of Chapter 11 are very significant for the security services regarding certain legal obligations in respect of international law:

- a. **Section 198(c)**. "National security must be pursued in compliance with the law, including international law."
- b. **Section 199(5)**. "The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and agreements binding on the Republic."
- c. **Section 200(2)**. "The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force."

Since there are various references to international law in these sections as well as in other parts of the Constitution,<sup>199</sup> it is important to establish the meaning of these phrases in relation to each other in order to determine the legal obligations of the South African security services.

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<sup>198</sup> Dixon (1990) 92 - 94

<sup>199</sup> For example Sections 232, 233, etc.

## SECTION 198(c)

As already stated,<sup>200</sup> section 198(c) of the Constitution prescribes that "*national security must be pursued in compliance with the law, including international law.*" It is important to determine what the words "*law*" and "*international law*" mean within the context of this section, as well in relation to the words "*international law*" as used in other parts of the Constitution.

**Meaning of the word "law"**. It is proposed that the meaning of the word "*law*" is a generic term used in a broad sense to include South African municipal law, as well as international law. The use of the words "*including international law*" is a strong indication that the word "*law*" is used within a broad context.

Following from the abovementioned, the next question is what is meant by the words "*international law*".

**Meaning of the words "international law"**. Starke<sup>201</sup> has a very comprehensive definition of the term "*international law*" which goes beyond the traditional definition of international law. This reflects the new developments of what international law is currently viewed as. He defines "*international law*" as:

*"That body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other, and which includes also:*

- a. *The rules of law relating to the functioning of international institutions or organisations, their relations with each other, and their relations with states and individuals; and*
- b. *Certain rules of law relating to individuals and non-state entities so far as the rights or duties of such individuals and non-state entities are the concern of the international community."*

In the South African Constitutional Court decision of *Makwanyane and Another*,<sup>202</sup> the Constitutional Court had to decide on the constitutionality of the death penalty. During the course of arguments presented to the Court, the Court was referred to the judgements of courts of various countries and international tribunals. In view thereof, the Court *inter alia* had to decide, what, in view of the provisions of Section 35(1)<sup>203</sup> of the Interim

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<sup>200</sup> *Supra* at 39.

<sup>201</sup> Starke (1989) 3.

<sup>202</sup> 1995 (6) BCLR 665 (CC).

<sup>203</sup> "*In interpreting the provisions of this Chapter, a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the right entrenched in this Chapter, and may have regard to comparable foreign case law.*"

Constitution<sup>204</sup> (now Section 39 of the 1996 Constitution),<sup>205</sup> constituted public international law, and what the Court's obligation was with regard to considering international and foreign comparative law.

The Court stated that international and foreign authorities are of value, because they analyse arguments for and against the issues to be decided, and show how courts of other jurisdictions have dealt with those issues.<sup>206</sup>

The Court decided that within the context of Section 35(1), public international law would include non-binding, as well as binding law. The Court stated that both may be used under this section as tools of interpretation. Furthermore the Court said that international agreements and customary international law accordingly provide a framework within which the Bill of Rights can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the European Court of Human Rights,<sup>207</sup> etc., may provide guidance as to the correct interpretation thereof. The wording of section 39(1)(b) of the 1996 Constitution places a definite obligation on the Courts to consider international law.<sup>208</sup> Although section 39(1)(b) states that international law must be considered when the Bill of Rights is interpreted, the application of international law by the national courts is not only restricted to these circumstances. This inference could be made when considering other sections of the Constitution which refers to international law.

With regard to foreign case law, the Court stated that it was not bound by it and the obligation the Court had, was to "have regard" to such law.<sup>209</sup> Section 39(1)(c) of the 1996 Constitution states the Courts "may consider" foreign law. Important is that the Court also stated that when it deals with comparative law in interpreting our own Constitution, the Court has to consider our own legal system, history, circumstances, etc., and although

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<sup>204</sup> South Africa. 1993. *Constitution of the Republic of South Africa*, No 200 of 1993. Government Printer, Pretoria.

<sup>205</sup> Section 39(1) states as follows:

"1. When interpreting the Bill of Rights, a court, tribunal or forum-

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law."

<sup>206</sup> *Makwanyane supra* on p 686 A.

<sup>207</sup> *Makwanyane supra* on p 686 E.

<sup>208</sup> "Must consider international law."

<sup>209</sup> *Makwanyane supra* on 687 C - D. Also see *Nortje and Another v Attorney General of the Cape and Another* 1995 (2) BCLR 236 (C) on p 247 A-D; *Park-Ross and Another v The Director, Office for Serious Economic Offences* 1995 (2) BCLR 198 (C) on p 208 C-F.

assistance could be derived from public international law and foreign case law, the Court is not bound to follow it.<sup>210</sup>

It is suggested that the Court, when referring to "*non-binding law*", also referred to so-called "*soft law*".<sup>211</sup>

The Court's interpretation of binding law, includes - with reference to Dugard,<sup>212</sup> - "*all the sources of international law recognised by article 38(1) of the Statute of the International Court of Justice*".<sup>213</sup>

In view of the abovementioned, it would appear as if the words "*international law*" would include binding law, such as treaties binding on the Republic, customary international law principles, etc, as well as non-binding law, such as "*soft law*".

### SECTION 199(5)

In contrast to section 198(c) of the Constitution as a broad guiding principle, section 199 prescribes specific conduct required by the security services. Section 199(5)<sup>214</sup> of the Constitution obliges the South African security forces to, *inter alia*, "*act in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.*" It is therefore important to determine what some of these phrases mean. The meaning of the word "*Constitution*" is self-explanatory and does not need further explanation. The word "*law*" has also already been discussed above.<sup>215</sup>

**Meaning of the words "*customary international law*"**. The definition and requirements of customary international law have already been dealt with<sup>216</sup> and needs no repetition. However, it is also important to discuss the status of customary international law within the context of South African municipal law. In this sense it is necessary to refer to section 232 of the Constitution which reads as follows:

*"Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."*

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<sup>210</sup> *Makwanyane supra* on 687 G - 688 A. Also see *Fose v Minister of Safety and Security* 1996(2) BCLR 232 (W) on p 237 H.

<sup>211</sup> *Supra* at 20.

<sup>212</sup> *Makwanyane supra* on 686 n 46.

<sup>213</sup> *Supra* at 14 and n 64.

<sup>214</sup> *Supra* at 39.

<sup>215</sup> *Supra* at 40.

<sup>216</sup> *Supra* at 11 and 15 - 17.

According to Dugard,<sup>217</sup> for over a hundred years, the South African courts simply assumed that the rules and principles of customary international law might be applied by municipal courts as if they were in some way part of South African law. Therefore these courts showed a strong support for the monist approach (the doctrine of incorporation) in respect of customary international law.<sup>218</sup>

Section 231(4) of the Interim Constitution of South Africa constitutionalized customary international law,<sup>219</sup> thereby adopting the doctrine of transformation (dualism). This was followed by the provisions of Section 232 of the 1996 Constitution, as quoted above.

According to Dugard,<sup>220</sup> the effect of this provision in the Constitution gives it additional weight. He states that customary international law is no longer subject to subordinate legislation and that only a provision of the Constitution or an Act of Parliament that is clearly inconsistent with customary international law will trump it. Dugard<sup>221</sup> states that this is emphasized by section 233 of the 1996 Constitution<sup>222</sup> and that common law rules and judicial decisions are now subordinate to customary international law as it is only the Constitution and Acts of Parliament that enjoy greater legal weight. He further argues<sup>223</sup> that the doctrine of *stare decisis* cannot be invoked as an obstacle to the application of a new rule of international law.

Section 232 does not state which customary should be applied and how they are proved. Dugard rightly states<sup>224</sup> that it will still be necessary to turn to judicial precedent to decide which rules of customary international law are to be applied and how they are to be proved.

