Chapter VI
Prospect for a Model Legal Framework

I. Introduction

The legal mechanism for determination of liability for environmental damage during armed conflicts needs to be re-evaluated and enforced. It is necessary to propose new ideas to address the inadequacies of the existing liability mechanism. The 1999 Kosovo conflict showed the inadequacy of existing legal mechanism for hearing and evaluating allegations of wartime environmental damage.

As it was shown in the previous chapters, the existing international legal framework contains many provisions that either directly or indirectly protect the environment or govern the military behavior. In practice, however, these provisions have not always been effectively implemented or enforced. Where the international community has sought to hold states and individuals liable for environmental harm caused during armed conflict, results have largely been poor, with one notable exception: holding Iraq liable for damage caused during the 1990-1991 Gulf War, including for billions of dollars worth of compensation for environmental damage.

In this Chapter, the aim is to first examine the regime of international environmental law with a view to extracting principles relevant to deliberate victimization of the environment during armed conflicts. The second task will be to consider whether the scattered collateral standards and references negotiated and concluded by the international community should be consolidated and developed into a single and new treaty. A more daunting task is to develop an actual institutional mechanism to ensure compliance with this treaty, to deter deviation there from, and to allocate liability for wrongdoing. The possibility and necessity of developing this mechanism also will be addressed in this chapter.

II. Principles

International environmental law is a new and dynamic legal regime developed in response to the rapid growth of industrialization, the development of transportation, the pollution explosion and the use of highly noxious substances, all of which have had sever
harm to the environment. Catastrophes such as the Torrey Canyon disaster in 1967, the Amoco Cadiz collision in 1978 and the Chernobyl explosion in 1986, all resulted in the establishment of principles of care and responsibility for environmental harm designated to minimize accidents in the future and clarify their legal consequences. The legal regime did not, until very recently, even address the deliberate environmental damage such as the pumping of oil into the sea or ignition of oil-well fires that occurred in the Gulf War. Nevertheless, to the extent that these principles apply to negligent or careless pollution, it is without doubt to assume that they must apply to deliberate pollution that may occur during war.

1. Precautionary Principle

The precautionary principle suggests that the mere lack of scientific knowledge about risk cannot justify a failure to take appropriate precautions. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. Simply put, precaution means that proponent of activities which might lead to significant or irreversible harm is obliged to take appropriate measures to prevent this damage, even if there is a lack of full scientific uncertainty as to the existence or severity of the risk.

A. Precautionary Principle in International Legal Instruments

The 1992 United Nations Conference on Environment and Development (UNCED) marked the full emergence of the precautionary principle in international environmental law. The Rio Declaration in its Principle 15 provides:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious

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or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental damage.4

Since 1992, the language of Principle 15 has been reflected in various international legal instruments. One study has shown that fifty three legally binding and forty five non-legally binding instruments have included some formulation of the precautionary principle.5

In its preamble, the Convention on Biological Diversity6 expresses a commitment to the sustainable use of biodiversity and stipulates that “lack of full scientific certainty should not be used as a reason for postponing measures” that avoid or minimize “a threat of significant reduction or loss of biological diversity.”7

The Cartagena Protocol on Biosafety8 is an environmental agreement in which the precautionary principle has taken centre stage. First, it is one of the international agreements that do not only include precautionary language in its preamble, but also it is placed in its objective provision. The Protocol preamble reaffirms the precautionary approach, and Article I presents the Protocol’s objective. According to Article I, parties to the Protocol are obliged to adhere to the precautionary approach as set out in Principle 15 of the Rio Declaration while implementing the Protocol’s objective. On both levels, the level of assessing a risk according to Article 15 and Annex III, and the level of taking a decision based on the outcomes of the risk assessment pursuant to Article 10 (1) and Article 10 (6), parties are obliged to apply the precautionary principle. Hence, in the Protocol, the precautionary principle is applied as a “risk assessment” tool, as well as a “risk management” tool.

The Stockholm Convention on Persistent Organic Pollutants (POPs Convention)9 contains a number of references to the precautionary principle. The Preamble

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4 Ibid., Principle 15.
5 See A. Trouwborst, note 1.
7 Ibid.
8 The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Montreal (2000) 391.I.M.
acknowledges "precaution underlies the concerns of all the Parties and is embedded within this Convention." Article 1 presents the objective of the Convention as to "protect human health and environment from persistent organic pollutants." Article 8 requires Parties to use a "precautionary manner" when deciding which chemical to list in the Annexes to the Convention. A proposal to list a chemical in the Annexes shall proceed if the chemical "is likely as a result of its long-range environmental transport to lead to significant adverse human health and/or environmental effects." Furthermore, "the lack of full scientific certainty shall not prevent the proposal from proceeding."

Under the United Nations Framework Convention on Climate Change (UNFCCC), States Parties "should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects." Article 3 (3) provides that "where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as reason for postponing such measures".