In the case of *S v Petane*<sup>225</sup> the Court had to decide whether Protocol I to the Geneva Conventions was part of South African law. The accused in this matter argued that South Africa was bound by the provisions of this Protocol, since its provisions had been accepted by the international community, which acceptance had made the terms of Protocol I part of customary international law. The Court stated<sup>226</sup> that:

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<sup>217</sup> Dugard (2000) 47.

<sup>218</sup> See for example *Nduli and Another v Minister of Justice and Others* 1978 (1) SA 893 (A).

<sup>219</sup> Section 231(4) states: "*The rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic.*"

<sup>220</sup> Dugard (2000) 51 - 52.

<sup>221</sup> Dugard (2000) 52.

<sup>222</sup> Section 233 states: "*When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*"

<sup>223</sup> Dugard (2000) 52.

<sup>224</sup> Dugard 52.

<sup>225</sup> 1988(3) SA 51 (C).

<sup>226</sup> See p 57 l.

"customary international law may in this way be created very quickly, but before it will be considered by our municipal law as being incorporated in to South African law the custom, whether created by *usus* and *opinio iuris* or only the latter, would at the least have to be widely accepted."

Dugard<sup>227</sup> argues that the approach taken in the abovementioned case, is the correct one, which is also agreed with.

**Meaning of the words "international agreements"**. According to Olivier,<sup>228</sup> the term "*international agreement*" was taken over by the 1996 Constitution from the 1993 counterpart. She states that the drafters at the time favoured this term as being inclusive rather than referring to specific kinds of agreements, such as treaties or conventions. This modern term was chosen in the Interim Constitution because it is the term preferred in modern state practice, as a generic term including treaties, conventions, protocols, exchange of notes, etc.<sup>229</sup>

Art 2 of the Vienna Convention does not contain a definition of "*international agreement*", although it contains a definition of "*treaty*".<sup>230</sup> Olivier states<sup>231</sup> that according to this definition, a treaty is but one form of international agreement and that the term "*international agreement*" appears to be much wider than what is traditionally understood under the term "*treaty*". Olivier further refers to section 102 of the UN Charter which refers to both treaties and international agreements to be registered and published by the Secretariat and concludes that this supports the view that treaties and international agreements are not necessarily synonymous.<sup>232</sup> Olivier refers to Baxter, who suggests that the term "*international agreement*" be used in a much wider sense as comprehending all those norms of conduct which states or persons acting on behalf of states have subscribed to, without regard to their being binding or enforceable, or subject to an obligation of performance in good faith.<sup>233</sup>

Dugard on the other hand, differs from the abovementioned viewpoint.<sup>234</sup> He states that terminology is not a determinant factor as to the character of an international agreement. What is important, is that the agreement be between states, in writing and that the state parties should intend it to be governed by international law. Once these requirements are met an international agreement exists between the state parties. Dugard states that the

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<sup>227</sup> Dugard (2000) 53.

<sup>228</sup> Olivier (1997) 65.

<sup>229</sup> Olivier (1993/1994) 5.

<sup>230</sup> *Supra* at 15 and n 69.

<sup>231</sup> Olivier (1997) 65.

<sup>232</sup> Olivier (1997) 65.

<sup>233</sup> Olivier (1997) 65.

<sup>234</sup> Dugard (2000) 59.

term international agreement used in section 231 of the Constitution is therefore synonymous with the word "treaty".<sup>235</sup> The same analogy can therefore be applied to the use of the term "international agreements" used in section 199(5) of the Constitution.

**Meaning of the words "binding on the Republic"**. In this sense, one has to establish whether the words "binding on the Republic" restrict the application of customary international law, or whether these words only regulate the application of international agreements.

With regard to the status of customary international law, section 231(4) of the 1993 Interim Constitution contained the words "binding on the Republic".<sup>236</sup> These words have, however, been omitted from Section 232<sup>237</sup> of the 1996 Constitution. According to Dugard,<sup>238</sup> the word "binding" was dropped from the 1996 Constitution on the grounds that it was considered unnecessary and tautologous.

If one examines the wording of Section 232 of the 1996 which deals specifically with customary international law, one could argue that if it was the intention of the legislature to restrict the application of customary international law only insofar it is binding on the Republic, section 232 would have contained words to that effect. Therefore the conclusion could be reached that the words "binding on the Republic" as used in section 199(5), only relate to the application of international agreements and not customary international law. The opposite argument could be raised that the words "binding on the Republic" also applies to the words "customary international law", i.e. that the security services have a legal obligation to act in accordance with only those rules of customary international law which are binding on the Republic. The latter viewpoint is agreed with, because of the wording of the Interim Constitution in this regard, as well as the fact that it is trite law that not all rules of customary international law are binding on a state. It is a well-established principle that rules of customary international law persistently objected to by a state, are not binding on that state.<sup>239</sup>

It is also interesting to note the specific order of the wording of section 199(5), i.e. the obligation of the security services to firstly comply with customary international law and then international agreements, especially if one considers that Article 38 of the Statute of the ICJ<sup>240</sup> mentions international conventions first.

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<sup>235</sup> Dugard (2000) 59.

<sup>236</sup> *Supra* n 219.

<sup>237</sup> *Supra* at 42.

<sup>238</sup> Dugard (2000) 54.

<sup>239</sup> Dugard (2000) 31; Botha (1992/1993) 47.

<sup>240</sup> *Supra* n 64.

**Meaning of the words "international agreements binding on the Republic"**. The meaning of the words "international agreements" has already been discussed.<sup>241</sup> The meaning of the whole phrase, however, has also to be interpreted within the context of section 231 of the 1996 Constitution.

Section 231 of the Constitution contains the following principles:

- a. **The national executive<sup>242</sup> must negotiate and sign all international agreements.**<sup>243</sup> This provision relates to the adoption of new treaties. According to Devine,<sup>244</sup> these two conditions are cumulative. He states that if in future treaties should be adopted at the international level but South Africa has not participated in their negotiation prior to their adoption, they will be considered 'old treaties'. The fact that the President signs the treaty after adoption and that it is later ratified by South Africa will not, according to Devine, alter its status as an 'old' treaty.

Devine further rightly proposes<sup>245</sup> that in international law, signature of a treaty does not normally signify that the signatory became a party to that treaty. A state normally becomes a party to a treaty by means of ratification or accession. It is therefore quite clear that South Africa will not become a party to a treaty purely upon negotiation and signature of the President. This will only take place through ratification or accession. Certain other requirements as discussed hereunder should also be met.

- b. **Any international agreement is only binding on the Republic once it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to subsection (3).**<sup>246</sup> **If it is an international agreement of a technical, administrative or executive nature, or which does not require ratification or accession, approval by Parliament is not necessary. The only requirement is that it must be tabled in Parliament within a reasonable time.**<sup>247</sup> Dugard<sup>248</sup> states that the Interim Constitution stipulated that all

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<sup>241</sup> *Supra* at 44 - 45.

<sup>242</sup> The executive authority of the Republic vests in the President as head of the national executive (Section 83), as well as the other members of Cabinet (Section 85) of the 1996 Constitution.

<sup>243</sup> Section 231(1) of 1996 Constitution.

<sup>244</sup> Devine (1995) 4.

<sup>245</sup> Devine (1995) 4.

<sup>246</sup> Section 231(2) of 1996 Constitution.

<sup>247</sup> Section 231(3) of 1996 Constitution.

<sup>248</sup> Dugard (2000) 56.

treaties signed by the executive were to be ratified by Parliament.<sup>249</sup> This provision did not take into account that most treaties are intended to come into operation immediately and that the ratification process is very cumbersome. The 1996 Constitution recognized this problem by exempting technical, administrative or executive agreements, or those who do not require ratification or accession, from Parliamentary approval.

The problem is that the Constitution does not clarify what is meant by "*technical, administrative or executive agreements*". This, according to Dugard,<sup>250</sup> could lead to disputes. Dugard argues<sup>251</sup> that ultimately, it is a question of intention. Where parties intend that an agreement is to come into force immediately without ratification at the international level, it would be ridiculous for the South African Parliament to insist on parliamentary approval.

Olivier<sup>252</sup> states that the state law advisors understand these terms to refer to agreements of a routine nature, flowing from the daily activities of government departments. She further states that the approach suggested by the Office of the President, is that in the case of any doubt whether an agreement falls under section 231(3), the longer parliamentary route should be followed.<sup>253</sup>

Botha points out that two possibilities exist regarding the meaning of the words "*technical, administrative or executive*".<sup>254</sup> The first is that each of them have a distinct meaning, each with an individual meaning and each constituting a separate sub-category. Alternately, the three terms may be read together as indicative of a single type or *genus* of treaty.

However, the exact procedure regarding ratification or accession, has also not been prescribed.<sup>255</sup>

- c. **An international agreement becomes law in the Republic when enacted into law by national legislation. A self-executing international agreement does not require incorporation into national law, but becomes law once Parliament has approved such self-executing provision, provided that such a provision is not inconsistent with the Constitution or the national**

<sup>249</sup> *Supra* at 45.

<sup>250</sup> Dugard (2000) 56.

<sup>251</sup> Dugard (2000) 56.

<sup>252</sup> Olivier (1997) 64.

<sup>253</sup> Also see Dugard (2000) 57.

<sup>254</sup> Botha (1997) 97 - 98.

<sup>255</sup> Botha (1995) 198.

**laws of the country.** According to Dugard,<sup>256</sup> these provisions are bound to create some problems, since they introduce the concept of self-executing treaties into South African law. Dugard states that the question whether the provisions of a treaty are self-executing or not has troubled the American courts for years.<sup>257</sup> Dugard states, that in view of this Constitutional provision, South African courts will have to decide whether a treaty is self-executing in the sense that existing law is adequate to enable the Republic to carry out its international obligations without legislative incorporation of the treaty. If not, and it is not self-executing, further legislation is required. According to Dugard,<sup>258</sup> no general guidelines can be given on this matter and each case will have to be decided on its own merits.

Botha<sup>259</sup> states that the adoption of section 231(4) confirmed the ruling in the *locus classicus* case of *Pan American World Airlines case*<sup>260</sup> on the application of treaties within municipal law.<sup>261</sup>

- d. **International agreements which were binding on the Republic when the 1996 Constitution took effect, remain binding on the Republic.**<sup>262</sup> This provision means that all international agreements to which South Africa is a party and which were entered into before the 1996 Constitution came into force, remain binding on the Republic. According to Botha,<sup>263</sup> in order to determine the abovementioned, it would be necessary to consider the provisions governing treaty conclusion both pre-1993 and under the Interim Constitution to determine whether the treaty under consideration was validly concluded or incorporated within its individual time-frame. Prior to 1993, the conclusion of a treaty was a so-called 'act of state' in which the individual, the courts or parliament had little, if any say. If, therefore, the treaty is one which was regarded as binding in terms of the then operating dispensation, it will remain so.<sup>264</sup> If the situation arises that a treaty concluded prior to 1993

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<sup>256</sup> Dugard (2000) 58.

<sup>257</sup> Dugard (2000) 58.

<sup>258</sup> Dugard (2000) 58.

<sup>259</sup> Botha (1997) 98 - 99.

<sup>260</sup> *Pan American World Airlines Incorporated v SA Fire & Accident Insurance Co Ltd* 1965 (3) SA 150(A).

<sup>261</sup> It was decided that:

"[T]he conclusion of a treaty ... by the South African government with any other government is a executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our law except by legislative process ... In the absence of any enactment giving [its] relevant provisions the force of law, [it] cannot affect the rights of the subject."

<sup>262</sup> Section 231(5) of 1996 Constitution.

<sup>263</sup> Botha (1997) 101.

<sup>264</sup> Botha (1997) 101.

is unacceptable, the treaty could be terminated according the termination route provided in the treaty itself, failing that, the Vienna Convention on the Law of Treaties would have to be followed.<sup>265</sup>

During the period 27 April to 04 February 1997, i.e. the timespan of the Interim Constitution, one has to consider whether the requirements for both international and municipal ratification have been met. In this regard, the requirements of sections 82(1)(i), 231(2) and 231(3) have to be considered.<sup>266</sup>

## SECTION 200(2)

As already stated,<sup>267</sup> section 200(2) of the Constitution requires the South African Defence Force, as a primary object, to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.

### **Meaning of the words "principles of international law regulating the use of force."**

Firstly it should be emphasized that Section 200(2) of the Constitution relates to the *ius ad bellum*,<sup>268</sup> i.e. the right of states to resort to war. The principal international law provision of relevance here is article 2(4) of the UN Charter.<sup>269</sup> This principle is accepted as a rule of customary international law by the ICJ.<sup>270</sup> Exceptions to the use of force are self-defence (individually or collectively) or when authorized by the UN Security Council.<sup>271</sup>

To determine the meaning of section 200(2) of the Constitution, one also has to examine the provisions of section 227(2)(d) of the 1993 Interim Constitution, which states:

*"The National Defence Force shall -*

*(d) not breach international customary law binding on the Republic relating to aggression;"*

The wording of the Interim Constitution with regard to the use of force, namely *"relating to aggression"* has been substituted in the final Constitution with *"regulating the use of force"*.

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<sup>265</sup> Botha (1997) 101.

<sup>266</sup> Botha (1997) 101.

<sup>267</sup> *Supra* at 39.

<sup>268</sup> See discussion at 5 *supra*.

<sup>269</sup> Article 2(4) states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

<sup>270</sup> See Botha (1993/1994) 144.

<sup>271</sup> Section 51 of the UN Charter.

It is assumed, for purposes of this discussion, that the two phrases have the same meaning.

Botha<sup>272</sup> states that section 227(2)(d) of the Interim Constitution - and by analogy certainly section 200(2) of the final Constitution - raises difficult problems. He gives the example that where the President (or the government) orders the SANDF to invade or attack another state, or carry out a limited operation, it might be clear that this operation is contrary to article 2(4) of the UN Charter, since the case is not one of self-defence, or that no authorization from the security Council has been given. He argues that this order could appear to be unconstitutional and illegal. Furthermore, if the SANDF carries it out, they would be acting contrary to international law and also contrary to the Constitution. Botha quite correctly states that the prohibition on the aggressive use of force is one which mainly applies to governments and not to the armed forces.<sup>273</sup>

It is true that the decision to resort to force, is usually a policy or political decision taken by government rather than an operational decision by the armed forces. Under the South African Constitution, the SANDF does not have the authority to make unilateral decisions regarding the use of force, because the utilization of the SANDF is subject to the authority of the national executive and Parliament.<sup>274</sup> To complicate the matter even further, under section 199(6) of the 1996 Constitution, no member of the SANDF may obey a manifestly illegal order. This means that if the SANDF is given an order by the national executive to deploy and this order seems to be manifestly illegal in terms of international law, or otherwise, SANDF members could legally refuse to obey this order.

One therefore agrees with Botha<sup>275</sup> that it is rather peculiar to address the prohibition to the SANDF and not the government which is ultimately responsible for deploying the SANDF.

Botha<sup>276</sup> states that since the Constitution is the supreme law of the Republic, it is difficult to imagine any legislation overriding the rules of customary international law relating to aggression and the use of force by states. He states that even if South Africa were not to become party to any of the treaties dealing with the use of force, the executive would still be bound by the supreme Constitution.

**Meaning of the word "force."** Article 2(4) of the UN Charter prohibits the use and threat of the use of force and is mainly applicable in international relations. According to Dugard,<sup>277</sup> Article 2(4) does not exactly define which use of force is prohibited. Although the traditional view is that Article 2(4) prohibits the use of armed force alone, Dugard states

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<sup>272</sup> Devine (1995.1) 185.

<sup>273</sup> Botha (1993/1994) 186.

<sup>274</sup> See for example sections 198(d); 202(1) &(2), 203 of the 1996 Constitution.

<sup>275</sup> Botha (1993/1994) 186.