The 1973 Convention on the International Trade in Endangered Species of Wild Flora and Fauna (CITES) does not explicitly invoke the precautionary principle in its provisions. In its Ninth Meeting, however, the Conference of the Parties adopted a resolution to incorporate the precautionary principle in the procedure for listing species in need of protection. The Resolution provides:

The Parties shall, by virtue of the precautionary approach and in case of uncertainty either as regards the status of a species or the impact of trade on the conservation of a species, act on the best interest of the conservation of the species concerned or adopt measures that are proportionate to the anticipated risks to the species.
Agenda 21\(^\text{19}\) contains many references to the use of precautionary principle for the purpose of environment protection. Paragraph 18.40 calls on states to introduce “the precautionary approach in water-quality management, where appropriate,” and also seeks the “application of precautionary measures derived from a broad-based life-cycle analyses” to control industrial waste discharges. In chapter 35, it is suggested that precaution can be a useful policy tool where complex systems “are not yet fully understood” and countries are called on to improve the interaction between the sciences and decision making “using the precautionary approach, where appropriate […] to gain time for reducing uncertainty.”\(^\text{20}\)

The precautionary principle also took centrestage in the 2002 World Summit on Social Development (WSSD) held in Johannesburg. The Summit called for urgent action at all levels to promote and “improve science-based decision-making and reaffirm the precautionary approach as set out in Principle 15 of the Rio Declaration.”\(^\text{21}\)

The precautionary principle has also taken a centrestage in a number of regional treaties related to the environment, and human health and even has become, according to some authors, the Leitmotiv of European Commonwealth environmental law and policy.\(^\text{22}\)

In 1993, the EU officially adopted the precautionary principle as a basis for all community environmental policy. According to Article 130 (2) of the Treaty Establishing the European Economic Community (EEC), as amended by the Treaty on European Union (the Maastricht Treaty):\(^\text{23}\)

Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken; that environmental damage should as a priority be rectified at the source and that polluter should pay.\(^\text{24}\)


\(^{20}\) Ibid., paras. 35 (3), (6).


\(^{23}\) Treaty on European Union (the Maastricht Treaty), 7 February, 1992, 31 ILM.

\(^{24}\) Ibid.
The European Water Convention provides that:

The Parties shall be guided by the [...] precautionary principle, by virtue of which action to avoid the potential transboundary impact of release of hazardous substances shall not be postponed on the ground that scientific research has not fully proved a causal link between those substances, on the one hand, and the potential transboundary impact, on the other hand.25

B. International Case Law

Beside international treaties, international case law also reflects the fact that the precautionary principle forms part of international law. In the 1999 Southern Bluefin Tuna Cases,26 the precautionary principle was considered by the International Tribunal on the Law of the Sea (ITLOS). In these cases, Australia and New Zealand accused Japan of failing to comply with its obligations under UNCLOS to conserve and manage tuna stocks. Australia and New Zealand claimed that Japan’s annual catch of southern bluefin tuna was higher that its catch allowed under the limit set in 1994 by the Convention on Conservation of Southern Bluefin Tuna and that the scientific evidence showed that Japan’s annual catch of the southern bluefin tuna could endanger the existence of tuna stocks. They sought urgent provisional measures from ITLOS, requesting, inter alia, that the parties act in accordance with the precautionary principle.27

ITLOS recognized that there was “scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna” and went on to find that the parties “should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock.” Relying on the

27 Ibid. paras. 31, 32.
precautionary principle, the Tribunal granted the provisional measures sought by Australia and New Zealand in order to “avert further deterioration” of the tuna stocks.28

The Appellate Body of the WTO has also referred to the precautionary principle in a number of cases. In the EC Hormones Case,29 the European Community sought to ban US and Canadian beef products on the grounds that the scientific evidence of their effects on human health were inconclusive. The EC attempted to justify its action on the basis of precautionary principle, arguing that the principle was “a general customary rule of international law or at least a general principle of law.”30 The US denied this, arguing that precaution was merely an “approach” that varied from context to context.31 According to Canada, precautionary principle was an “emerging” principle of international law. The principle may “in the future, crystallize into one of the general principles of law recognized by civilized nations.” 32

In its decision, the Appellate Body was reluctant to take any explicit position on the status of the precautionary principle in international law, stating that “the status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioner, regulators and judges.” Thus, it would be “unnecessary, and probably imprudent” to do so when that status is “less than clear”.33 The Appellate Body noted “that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.” The Appellate Body, however, found that precaution was incorporated into Article 5 (7) of SPS Agreement and agreed with the EC that it may be relevant beyond that Article, though, according to Appellate Body, the precautionary principle does not override Article 5 (1).34 Accordingly, the Appellate Body decided that the EC ban on US

28 Judge Treves, in his separate opinion, made it clear that a precautionary approach was inherent in the Tribunal’s power to grant the provisional measures sought by Australia and New Zealand.
30 Ibid, para. 16.
31 Ibid, para. 43.
32 Ibid, para. 60.
33 Ibid, para. 123.
34 Ibid, para. 125.
and Canadian beef was unjustified, as the EC has not conducted a proper risk assessment as required by that Article.

The Appellate Body’s position in the Hormones Case could be interpreted as such that precaution may be a principle of customary international of specific application to international environmental matters, rather than a customary legal principle that should be broadly applied in all matters related to trade, development, etc.

In the Nuclear Weapons Case, Judge Weeramantry counted the precautionary principle amongst the general principles of environmental law, to be recognized by the ICJ in reaching its decisions. In the 1995 Nuclear Test Case, New Zealand referred frequently to the principle, calling it “a very widely accepted and operative principle of international law”. The country argued that the precautionary principle was a binding rule.

C. Status of the Principle

On the basis of the evidences presented above, it could be argued that there is sufficient State practice to justify the conclusion that the precautionary principle is getting sufficiently broad support and it represents an emerging principle of customary international law. Certainly, in Europe, precaution is considered by States to be a general principle of international law, as noted in the Communication of European Commission. The Appellate Body of the WTO also suggested that the principle forms part of international law relating to environment.

D. Precautionary Principle in the Context of Armed Conflict

In the context of armed conflict, the precautionary principle can be described as such that lack of scientific certainty in regard to the effects on the environment of certain

36 Ibid, (dissenting opinion on Judge Weeramantry), Section 10 (e).
38 Ibid.
39 Ibid.
41 Treaty on European Union (the Maastricht Treaty), note 23.
military operations does not absolve parties to a conflict from taking proper precautionary measures to prevent undue damage. It means that the potential effect on the environment will need to be addressed and assessed during the planning of an attack. As in the most cases of military attacks there is uncertainty in regard to their full impacts on the environment, the parties need to take precautionary measures to minimize, to the extent possible, their effects on the environment.

In addition, there is practice to the effect that this environmental law principle applies to armed conflict. In its advisory opinion in the Nuclear Weapons Case, the International Court of Justice stated that the basic principles it recognized in the Nuclear Test Case of 1995 would also apply to the actual use of nuclear weapons in armed conflict.\textsuperscript{42} The ICRC, in its report submitted in 1993 to the UN General Assembly on the protection of the environment in time of armed conflict, referred to the precautionary principle as "an emerging, but generally recognized principle of international law [whose object is] to anticipate and prevent damage to the environment and to ensure that where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason to postpone any measures to prevent such damage."\textsuperscript{43}

2. The Principle of State Responsibility for Environmental Damage

According to the International Law Commission, every internationally wrongful act of a State entails the international responsibility of that State.\textsuperscript{44} A wrongful act is defined as State conduct consisting of an action or omission attributable to the State and constituting a breach of an international obligation of that State.\textsuperscript{45}

The general principle of international environmental law made its first appearance in the 1941 \textit{Trail Smelter Case}\textsuperscript{46} relating to injuries caused to the State of Washington by

\textsuperscript{42} Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, note 35, para. 32.

\textsuperscript{43} ICRC, Report on the protection of environment in time of armed conflict, para. 143.


\textsuperscript{45} Ibid., Art. 2.

\textsuperscript{46} Trail Smelter Case (United States v. Canada), 3 R. Int'l Arb. Awards at 1905.
sulphur dioxide emissions from a smelter plant in British Colombia. The Special Arbitral Tribunal declared that:

Under principles of international law... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.\textsuperscript{47}

On the basis of this principle, the Tribunal held that Canada was responsible in international law for the conduct of the Trail Smelter and had "the duty... to see to it that this conduct should be in conformity with the obligation of the Dominion under international law."\textsuperscript{48} The Tribunal ordered reparation by way of injunctive relief and the payment of an indemnity.

In 1949, the International Court of Justice in the Corfu Channel Case affirmed that no State may utilize its territory contrary to the rights of other states.\textsuperscript{49}

Based on such precedents, the principle of State responsibility for environmental damage has been proclaimed by numerous international texts and consistently cited as laying down a general principle of state responsibility for environmental damage. Any doubt as to whether this principle was a norm of customary international law conclusively removed by Principle 21 of the 1972 Stockholm Declaration of the United Nations on the Human Environment,\textsuperscript{50} which stresses that states have the responsibility to ensure that activities under their jurisdiction or control do not cause damage to the environment of other states or areas beyond national jurisdiction.\textsuperscript{51} The Declaration is not itself legally binding. However, Principle 21 was the culmination of thirty years of international judicial development and is universally accepted as a statement of customary international law.\textsuperscript{52}

\textsuperscript{47} Ibid., at 1965.
\textsuperscript{48} Ibid., at 1966.
\textsuperscript{51} Ibid, Principle 21.
\textsuperscript{52} See 1984 I.L.C. Rep. 171, 175.
This principle can also be found in various global environmental conventions including the 1982 Convention on the Law of the Sea\textsuperscript{53} and the Convention on Biological Diversity\textsuperscript{54} to which virtually all the states of the world are contracting parties. The principle reaffirmed in the ICJ advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* which states that "the existence of the general obligation of States to ensure the activities within their jurisdiction and control respect the environment of other States or areas beyond national control is now part of the corpus of international law relating to the environment."\textsuperscript{55}

To fully understand the law on state responsibility for environmental harm, it is also important to have a look at some other general principles of international law, i.e. territorial sovereignty and territorial integrity, upon which it is based.

The rules of state responsibility arise from the position of a state as member of the international community of states. Membership involves relationship with other states under rules of international law. Sovereignty is the concept used to define a state’s position in respect of those relationships. The doctrine of sovereignty gives rise to certain rights, for example, exclusive control and jurisdiction over territory, population and domestic affairs. However, sovereignty is not absolute and the rights arising from are not without concomitant obligations. It is relative to that of another, rather than absolute.\textsuperscript{56} International law attempts to balance the rights and obligations of territorial sovereignty against the rights and obligations of territorial integrity. The rules that balance these rights and obligations include those of state responsibility.\textsuperscript{57}

\textbf{A. Status of the Principle}

On the basis of the evidences considered, it can be said that the principle of state responsibility for environmental harm is a broadly accepted rule of customary

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\textsuperscript{54} The Convention on Biological Diversity, note 6, art. 3.
\textsuperscript{55} Legality of the Threat or Use of Nuclear Weapons, note 34, 226.
\textsuperscript{56} See EL Salvador v Nicaragua (Central American Court of Justice) (1917) Am. J. Int’l L, vol. 11, 674, 718;
international law. The two constituting elements of customary international are present: (1) numerous affirmations together with consistent international practice; and (2) expression of the psychological element of *opinio juris*.