<sup>276</sup> Botha (1993/94) 144.

<sup>277</sup> Dugard (2000) 414.

that there is support for the view that this prohibition also includes the use of economic force,<sup>278</sup> e.g. sanctions, or the use of indirect force,<sup>279</sup> e.g. if state A gives active support to rebels of state B, such as by permitting them to establish bases in its territory for attacks on state B, state A makes itself a party to the unlawful use of force.

## HAS THE ACT OF STATE DOCTRINE SURVIVED THE CONSTITUTION?

Dugard<sup>280</sup> states that the executive is responsible for the conduct of South Africa's foreign relations and in the exercise of this function it will frequently make decisions on subjects governed by international law. These include, for example, the recognition of a foreign state or government, the recognition of territorial acquisitions by another state, the commencement or termination of a state of war with another country, whether or not a person is entitled to diplomatic status, whether any person is to be regarded as head of state or government of a foreign state. Dugard states<sup>281</sup> that it is undesirable that different organs of state should pronounce on the same subject, especially if their assessment of the legal implications of the matter should differ. In the English case of *Government of the Republic of Spain v SS "Arantzazu Mendí"*,<sup>282</sup> it was stated that 'Our state cannot speak with two voices ... the judiciary saying one thing, the executive another'.

Therefore, in order to avoid confusion, the courts have deferred to the judgement of the executive on certain acts of facts of state.<sup>283</sup> The judgement of the executive is generally given in an executive certificate handed in to court. In this way the executive in effect seeks to usurp the power of a municipal court to apply rules of customary international law to a particular factual situation that comes before it.<sup>284</sup>

Before 1994, the application of international law in South Africa was subject to constitutional rules and prerogatives mainly derived from the English law.<sup>285</sup> According to Botha,<sup>286</sup> under the pre-constitution dispensation, the act of state, ruled with full force in the conduct of the country's international relations.<sup>287</sup> This doctrine was also mainly derived

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<sup>278</sup> Dugard (2000) 414.

<sup>279</sup> Dugard (2000) 415.

<sup>280</sup> Dugard (2000) 64 - 67.

<sup>281</sup> Dugard (2000) 64 - 65.

<sup>282</sup> 1939 AC at 264.

<sup>283</sup> Dugard (2000) 65.

<sup>284</sup> Dugard (2000) 65.

<sup>285</sup> Dugard (2000) 67.

<sup>286</sup> Botha (1999) 331.

<sup>287</sup> See for example *Beckmann v Minister of Interior* 1962 (2) SA 233 (E) on 240; *Attorney-General v De Keyser's Royal Hotel* 1920 AC 508 (HL) on 539, 576.

from the English law.<sup>288</sup> When a court was required to decide on the continued existence of a treaty within South African law, this was acknowledged to be an area on which the executive was best equipped to speak.<sup>289</sup>

In the case of *Harksen v President of the Republic of South Africa*,<sup>290</sup> the Court had to decide *inter alia*, whether it accepted an executive certificate from the Minister of Justice declaring that there was no extradition agreement between South Africa and the Federal Republic of Germany. The Court, however, declined to accept the Minister's certificate binding upon it and made its own determination of the question of customary international law before it.<sup>291</sup>

The question, therefore is whether, the so-called "act of state" doctrine has survived the new constitutional dispensation, or as Botha asks,<sup>292</sup>

*"is there still an area where it can be said that the will of the executive is not open to judicial scrutiny?"*

This question is of particular importance if one considers that in terms of the final Constitution, customary law is part of South African law.<sup>293</sup>

There seems to be a difference of opinion in this regard. According to Dugard,<sup>294</sup>

*"the continued validity of these powers, sometimes described as prerogative powers, is highly questionable."*

Booyesen,<sup>295</sup> states that:

*"the basic question is whether the act of government is an exercise of the power to conduct foreign affairs. If the act concerns direct relations with another state, it is an unjusticiable act of state. A typical example would be the conclusion of a treaty."*

Booyesen therefore concludes<sup>296</sup> that the prerogative in foreign affairs and the concomitant exercise of the prerogative, the act of state, have not survived the Constitution unscathed. The courts retain their former jurisdiction to determine whether or not an act is an act of

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<sup>288</sup> See *Laker Airways Ltd v Department of Trade* 1977 All ER 182 (CA).

<sup>289</sup> Botha (1999) 331.

<sup>290</sup> 1998(2) SA 1011 (C); Dugard (2000) 65 - 66.

<sup>291</sup> Dugard (2000) 67.

<sup>292</sup> Botha (1999) 333.

<sup>293</sup> Section 232 *supra* at 42.

<sup>294</sup> Dugard (2000) 66.

<sup>295</sup> Booyesen (1995) 189 - 190.

<sup>296</sup> Booyesen (1995) 196.

state, but what has changed, is that the absolute discretion which the executive previously enjoyed within the confines of the prerogative power, has now been subjected to international law. According to Booysen, it is, however, a different situation where the act concerns an individual. On 196, Booysen further states:

*"If acts are primarily aimed at individuals they will be justiciable."*

Carpenter<sup>297</sup> concludes that:

*"... those prerogatives that qualify as acts of state in foreign affairs and which were part of our law before 1994 (such as the power to recognise foreign governments), remain in existence provided that they are not inconsistent with the terms of the constitution. Furthermore, the exercise of such acts of state is not subject to judicial scrutiny, in accordance with the doctrine of separation of powers."*

Dugard<sup>298</sup> refers to an interesting decision of *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*<sup>299</sup> where the applicant, a company registered in Lesotho, but controlled by South African shareholders, sought to obtain discovery of documents relating to an alleged conspiracy between the South African and Lesotho governments to dispossess the applicant of its rights to diamond leases in Lesotho. With no mention of South Africa's constitutional rules, the Court found that the *'true agreement'* between South Africa and Lesotho was non-justiciable. The Court found that the relationship between South Africa and Lesotho *'belonged'* to *'international law'* and was *'not an area for the judicial branch of government'* and was therefore *'a matter in respect which this court should exercise judicial restraint.'*

In view of all the abovementioned, it seems that the new Constitutional dispensation has brought about recognition of the fact that at least some acts of state are justiciable and that certain acts of state are subject to judicial scrutiny. This is a positive development away from the traditional approach that acts of state are non-justiciable. However, it also appears that there is a viewpoint certain acts of state are non-justiciable. It will be up to the courts in future to clarify this judicial uncertainty.

## **RELATIONSHIP BETWEEN THE PRINCIPLE OF SELF-DEFENCE AND HUMANITARIAN LAWS OF WAR**

It is well established by now that there is a very clear distinction in the LOAC between the *ius in bello* and the *ius ad bellum*.<sup>300</sup> Devine<sup>301</sup> states that the entire LOAC must now be

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<sup>297</sup> Carpenter (1997) 111. *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC). In this case, the Court decided that, with reference to section 82 of the Interim Constitution and section 84 of the 1996 constitution, that while the powers enumerated in section 82(1) undoubtedly had their origin in the royal prerogative, the President has no powers derived from prerogative other than those expressly enumerated in that provisions (par 8, 714D-E).

<sup>298</sup> Dugard (2000) 70.

<sup>299</sup> 1999 (2) SA 279 (T).

<sup>300</sup> *Supra* at 5.

<sup>301</sup> Devine (1995) 187 - 188.

considered in the light of Article 2(4) of the UN Charter, which prohibits the aggressive use of force. He states that in the aftermath of Article 2(4), it appears that the LOAC continue to apply in hostile situations. They do not contravene Article 2(4), because they impose restrictions on belligerent conduct in the interest of humanity and civilization. This is not so for the *ius ad bellum*, since these rules authorize belligerents to take positive action aimed at overcoming an enemy. They will, therefore usually go beyond the bounds of self-defence. According to Botha, it is for this reason that reliance on them in hostile situations may no longer be in accordance with international law.