**B. Scope of the Principle**

After establishing the principle of state responsibility for environmental damage, it is necessary to know (1) where must the injurious act occur? (2) where must the damage impact? And finally (3) how much damage must occur?

(i) **Origin of Harm**

It seems clear from the Trail Smelter and Corfu Channel cases that a state may be responsible if activities occurring within its territory cause environmental harm. Furthermore, as was made clear in the Trail Smelter Case, states are responsible not only for their own activities, but also for the public and private activities. According to Article 21 of the Stockholm Declaration, the requisite place of origin of the injurious acts of states is “their jurisdiction or control”. This phrase also appears in Article 1 of the International Law Commission’s Draft Articles. The word “jurisdiction” arguably means both a state’s territorial and its more limited extra-territorial jurisdiction over nationals, flagships and corporations registered or incorporated within the state. Accordingly, the obligation could extend to the activities of nationals, where ever such activities are undertaken. The word “control” is used as an alternative to jurisdiction and must be intended to have a wider meaning than jurisdiction. The ordinary meaning of control is wide enough to include residents of a state.

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58 Ibid. p. 77.
59 “States have ... the responsibility to ensure that activities within their jurisdiction or control ...” Stockholm Declaration, note 50.
60 “The present articles apply with respect to ... places under its jurisdiction ... or ... under its control ...” ILC Draft Articles, note 50.
61 Prue Taylor, note 57, p. 79.
62 Ibid.
(ii) Areas of Impact

With regard to requisite area of impact, the Trail Smelter Case only imposed liability for damage caused to the "territory of another state". The Corfu Channel Case refers to harm to the rights of other states. However, the Stockholm Declaration extends liability more generally to "areas beyond the limits of national jurisdiction" such as the high seas.

The term 'environment' is wide enough to include territory in its traditional sense of land mass, internal waters, air space and territorial sea. The phrase 'the environment of areas beyond national jurisdiction' refers to areas beyond state territory, i.e. the high sea, the atmosphere above the high seas, outer space and the deep sea-bed. The principle 21 and the two above mentioned cases, however, don't include a state's own environment as an area of environmental harm. Therefore a question may be raised here; is a state under obligation to prevent such harm? Some authors state that no responsibility for injury to environmental resources within state territory is identified. It is, however, argued that the earth biosphere is interdependent and that certain activities, which occur within a national territory and seem to cause limited harm, may in reality harm the whole of the earth's environment.

It is nowadays accepted as an undeniable fact that the earth's biosphere represents a single individual system characterized by the interrelation of its functional and ecological subsystems, the destruction of any one of which promotes the breakdown and destabilization of another.

Despite the growing recognition of the need to prevent states from causing harm to their own environments, no customary law obligation exists, as yet, to give effect to this

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63 Trail Smelter Case, 1, note 46.
64 Stockholm Declaration, note 56, Principle 21.
65 Brownlie (1979), 120-123, cited in Prue Taylor, note 57, p. 82.
66 Ibid.
68 For example, large scale destruction of tropical rainforests is partly responsible for the greenhouse effect due to carbon dioxide emissions, and to interference with the earth's hydro and geochemical carbon cycle.
69 Handle 1975: 53, cited in Prue Taylor, note 57, p. 84.
end. “the preventive obligation with respect to injury to a state’ own environmental resources is in precisely this early stage of development.”

(iii) Nature and Degree of Harm

The principle is only concerned with environmental harm – in other words, pollution. Pollution is defined as: “any introduction by man, directly or indirectly, of substance or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystem, impair amenities or interfere with other legitimate uses of environment.”

As regard to the degree of harm, the threshold stipulated by the Trail Smelter Case is injury of ‘serious consequences’. The threshold has been interpreted as only prohibiting ‘substantial’ or ‘significant’ environmental harm. Accordingly, every case of environmental harm will not result in a breach of the obligation. It must be significant or substantial. The ILC draft Articles do state that the damage must be “greater than the mere nuisance or insignificant harm which is normally tolerated.” In contrast to the Trail Smelter Case and ILC draft Articles, Principle 21 does not specify a threshold and only refers to ‘damage’. Therefore, Principle 21 includes duty to prevent any sort of injury to the territory of other States.