Botha further states at 188 that: "*It follows that if the reliance on traditional rules of war is to be legal, it must be possible to bring the conduct of states relying on them within the ambit of the principle of self-defence.*" This is respectfully submitted to be too restrictive an approach. The LOAC does not only apply during a situation of self-defence, seeing that some LOAC principles also apply during internal armed conflict, such as a civil war.

## DISCUSSION

From the abovementioned, it is evident that the legal obligations of the South African security forces are primarily regulated by the provisions of Chapter 11, of which the most important provisions are sections 198, 199, and 200. These sections however also contain words and phrases which are also to be found in other parts of the Constitution. In terms of the provisions in Chapter 11, the SANDF may not breach customary international law and international agreements binding on the Republic and must comply with the principles of international law regulating the use of force.

The question is why are these phrases also specifically used in Chapter 11 when most of these principles are contained in other sections of the Constitution, for example sections 231 (international agreements), 232 (customary international law), etc. Is the inclusion thereof in Chapter 11 superfluous, or was it included for a specific purpose?

Booyesen<sup>302</sup> (although he refers to the Interim Constitution, the same arguments can be submitted iro the 1996 Constitution<sup>303</sup>) argues that the fact that these specific acts are specifically mentioned can be interpreted in two ways. He states that on the one hand, it could be argued that they are the exceptions to the non-justiciability of acts in foreign affairs. On the other hand, they are mentioned *ex abundantia cautela*. Booyesen states that the latter argument is the more persuasive one, because to make the acts of the executive and the SANDF in armed conflict subject to legal rules is so important that it needs specific mention. This viewpoint can be supported.

Booyesen, however, states that the fact that the security forces are subject to international law does not necessarily imply that the courts have the function of enforcing such rules. This is true, because many of the international agreements/conventions applicable to armed conflict to which South Africa is a party, have not yet been incorporated into

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<sup>302</sup> Booyesen (1995) 35.

<sup>303</sup> Booyesen (1997) 54.

municipal law. This means that the national courts are not in a position to enforce these agreements/conventions.

Booyesen also states<sup>304</sup> that the fact that the security services are specifically required to act in terms of customary international law, means that this duty cannot be affected by ordinary legislation. It is a constitutional obligation which cannot be changed by an ordinary Act of parliament.

From all the abovementioned, the question is how do these principles apply to the LOAC, and in particular to the protection of water.

Regarding LOAC customary international law principles such as the prohibitions on indiscriminate attacks, attacking civilians or civilian property (which would include water installations, water supplies, etc.), unless the latter is solely used for military purposes, prohibition on the poisoning of water supplies, etc, it is clear that the SANDF will be bound to adhere to these rules by virtue of the provisions of section 199(5)(customary international law), as well as section 232 of the Constitution.

However, all these LOAC customary international law principles are also contained in treaties to which South Africa became a party before the 1996 Constitution took effect, e.g. the 1949 Geneva Conventions, Protocol I and II to the 1949 Geneva Conventions, etc. Therefore these international agreements are, apart from customary international law, also binding on the SANDF by virtue of the provisions of section 199(5)(international agreements binding on the Republic) and section 231(5) of the Constitution (international agreements binding on the Republic before the 1996 Constitution took effect).

The legal significance of the abovementioned is, that although South Africa may not be a party to a specific treaty, it may still be bound by customary international law principles in terms of Section 232 of the Constitution. On the other hand, South Africa would be bound by international agreements which are binding on the Republic by virtue of the provisions of Section 231, although those agreements or parts thereof, may not constitute customary international law. It could also well be that customary international law principles are also embedded in certain treaties, which means that South Africa would be bound by both the provisions of Section 231 and 232 of the Constitution.

As already stated,<sup>305</sup> the Constitutional Court's interpretation of the meaning of the words "international law" in the *Makwanyane* case is also significant for the interpretation of these words in other sections of the Constitution. In practical terms it means that the unqualified meaning of the words "international law" as used in Section 39 of the Constitution, can also be applied to the unqualified use of the words "international law" in Section 198(c) of the Constitution.

It is submitted, that when the abovementioned rights are interpreted by the Court, the Court is, in terms of Section 39(1)(b) and (c) obliged to consider international law and may

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<sup>304</sup> Booyesen (1997) 54.

<sup>305</sup> *Supra* at 40 - 42.

consider foreign law. When considering international law, it would mean that the Court has to consider, for instance the LOAC international customary law principles, such as the prohibition on poisoning water supplies, attacks on civilians and civilian objects indispensable to their survival, indiscriminate attacks. Furthermore the Court could also take into consideration international treaties, such as Protocol I and II to the Geneva Conventions and soft law such as the Guidelines,<sup>306</sup> etc.

## CLASSIFICATION OF LOAC WATER RIGHTS

In respect of the abovementioned discussion of the South African Constitution, it is imperative to establish what the legal status of the LOAC rules iro the protection of water during armed conflict in terms of the Constitution are and on which legal basis South Africa would be bound to these rules. In practical terms, it means the necessity to establish whether these rules are customary international law, treaty law, or soft law.

Up to now, the following LOAC principles/rules related to the protection of the water/environment have been identified and discussed:

- a. **Prohibition on warring parties to poison the water supplies of the adverse party.** The Hague Convention IV of 1907 respecting the laws and customs of war on land is widely accepted as customary international law.<sup>307</sup> Therefore South Africa would also be bound by it in terms of sections 199(5)(customary international law) and 232(customary international law) of the Constitution.
- b. **The right of the parties to the conflict to choose methods or means of warfare is not unlimited.** This rule is a general LOAC rule, but could also be applicable to the protection of water during armed conflict, e.g. water resources may not be poisoned, etc. Although this rule is a customary LOAC rule, it is also embedded in Article 35(1) of Protocol I. Protocol I was ratified before the 1996 Constitution took effect. Therefore South Africa would firstly be bound by virtue of sections 199(5)(international agreement binding on the Republic) and 231(5) (international agreement binding on the Republic) of the Constitution. Seeing that this rule is considered a customary LOAC rule, South Africa would also be bound by virtue of the provisions of sections 199(5)(customary international law) and 232(customary international law) of the Constitution.
- c. **Proportionality.** The principle of proportionality is another basic principle of the LOAC,<sup>308</sup> and it clearly also finds application in protection of the environment during times of armed conflict. Although this rule is a

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<sup>306</sup> *Supra* at 34.

<sup>307</sup> Kalshoven (1987) 18.

<sup>308</sup> *Supra* at 13.

customary LOAC rule,<sup>309</sup> it is also embedded in, for example, Article 57 of Protocol I. Art 57(2)(a)(iii) for example states that there must be refrained from attack "if the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." Protocol I was ratified before the 1996 Constitution took effect. Therefore South Africa would firstly be bound by virtue of sections 199(5)(international agreement binding on the Republic) and 231(5) (international agreement binding on the Republic) of the Constitution. Seeing that this rule is also considered a customary LOAC rule, South Africa would also be bound by virtue of the provisions of sections 199(5)(customary international law) and 232(customary international law) of the Constitution.

- d. **The prohibition 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.** This rule was not considered customary international law, because initially the environment was afforded little protection in terms of customary international law as well as treaty law. The environmental devastation caused by the Vietnam war was one of the main events which sparked international concern and action to take concerted action to protect the environment, which lead to the adoption *inter alia* of treaty law, such as the ENMOD Convention and Protocol I.

The abovementioned rule was incorporated into Protocol I.<sup>310</sup> Protocol I was ratified before the 1996 Constitution took effect. Therefore South Africa would be bound by virtue of sections 199(5)(international agreement binding on the Republic) and 231(5) (international agreement binding on the Republic) of the Constitution.

South Africa is not a party to the ENMOD Convention and would therefore not be bound by the provisions thereof.

- e. **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.** The comments made in paragraph d above apply *mutatis mutandis*.
- f. **Attacks against the natural environment by way of reprisals are prohibited.** The abovementioned rule was incorporated into Protocol I.<sup>311</sup>

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<sup>309</sup> Hague Rules Art 23(e) *supra* at 22.

<sup>310</sup> Article 35.

<sup>311</sup> Article 55(2).

Protocol I was ratified before the 1996 Constitution took effect. Therefore South Africa would be bound by virtue of sections 199(5)(international agreement binding on the Republic) and 231(5) (international agreement binding on the Republic) of the Constitution.

- g. The Martens clause, which states: **"In cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule 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."** This rule is part of the Hague Convention IV of 1907 respecting the laws and customs of war on land and is considered a customary LOAC rule. Therefore South Africa would be bound by it in terms of sections 199(5)(customary international law) and 232(customary international law) of the Constitution.
- h. **Prohibition of the destruction of enemy property.** Water may be part of either public or private property. Article 23(g) of the Hague Convention IV of 1907 respecting the laws and customs of war on land states that it is forbidden to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.
- This is also considered to be a customary LOAC rule. Therefore South Africa would also be bound by it in terms of sections 199(5)(customary international law) and 232(customary international law) of the Constitution.
- i. **Prohibition of the destruction of objects indispensable to the survival of the civilian population.** This rule is part of Protocol I.<sup>312</sup> Protocol I was ratified before the 1996 Constitution took effect. Therefore South Africa would be bound by virtue of sections 199(5)(international agreement binding on the Republic) and 231(5) (international agreement binding on the Republic) of the Constitution.
- j. **Prohibition of attacks on works and installations containing dangerous forces.** This rule is part of Protocol I.<sup>313</sup> Protocol I was ratified before the 1996 Constitution took effect. Therefore South Africa would be bound by virtue of sections 199(5)(international agreement binding on the Republic) and 231(5) (international agreement binding on the Republic) of the Constitution. South Africa has ratified Protocol I and therefore would be bound by virtue of the provisions of Section 231(5) of the Constitution.
- k. **Water as an indispensable resource for the survival of protected persons.** Article 54(2) of Protocol I prohibits the attack on any object indispensable to the survival of the civilian population. This includes drinking

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<sup>312</sup> Article 54(2).

<sup>313</sup> Article 54(2).

water installations, supplies and irrigation works. Protocol I was ratified before the 1996 Constitution took effect. Therefore South Africa would be bound by virtue of sections 199(5)(international agreement binding on the Republic) and 231(5) (international agreement binding on the Republic) of the Constitution. South Africa has ratified Protocol I and therefore would be bound by virtue of the provisions of Section 231(5) of the Constitution.

Apart from the abovementioned, this is also considered to be a customary LOAC rule. Therefore South Africa would also be bound by it in terms of sections 199(5)(customary international law) and 232(customary international law) of the Constitution. It goes without saying that this rule is considered a customary LOAC rule. Therefore South Africa would be bound by virtue of the provisions of Section 232 of the Constitution.

- i. **"Helsinki Rules" of 1966, relating to the use of international waterways, are intended to prohibit the poisoning of water essential for the health and survival of civilian populations or the act of making it unfit for human consumption.** The prohibition on poisoning water has already been discussed and does not need repetition. As indicated, South Africa would be bound to this LOAC customary rule by virtue of the provisions of Section 232 of the Constitution. The rest of the Helsinki Rules could be classified as soft law, which means that they are not binding law, but in terms of the *Makwanyane* decision, are one of the sources of international which must be considered when the national Courts have to interpret the words "*international law*" as contemplated in *inter alia* Sections 39 and 198(c) of the Constitution.
- m. **Plan of Action - 27th International Conference held in Geneva November 1999.** This is also an extremely important example of recently developed "soft law" which is considered one of the sources within the meaning of the words "*international law*" as used in Sections 39 and 198(c) of the Constitution. The comments made in paragraph regarding soft law apply *mutatis mutandis*.<sup>314</sup>

## **STATUS OF LOAC TREATIES IN SOUTH AFRICAN MUNICIPAL LAW**

Currently no national legislation exists with regard to the LOAC treaties to which South Africa is a party. South Africa signed/ratified *inter alia* the undermentioned Conventions without reservations:

- a. The four 1949 Geneva Conventions, in 1952.
- b. The 1977 Additional Protocol I and II to the 1949 Geneva Conventions, in 1995.
- c. The Chemical Weapons Convention in 1995.

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<sup>314</sup> *Supra* at 15; 20 - 21; 42.

- d. The Rome Statute of the International Criminal Court in 1998 (the Convention, however, is not in force yet).

The abovementioned are all international agreements. Section 231<sup>315</sup> of the 1996 Constitution deals with international agreements binding on the Republic. Section 231(4) *inter alia* states that an international agreement only becomes law when it is enacted into law by national legislation. This is a clear example of the doctrine of transformation as discussed above.<sup>316</sup> With regard to the LOAC treaties, SA is bound by, for example, by the 1949 Geneva Conventions,<sup>317</sup> as well as Additional Protocols I and II to the 1949 Geneva Conventions,<sup>318</sup> by virtue of the provisions of section 199(5) and 231(5) of the 1996 Constitution.

Since South Africa became a party to, for example, the Geneva Conventions in 1952, they would therefore be binding on South Africa internationally. However, they cannot be enforced in the national courts until they have been incorporated in the South African municipal law, unless these rules, or at least some of them, are considered customary international law. If so, they are part of the national laws of South Africa and must be applied by the national courts.

In order to give effect to the enforcement of the Geneva Conventions in South African municipal law, the Department of Defence, in collaboration with the Department of Foreign Affairs, is currently in the process of drafting the Geneva Conventions Bill. The aim of this Bill as described in the draft text is *"To provide for the prevention and punishment of grave breaches and other breaches of the Geneva Conventions of August 12, 1949 and the 1977 Protocol Additional to the Geneva Conventions of August 12, 1949, Relating to the Protection of Victims of International Armed Conflicts; and to provide for matters connected therewith."*

With regard to the protection of water during armed conflict, this would mean, for example that those grave breaches as stated in *inter alia* Article 85 of the 1977 Additional Protocol I to the Geneva Conventions would be punishable under our national law, for example:

- a. Launching an indiscriminate attack affecting the civilian population or civilian objects.<sup>319</sup> This would include, for example, attacks on water installations, water supplies, etc.

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<sup>315</sup> *Supra* at 45 - 48.

<sup>316</sup> *Supra* at 38.

<sup>317</sup> Ratified in 1952.

<sup>318</sup> Both ratified in 1995.

<sup>319</sup> Article 85(3)(b).

- b. Launching an attack against works or installations containing dangerous forces (e.g. dams, dykes) in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects.<sup>320</sup>

The ENMOD Convention<sup>321</sup> has not been ratified by South Africa, although it has very important provisions regarding the protection of the environment during armed conflict. South Africa is therefore not bound by the ENMOD Convention.

## INDIVIDUAL PENAL RESPONSIBILITY

A war crime is a serious and criminally punishable violation of international humanitarian law. In order for an act to be classified as a war crime, the existence of an armed conflict is essential.<sup>322</sup> In order for a crime to fall within international jurisdiction, it is not sufficient that it be perpetrated in a state where an armed conflict takes place, but a nexus must be established between the offence and the armed conflict. This, however, does not mean that the crime has to be committed at the exact time and place where active hostilities are under way. *"The only question, to be determined in the circumstances of each individual case, is whether the offences were closely related to the armed conflict as a whole."*<sup>323</sup>

State parties to the Geneva Conventions and Protocols are bound to take all possible measures to ensure their proper discharge of their obligations in time of armed conflict. Among these measures, one of the more important is the adoption of appropriate national rules on penal sanctions. South Africa as yet, does not have any national legislation in place to prosecute war crimes.

Although causing widespread, long-term and severe damage to the environment as such is not specified as a grave breach of the Geneva Conventions<sup>324</sup> or Protocol I, such acts may be part of a grave breach of other provisions.<sup>325</sup>

The principle of individual criminal responsibility of the perpetrator of certain breaches of international law, including those bearing on the environment in time of armed conflict, as

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<sup>320</sup> Article 85(3)(c).