C. Consequence of State Responsibility

Whenever state responsibility established, it give raise to state liability for making “reparation”. Under customary international law, a state committing an ‘international wrongful act’ is responsible. This responsibility can only be discharged by making reparation. The Permanent Court of International Justice has explained that:

Reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act

70 Judge Tanaka of the ICJ, in; Smith 1988: 110, cited in Prue Taylor, ibid, 86.
72 Trail Smelter Case, note 46.
74 Draft Articles on State Responsibility, note 44, art. 2 (h).
had not been committed, Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it-such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.75

Some legal documents demonstrate that certain obligations are capable of amounting to an international crime, in other word, criminal responsibility. The ILC’s Draft Article on State Responsibility provides:

An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitute an international crime.76

Significantly, Article 19 (3) of the Draft Articles expressly stipulates that “an international crime may results, inter alia... a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas ...”77

D. Applicability of the Principle during Armed Conflict

The Trail Smelter Case as well as Corfu Channel Case and the Stockholm Declaration introduced the principle in broad terms and do not in any way preclude its application in the context of hostilities. This understanding is reaffirmed by the World Charter for Nature, in which the United Nations General Assembly overwhelmingly resolved that “nature shall be secured against degradation caused by warfare or other hostile activities.”78 As part of a General Assembly resolution, this provision is not inherently binding. It does, however, constitute further evidence supporting of the applicability of the principle during armed conflict.

75 The Factory at Chorzow (Ger. V. Pol.), P.C.I.J., 1928, ser. A, No. 17, at 47.
76 Draft Articles on State Responsibility, note 44, Article 19 (2).
77 Ibid., Article 19 (3).
In some certain circumstances, however, the applicability of the principle may be precluded. The special circumstances most likely to be invoked by a state causing wartime environmental damage are distress and necessity.

Under Article 24 of the ILC’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, distress may be invoked if the state had no other means of saving the lives of persons entrusted to its care. Distress may not be invoked if the state in question has contributed to the occurrence of the situation of extreme distress, or if the conduct in question was likely to create a comparable or greater peril.

Under Article 25 of the ILC’s Draft Article, necessity may be invoked if the State in question is safeguarding “an essential interest of the state against a grave and imminent peril”. It is, however, stipulated that the act of necessity must not “seriously impair an essential interest of the victim state”.

From the above discussion, it could be concluded that the vast majority of wartime environmental damage may give raise to state responsibility and make states liable to compensation and reparation.

3. Principle of Individual Criminal Responsibility for Environmental Damage

Individuals are responsible for serious violations of international humanitarian law rules that they commit or order others to commit. It requires that those who are responsible for serious violations be prosecuted and punished as criminals. The serious violations of humanitarian law that require criminal sanction are termed as war crimes.

Perhaps, the most renowned citation in regard to this principle is the judgment of the International Military Tribunal at Nuremberg (IMT):

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80 Ibid.
81 Ibid., p. 194.
82 Ibid.

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“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can provisions of international law be enforced.”

In the six decades, which have passed since the IMT judgment was handed down, the concept of individual criminal liability has evolved and developed, particularly since the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in the 1990’s and most recently the International Criminal Court (ICC).

The recognition of the concept of individual criminal liability for crimes committed in the context of an armed conflict, however, can be traced back to ancient time. The Manu Smriti or the Laws of Manu, which is an ancient Indian treaty on religious law and dated around 200 B.C., is potentially of relevance in this context. This treaty that formulates general rules of conduct for Indian society provides *inter alia* that when a king fights his enemies in battle, he should not strike (i) with weapons which are concealed, nor with weapons which are barbed, poisoned, or the points of which are “blazing with fire”; nor (ii) one who sleeps, nor one who has lost his coat of mail, nor one who is naked, nor one who is disarmed, nor one who looks on without taking part in the fight…; nor (iii) nor one who has been grievously wounded, nor one who is in fear, nor one who has turned to flight. The violators of such rules could be tried before a court of law (*dharma*).

In the 14th century, the 1621 Articles of War decreed by King Gustavus of Sweden provided some specific provisions for the punishment of any man who abused a...
woman, in certain circumstances, set fire to a town or village, pillaged any church or hospital or set fire to any church, hospital, school or mill. 88

During the 18th, 19th, and early 20th centuries significant steps were taken, in the context of international law, towards the recognition of the concept of individual liability for crimes committed during armed conflict. The 1863 Libber Code 89 issued by President Lincoln in connection with the American Civil War was an important event in the recognition of the concept of individual liability for the violation of the law of the war. Under the Libber Code specific provisions were provided inter alia for the punishment of individuals who violated the laws of war, e.g. by (i) engaging in acts of extortion or other acts for individual gain, acts of private revenge or connivance at such acts; (ii) committing offences contrary to the principle that the United States acknowledges and protects, in hostile countries occupied by them, religion and morality, strictly private property; the persons of inhabitants, especially those of women; and sacredness of domestic relations; (iii) committing an act of wanton violence against persons in the invaded country, an act of destruction of property not commanded by the authorized officer, any act of robbery, pillage or sacking, and/or any act of rape, wounding, maiming, or killing of such inhabitants.

The concept of individual liability was also developed as a consequence of the recognition of rights of an individual under international law. Since the half of the 19th century it has been generally recognized that individuals have some specific rights under international law. 90 Along with the recognition of rights for individuals, it was also generally recognized that there are acts of commission or omission for which international law may impose criminal liability on individuals and for which punishment

90 Rashmi Salpekar (2007), Criminal Responsibility under International Law, Thirty Sixth Annual Conference, 24-25 March 2007, New Delhi, organized by The Indian Society of International Law.
may be imposed, either by properly empowered international tribunals or by national courts and military tribunals.

Individual criminal liability formed the basis for the constitution and jurisprudence of the Nuremberg and Tokyo tribunals. The Nuremberg and Tokyo Tribunals that were established in the year 1946, to prosecute the perpetrators of war crimes during Second World War set a significant precedent concerning to the individual criminal liability under international law. The Nuremberg Tribunal was empowered to try major German Officials accused of war crimes and the Tokyo Tribunal was established to try war criminals of Japan for the crimes committed during the Second World War.