<sup>321</sup> *Supra* at 24.

<sup>322</sup> ICRC (1999) 45.

<sup>323</sup> ICTY, *Prosecutor v. Dusko Tadic a.k.a. "Dule"*: *Opinion and Judgement*, 7 May 1997, Case No. IT-94-1-AR72, paragraph 573.

<sup>324</sup> See Article 50 of First Geneva Convention, Article 51 of Second Geneva Convention, Article 130 of Third Geneva Convention, Article 147 of Fourth Geneva Convention.

<sup>325</sup> See for example Article 85(3)(b) of the 1977 Additional Protocol I "*launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects*"; Article 85(3)(c) "*launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians, or damage to civilian objects*" (my emphasis).

well as the of the person ordering the commission of such acts, is of critical importance.<sup>326</sup> It is firmly rooted in both customary and treaty law.<sup>327</sup>

However, although the Geneva Conventions and Additional Protocols do not contain specific articles declaring environmental crimes war crimes, the newly developed Rome Statute<sup>328</sup> has very clear stipulations regarding the environment. Of specific importance is the contents of Article 2 of the Rome Statute, which makes provision for the jurisdiction of the Court to try war crimes. Article 2 contains the definition of war crimes which are considered punishable. Of specific importance, is Article 8(2)(b)(iv) which deals specifically with the environment:

"2. For the purpose of this Statute, 'war crimes' means:

(iv) *Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment (my emphasis) which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.*"

Other provisions of the Statute could also be interpreted as giving protection to the environment,<sup>329</sup> civilians, civilian objects, objects indispensable for the civilian population, aid workers, etc.<sup>330</sup> The Rome Statute, however, is not in force yet.

<sup>326</sup> ICRC (1993) 12.

<sup>327</sup> See for example the regulations annexed to the Hague Convention IV of 1907 (*supra*) and the provisions of the Geneva Conventions relating to grave breaches.

<sup>328</sup> *Supra* at 59.

<sup>329</sup> See for example Article 8(2)(b)(ii). "Intentionally directing attacks against civilian objects, that is, objects which are not military objectives";

Article 8(2)(b)(iii). "Intentionally direct attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict";

Article 8(2)(b)(xiii). "Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war";

Article 8(2)(b)(xxvi). "Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions."

<sup>330</sup> See for example Article 8(2)(b)(ii). "Intentionally directing attacks against civilian objects, that is, objects which are not military objectives";

Article 8(2)(b)(iii). "Intentionally direct attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict";

Article 8(2)(b)(xiii). "Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war";

## ENVIRONMENTAL WARFARE AND THE FUTURE<sup>331</sup>

Centner states that the correlation between future wars and water is more complex than often assumed. While water has been used as a weapon over time, its potential as a *casus belli* is less directly evident. The interrelationship between the two has to be seen as part of a far more complex set of factors that reflect the ways that societies structure themselves and allocate their resources.

However, it is a fact that if left unconstrained by effective treaties or international norms, environmental warfare will play a much greater role in future armed conflicts.<sup>332</sup> Historically, environmental warfare has been used intermittently, even sparingly. With military doctrines increasingly cognizant of environmental topics, it is possible that future war will see deliberately comprehensive, co-ordinated environmental attacks designed to achieve strategic goals.

Considering historical precedence, environmental attacks are more likely during full-scale wars involving ethnic, religious or other differences where the distinctions between the antagonists are fundamental. This statement is particularly true in the Africa scenario. The threat of environmental or nuclear retaliation will dissuade some nations from using environmental warfare in total wars. The potential for collateral damage and unwanted side-effects, as well as international opinion, will dissuade industrialized nations from environmental attacks in limited conflicts.

Based upon historical evidence, traditional attacks will continue against hydrologic facilities, crops and forests. Increases in population density, urbanization, and dam water capacity will make these forms of attack even more devastating.

Funding agencies, such as the World Bank, will decline funding for potentially dangerous projects, such a large dams, without resolution of internal or regional conflicts.

Information necessary to select appropriate environmental targets is readily available. Maps and public documents indicate the location of irrigation and hydroelectric dams. Computer databases and modern modelling techniques enable planners to predict more accurately the possible short-term effects of environmental attacks. However, accurate predictions of long-term effects, which may include massive collateral damage and unwanted cascading effects, remain beyond the capability of modelling techniques.

The numbers of potential targets for environmental attack are enormous and increasing. There are approximately 20 nuclear waste-reprocessing plants in the world located in about a dozen countries, and more than 465 nuclear power facilities in over 25 countries. More

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Article 8(2)(b)(xxvi). *"Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions."*

<sup>331</sup> Centner (1995) 25 - 27.

<sup>332</sup> Centner (1995) 25 - 27.

than 40 countries world-wide depend upon hydroelectric power for 50 percent or more of their electricity. The number of potentially dangerous dams, dykes, and irrigation systems is in the hundreds or more.

## **NATIONAL DEFENCE VERSUS ENVIRONMENTAL PROTECTION: CAN WE HAVE IT BOTH WAYS?**

Dycus<sup>333</sup> poses an interesting question whether it is possible to maintain a strong national defence, even to win a war, while at the same time protecting the environment for future generations?

In some countries, like the USA, the choice is not an either/or proposition.<sup>334</sup> Despite such resolve, it is not always easy to abandon bureaucratic habits developed over generations, or to change the way we have long thought about what is needed to defend the nation. We first have to recognize that environmental security is itself an important national interest, as well as international interest.

Rhetoric must be coupled with action, however. Decision-makers at every level of the defence establishment have to be rewarded for their environmental sensitivity, just as they are for performance of their military missions. Military missions should be carried out in an environmentally responsible way.

There surely will be occasions when environmental sacrifices are necessary. The challenge is to decide whether such sacrifices are really necessary and justified from a military perspective. The consequences of a wrong decision could be catastrophic.

What is needed is a settled procedure for determining when we must choose between environmental protection and national defence. This procedure should include a clear articulation of the issues and evaluation of the stakes. It should describe who will be entrusted with fateful military decisions and how he or she will go about making them. Because the choices are apt to present themselves in times of urgency and stress, prior planning is necessary to lay the groundwork for decisions in a system of rules that will yield wise and, insofar as possible, predictable results.

Sometimes it is assumed that the ordinary environmental laws do not apply to armed conflict or to other wartime activities of the military. This assumption seems to grow out of a belief that no legal constraints are tolerable when the fate of the nation hangs in the balance. Obviously there is no legal basis for this assumption and this view ignores the fact that the natural environment is itself a national, and international interest that should be protected.

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<sup>333</sup> Dycus (1995) 2 - 3.

<sup>334</sup> Dycus (1995) 2 - 3. Former Defence Secretary, Dick Cheney answered this way: *"Defence and the environment is not an either/or proposition. To choose between them is impossible in this real world of serious defence threats and genuine environmental concerns. I want every command to be an environmental standard by which federal agencies are judged."* Former president Bush even linked "environmental security" with economic growth as a basic national security objective.

However, just bringing the defence community into full compliance with existing environmental laws is not all that is required. It will require changes in patterns of thinking and the concept of environmental protection must be embraced by all segments of our society, and not just the military. This statement is particularly true regarding the SANDF. Taking the history of South Africa into account, the SANDF played an instrumental part in the apartheid government's '*kragdadige*' approach to international relations in the 1970s and 1980s, as accurately described by Botha.<sup>335</sup> Botha states that the official approach to international law by South Africa was hostile and reactionary and the country's isolation had a profound effect on the teaching and practice of international law. The new political dispensation brought about a dramatic turnaround, especially regarding international law. Suddenly it became a constitutional imperative for the country to comply with international law and international agreements.