Though, The Nuremberg and Tokyo tribunals have not directly recognized environmental offences as international crimes, a connect point was established between international criminal law and international environmental law. These two bodies of international law connect in the environmental context of international crimes such as genocide, crimes against humanity, and war crimes. While crimes such as genocide and crimes against humanity can occur in situations that are not classified as armed conflicts, individual international criminal responsibility has developed principally in the context of the international law of armed conflict.

The environmental offence is expressly recognized as a crime by The Rome Statute of the ICC. According to the ICC Statute, a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment.91

One of the war crimes which fall under the jurisdiction of the ICC is the “international launching of an attack in the knowledge that such an attack will cause widespread, long-term and severe damage to the natural environment. . . “92

The other war crime over which the ICC has jurisdiction and are potentially more relevant with regard to damage to environment are: (1) “the extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly”; (2) “the intentional directing of attacks against civilian objects which are not military objectives”; (3) “disproportionate collateral damage to civilian objects.”93 In addition, the

91 ICC Statute, note 85, Article 25.
92 Ibid, Article 8 (2) (b) (iv).
93 Ibid, Articles 8 (2) (a) (iv), 8 (2) (b) (ii), 8 (2) (b) (iv).
Statute prohibits the use of poison and poisoned weapons, as well as the use of chemical weapons.\textsuperscript{94}

\textbf{III. Legal Tools}

There is no doubt that international law is moving in the direction of greater protection for environment in all situations, including wartime. We already have the Geneva Conventions and Protocols and other international agreements that discourage the worst excesses of armed conflict, including the targeting civilians, the mistreatment of prisoners of war, and the destruction of sensitive infrastructures such as large dams and nuclear power and chemical stations.

However, with the increasingly devastating potential of modern warfare, it has become evident that existing international legal framework does not fully addresses the harm caused by war. That harm may take many forms, including the potential devastation caused by weapons of mass destruction, the indiscriminate use of landmines and the ecological destruction caused by mass movement of refugees. Therefore, we should examine how legal mechanism can be developed and strengthened to guarantee protection of environment during armed conflict.

Commentators on this issue are divided into three groups. The first group believes that the existing environmental law rules are sufficient to assure environmental protection during armed conflict, and that the problem consists of guaranteeing compliance with the existing rules and not in the rules themselves\textsuperscript{95}. Another group of commentators are in this view that a new law to deal with environmental damage during armed conflict is necessary.\textsuperscript{96} The third group lies somewhere in between, \textit{i.e.}, that existing system is not completely capable of assuring the environmental protection during wartime. However, it

\textsuperscript{94} \textit{Ibid,} Articles 8 (2) (b) (xvii), 8 (2 (b) (xviii).


\textsuperscript{96} The European Community Environment Commissioner, Greenpeace, the Government of Jordan and to some extents UNEP fall in this group. \textit{Ibid.}
is not necessary to adopt new laws. Instead, it would be sufficient if existing international law instruments are modified or supplemented to respond to the present environmental threats. 97

A. Improving Existing International Agreements

Most of the international humanitarian law (IHL) instruments have the potential to be modified and improved. There are different provisions in those instruments that either are vague or represent a very high threshold for imposing liability for environmental damage during armed conflict.

For example, the principle of “military necessity” introduced in a number of international humanitarian law conventions, including the Geneva Conventions of 194998 and 1977 Protocol I Additional to the 1949 Geneva Conventions is capable of divergent interpretations.99 Some commentators argued that even if the law of environmental warfare were clear the environment would still not be sufficiently protected, because of the doctrine of military necessity. 100 These divergent interpretations will prevent the international environmental legal instruments from operating in practice as a deterrent. As a result, every wanton destruction would be justified under this principle, by super power belligerents. These instruments would be improved and operate as a deterrent if the principle is eliminated or its application is conditioned on not harming human lives or environment.101

101 Nada Al-Duaij, note 97, p. 428.
Moreover, Articles 35 (3) and 55 of the Additional Protocol I to the Geneva Conventions\textsuperscript{102} can be modified as to attenuate the condition of liability for environmental damage during armed conflict. Instead of requiring all three elements i.e., widespread, long-term and sever damage, it would be useful, if like the ENMOD,\textsuperscript{103} liability were based on the occurrence of a single element.\textsuperscript{104} Damage that could be described in terms of any one of those elements could present a real danger to the environment and could be modified as to improve the protection environment during armed conflict. Article 56 of the Additional Protocol I also could be modified and improved. The text of this Article provides protection only to a certain number of installations such as “dams, dikes, and nuclear electrical generating stations.” The oil facilities can be added in the forecited list in order to protect natural resources during times of armed conflict.\textsuperscript{105} The Additional Protocol I provisions should be extended to cover internal armed conflict too, since there is no reason to distinguish between the destruction of environment caused by international armed conflict and that caused by non-international armed conflict.\textsuperscript{106}

Additional Protocol II to the Geneva Conventions can also be modified by including provisions similar to Articles 35 (3) and 55 of the Additional Protocol I.\textsuperscript{107}

The ENMOD which currently provides protection against only widespread, long-lasting or severe damage could be modified to include under its jurisdiction, any environmental damage. Since ENMOD addresses offensive military activities, it could be


\textsuperscript{104} Simonds, note 95, p. 211.