This had a profound impact on the SANDF, requiring a sudden paradigm shift from the old to the new. Within a short period of time, South Africa signed/ratified several international conventions regarding the military. These conventions, as well as other international instruments and soft law regarding the environment, have a huge impact on the strategic and tactical doctrines of the SANDF, the full impact of which have most probably not yet been grasped. Protection of the environment by the SANDF during both peace time and armed conflict is an international law obligation. Much work has already been done by the SANDF regarding protection of the environment during peace time. However, it is submitted that some work still needs to be done to determine the full effect of, for example, the provisions of Protocol I regarding the protection of the environment during armed conflict.

At the same time, existing national laws need clarification to remove any lingering doubts that they provide baseline environmental standards for defence activities. Amendments are also needed to make the laws clearly applicable to military actions abroad both in peacetime and during armed conflict.

Despite political, legal, financial and technological challenges, there should be optimism that we can maintain a strong national defence that is also environmentally sound.

## **THE SOUTH AFRICAN NATIONAL DEFENCE FORCE AND ENVIRONMENTAL POLICY**

As already stated,<sup>336</sup> the new political dispensation brought about a dramatic new role for the SANDF, necessitating changes in existing attitudes, perceptions, and doctrine. This also relates the SANDF's approach towards protection of the environment.

According to the White Paper on Defence, the Minister of Defence and the Chief of the SANDF are responsible for ensuring the exercise of proper ecological management and control of military properties. This is done in co-operation with other government departments and environmental organisations.

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<sup>335</sup> Botha (1992/1993) 37.

<sup>336</sup> *Supra* at 64.

The environmental function aims to ensure the environmental sustainable management of military activities and facilities by following an advanced and comprehensive approach of Military Integrated Management (MIEM) encapsulated by the phrase "GREEN SOLDIERING". The Department of Defence ("DoD") has recently adopted a comprehensive DoD Policy Statement on Defence Estates and Environmental Management.

The following guiding principles for environmental management of defence estates in the DoD which were accepted, include *inter alia* the following:

- a. The handling of environmental matters should take place within the parameters of international, national and regional agreements, legislation and regulations, and should support national environmental objectives.
- b. The emphasis on environmental management should be on integrating environmental considerations in all military planning and activities which could have an impact on the environment.
- c. Every commanding officer is responsible to ensure that the activities which take place under his/her control are carried out in an environmentally responsible way.
- d. The military will have to accept responsibility for the environmental impacts of its activities over their entire life cycle.

Furthermore the proposed DoD draft environmental policy states that (quoted verbatim):

*"The Department of Defence, shall, in compliance with the environmental obligations placed upon it by the Constitution, national and international regulatory provisions and within the constraints imposed from time to time by nature of its business,*

*protect the environment through pro-active measures of Military Integrated Environmental Management;*

*accept responsibility for use of the environment entrusted to it;*

*minimise the impacts of its operations on the environment by means of a programme of continual improvement;*

*promote open communication on environmental issues to all interested and affected parties;*

*train and motivate its members to regard environmental considerations as an integral and vital element of their day-to-day activities."*

The abovementioned guidelines and policy statement on the environment are of significant importance, affirming the DoD's commitment to environmental protection. However, policies and plans are worthless unless they are put in practice. These should be in place for both peacetime and during armed conflict. In the LOAC context, it means full compliance by the SANDF with *inter alia* the Geneva Conventions and Additional Protocols

I and II to the Geneva Conventions. Of specific importance is compliance with Articles 35 and 55 of Additional Protocol I, which specifically address the protection of the environment during armed conflict, which, as already stated on numerous occasions, includes the protection of water installations, water works, etc.

Furthermore, it would require a legal review to establish which weapons in relation to Articles 35 and 55 of Protocol I, could cause "*widespread, long-term and severe damage to the environment*", as well as a legal review of new weapons in terms of Article 36 of Protocol I to establish whether the use of these weapons would comply with the provisions of Protocol I.

## CONCLUSION

Environmental warfare is not new. Military forces have used methods encompassed by the term throughout most of recorded history. Environmental warfare exploits natural and man-made environmentally sensitive targets to achieve specific military objectives. The deliberate destruction of forests, croplands, dams, rivers, canals and deliberate pollution that adversely affects enemy forces and populations are examples of environmental warfare.

Operationally and tactically, environmental warfare can be used to support many types of military operation. Its effects may be either transient or long-term.

During armed conflict, water sometimes becomes a target, or is even used as a means of warfare. Until the 1970s, the protection of the environment - especially the protection of water - enjoyed little legal protection under either customary international law or treaty law. Apart from the customary LOAC rule which prohibited poisoning of the enemy's water, no specific rules existed which specifically addressed environmental protection. Some customary LOAC rules, however, did afford some indirect protection to the environment, such as the principles contained in the 1868 Declaration of St Petersburg, Article 23 paragraph 1(g),<sup>337</sup> etc.

The 1970s characterised an upsurge of environmental awareness world-wide. Governments, industries and citizens around the world became increasingly aware of environmental issues and the need to manage these issues effectively. This has subsequently led to increased public opinion and environmental legislation, resulting in a general increase in environmental awareness in the international defence arena.

Threats to water are the same as threats to the environment. The same emphasis should be placed on the need to protect water against the polluting and destructive effects of armed conflict.

The 1976 ENMOD Convention was the first treaty affording direct protection to the environment. Its application is, however, hampered by the fact that many countries have not yet ratified this Convention.

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<sup>337</sup> *Supra* at 22.

Thereafter, the 1977 Additional Protocols to the 1949 Geneva Conventions, have made an important contribution to the strengthening of the international rules intended to protect the environment in time of armed conflict.

In either case, as long as water is a civilian object and indispensable to the survival of the civilian population, warfare against, or by means of water, is totally incompatible with the principles and rules of humanitarian law, as discussed. The importance of the provisions concerned and the obligation to implement them effectively cannot be overemphasized.

The establishment of the Rome Statute<sup>338</sup> was the next major step to afford environmental protection by *inter alia* classifying wilful attacks against the environment as war crimes.

The development of the environmental soft law applicable to armed conflict should also not be underestimated. In this regard the Helsinki Rules, United Nations General Assembly Resolution No A/47/37 and the ICRC Plan of Action are major developments. In many instances these documents re-affirm some customary LOAC rules. In other instances they present guidance and direction to governments, which may evolve in the development of these principles into customary international law. The Helsinki Rules confirm the customary rule prohibiting poisoning of water, the UN Resolution No A/47/37 shows a new tendency to prohibit any destruction of the environment which cannot be strictly justified by military ends, while the ICRC Plan of Action also urges member states to the Geneva Conventions to comply with international law, to respect civilians and civilian objects (which obviously include water installations, water works, etc), integration by states, of their obligations under international humanitarian law in relevant procedures and training, urging states to allow humanitarian repair work during armed conflict, and urging states to ensure that their weapons comply with international humanitarian law.

However, the true significance of the laws for the preservation of the natural environment during armed conflict has yet to be fully grasped. Further studies must be undertaken on the national and international levels, taking into account not only recent experiences with attacks on the environment, but also the growing international concern and recognition for environmental protection.

Protecting the environment during armed conflicts is a subject that today poses important questions to which effective and realistic answers must be found. Within the African context, where water is a very scarce commodity, the need for protection of water cannot be overemphasized.

What we more frequently see on our television screens, are regional conflicts being fought all over the world. South Africa has already become part of some of these and will definitely become more and more involved in peacekeeping and peace enforcement military operations, especially within the African regional context. The new constitutional dispensation suddenly brought about dramatic international legal obligations for the SANDF. Apart from other relevant provisions in the 1996 Constitution, Chapter 11 thereof specifically prescribes to the SANDF compliance with international law, international customary law and international agreements.

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<sup>338</sup> *Supra* at 59; 62.

In view of the abovementioned, it is imperative that during military operations, the SANDF complies with the relevant legal obligations of national and international law regarding protection of the environment. In a few years time, only history will be the judge whether our deeds were lawful in this regard.

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10 October, 1980

Convention on prohibitions or 6  
restrictions on the use of  
certain conventional weapons  
which may be deemed to be  
excessively injurious or to have  
indiscriminate effects.