\textsuperscript{105} In view of the Iraqi degradation of the environment in Kuwait in 1991, when the Iraqi military burned the oil wells and spilled crude oil into the Gulf waters, and burned oil wells and crude oil in Iraq in 2003, it becomes essential to include oil facilities in the Article 56. See Katherine M. Kelly, Note (1992), Declaring War on the Environment: the Failure International Environmental Treaties During the Persian Gulf war, AM. U. J. INT’L L. & Pol’Y, vol. 7. P. 921-946.

\textsuperscript{106} Simonds, note 95, p. 213-214.

\textsuperscript{107} Ibid., p. 213.
modified to extend its jurisdiction to defensive activities as well. It could also be strengthened by a provision that allow for enforcement even if the State causing damage did not admit a hostile intent behind its action, because we should consider the effect on environment and damage caused to it, not the mindset of the state. The ENMOD could be improved to include military operations in peacetime, particularly those activities that conducted on military bases abroad. The Convention can provide that any act that causes damage to the environment, even in times of peace, would be considered as a crime. The Convention should assure that military forces are not protected by their national systems in cases of flagrant violations against environment.

Finally, the Marten’s Clause for environmental protection should be included in all instruments regulating international and internal armed conflicts. The Marten’s Clause can fill any gap in current environmental laws. It states:

> Until a more complete international code of environmental protection has been adopted, in cases not covered by international agreements and regulations, the biosphere and all its constituent elements and processes remain under the protection and authority of the principles of international law derived from established customs, from dictates of the public conscience, and from the principles and fundamental values of humanity acting as steward for present and future generations.

B. Concluding New Treaty

Following Gulf War II, there was some pressure on the international community to conclude a treaty encompassing wartime environmental damage. An academic conference reported in *The Independent* (London) on June 4, 1991, reaffirmed that trend. In that conference, the question of whether a new set of rules should be codified, or whether the existing rules should be modified, was subject to great debate and

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110 Nada Al-Duaij, *note* 97, p. 430.
discussion. As it was earlier cleared in this work, many good rules already exist, some others need to be modified, and some new laws need to be adopted. For example, a new convention that criminalizes damage to the environment during armed conflict should be adopted.

Some commentators have already suggested making it a crime to recklessly or intentionally harm the environment, both within, and outside of, the context of war. This crime, named ecocide, literally a killing of the earth, is the environmental counterpart of genocide and would be enshrined in a single international convention, named the Convention on the Crime of Ecocide. In fact, the adoption of a new Convention on Ecocide was inspired by the adoption of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and compared the importance of environmental protection to the importance of humans.

Prof. Richard Falk has drafted some articles for the proposed Convention on the Crime of Ecocide. According to Article I of the Draft Convention on the Crime of Ecocide, “ecocide, whether committed in time of peace or in time of war, is a crime under international law...” Article I requires member states to prevent and punish the crime of ecocide. Article II of the Draft Convention defines criminal acts as done with “intent to disrupt or destroy” the environment. This requirement may exclude serious acts of environmental destruction that may be committed as a result of mere negligence or disregard. It is, however, argued that for the effectiveness of the ecocide provision, it would be important to capture not only the mens rea standard, but also negligence, willful blindness, carelessness, and objective certainty standards.

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115 Ibid, 43.
116 Ibid, 45.
The Draft not only criminalizes completed crimes against the environment, but also conspiracy and attempts to commit such crimes.\textsuperscript{119} This Draft requires the UN to form a Commission for the investigation of ecocide crimes.\textsuperscript{120} Jurisdiction is given either to an international environmental court or the judicial authority of the state where the crime was committed.\textsuperscript{121} To facilitate the prosecution procedures, member states are required to cooperate in extraditing criminals to the concerned authority, and such environmental crimes should not be, under any circumstances, described as political crimes that may allow criminals to escape extradition and prosecution.\textsuperscript{122}

It is also stated that the threshold of damage in the ecocide must be lower than the threshold provided by the ENMOD and Protocol I, e.g. the existence of “widespread, long-term and severe” damage. Florencio Yuzon states:

In an international crime of environmental destruction, the quantum of proof that is necessary, or the threshold of damage that must occur, is relatively low compared to ENMOD and Protocol I where higher thresholds of damage must be met. . . . Any damage, regardless of degree . . . would automatically render the State and/or its military, criminally liable.\textsuperscript{123}

As an alternative proposal, several groups, including the United Nations, ICRC, Greenpeace International and a number of jurists, proposed a fifth Geneva Convention.\textsuperscript{124} The proposed fifth Geneva Convention includes the Marten's Clause to cover all the subjects not examined in the earlier Conventions.\textsuperscript{125} It covers all the environmental

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{119}] Draft Convention on the Crime of Ecocide, note 117, art. III (b) (d).
\item[\textsuperscript{120}] Ibid, art. V.
\item[\textsuperscript{121}] Ibid, art. VII.
\item[\textsuperscript{122}] Ibid, art. VIII.
\item[\textsuperscript{123}] Ensign Florencio J. Yuzon (1996), Deliberate Environmental Modification Through the Use of Chemical and Biological Weapons: “Greening” the International Laws of Armed Conflict to Establish an Environmentally Protective Regime, \textit{AM. U. INT’L L. & POL’Y} 793-815.
\end{itemize}
\end{footnotesize}
destruction resulting from armed conflict, including internal armed conflicts. However, it does not apply to peace time environmental damage.\textsuperscript{126}

The proposed Convention requires member states to be cautious in military activities that may harm neutral states, and should inform them about any harmful conduct.\textsuperscript{127} The applicability of the principle of necessity is limited in this Convention. It states that the principle shall “not automatically prevail over the principle of environmental protection.”\textsuperscript{128} The proposed fifth Geneva Convention is applicable in the case that there is intent to harm the environment. It also considers the nature of the weapons or techniques used. If the nature of those weapons is likely to cause environmental damage then the Convention will be applied.\textsuperscript{129} In addition, the Convention requires states to prohibit weapons and techniques that can be expected to cause environmental damage in all circumstances.\textsuperscript{130} It also prohibits the use of certain specific weapons and tactics that already recognized to be harmful to the environment. The zones and areas containing ecosystems, species or genetic materials of vital international importance are also excluded from being subject to any attack.\textsuperscript{131} Beside state responsibility,\textsuperscript{132} individuals are also can be prosecuted under the Convention.\textsuperscript{133}

Both the Ecocide Convention and fifth Geneva Convention are very advanced proposal and can help to fill the gaps that there are in the current legal system. However, states are usually cautious regarding any new international convention, and therefore, these proposals are unlikely to be accepted without considerable discussion and education.

\textsuperscript{126}
\textit{ibid.}, Part I Element 1 (B), p. 43.
\textsuperscript{127}
\textit{ibid.}, Part I, Element 1 (B), p. 44.
\textsuperscript{128}
\textit{ibid.}, Part I, Element 1 (F).
\textsuperscript{129}
\textit{ibid}, Part II, Element 2 (A).
\textsuperscript{130}
\textit{ibid}, part 2, Element 2 (B).
\textsuperscript{131}
\textit{ibid}, Part 1, Element 1 (H).
\textsuperscript{132}
\textit{ibid}, Part 1, Element 1 (D).
\textsuperscript{133}
\textit{ibid}, Part 4, Element 4 (B).
IV. Institutions

The importance of the legal protection of the environment is generally recognized. Still, such recognition has not resulted in the establishment of proper international institutions or tribunals to ensure compliance with the norms of international environmental law.

As was discussed in detail in the last Chapter, there are different evidences that show the inadequacy of existing legal mechanisms for hearing and evaluating allegations of wartime environmental damage. Among other things, there is lack of expertise in the field of environment. Despite the experiences that most international jurists have in the field of resolving international conflicts, they still lack the necessary expertise in the environmental field. This field of international law has its own characteristics and is a relatively new area of the law. Therefore, a certain level of expertise of international environmental law is required among judges and arbitrators to be able to make environmentally satisfying decisions.134 Most international judicial bodies, pose no expertise in environmental issues.135 This can heighten the transaction costs of proceeding with environmental cases, as well as produce ineffective jurisprudence. For example, in the International Court of Justice (ICJ) decision on the Danube dispute between Hungary and Slovakia,136 the Judge had to be educated in the environmental science aspects of the dispute. Although there is much to be gained from educating jurists on environmental issues, this would be much time consuming as well as involving more financial costs, which can be avoided by establishing a specialized tribunal.137

A major problem with the existing institutions is their limited jurisdiction. The ICJ has jurisdiction over environmental disputes, but is limited to advisory opinions and disputes between state parties. NGOs, International organization or groups of individual have no right to invoke the jurisdiction of the ICJ.138 Furthermore, before hearing the

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135 Simonds, note 95. According to Article 26 (1) of the ICJ Status, the Court may form a permanent chamber, composed of three or more judges, to deal only with environmental cases.
136 Case Concerning the Gabcikovo-Nagyamaros Project (Hungary/Slovakia), No. 92, General List (September 25, 1997).
137 Mark A. Drumbl, note 118, p. 640.
138 Statute of the International Court of Justice, 26 June 1945, art. 36 (2).
case, the ICJ needs to get the consent of both parties to its jurisdiction. The jurisdiction of the International Criminal Court (ICC) is limited to claims against natural persons. It is virtually impossible to find an organization or state liable for environmental crimes in connection with claims brought this Court. On the other hand, the International Criminal Court is principally designed to punish and deter genocide and crimes against humanity per se. Environmental offences are basically ancillary offences, and therefore might not receive enough attention. For example, Rwandan civil war (1994) caused severe environmental destruction: two national parks landmined, endangered species poached, agricultural lands rendered barren to coerce migration of persecuted peoples, and systematic resettlement exhausting moderate lands of their agricultural capacities. The ad-hoc International Criminal Tribunal for Rwanda, however, has made no mention of these issues in its proceedings. The domestic war crimes prosecutions also were very reticent in the area of environmental crimes. The same might happen within the context of the International Criminal Court.

Another problem that the International Criminal Court is facing is that the Court can only address environmental crimes committed by military forces actively engaged in hostilities. The Court apparently has no jurisdiction on cases related to environmental destruction conducted by armed forces in the testing of weapons or in the mobilization of forces. Furthermore, the ICC’s jurisdiction over war crimes does cover crimes that have widespread, long-term and severe damage to the natural environment. This threshold is too high, since it requires the presence of all three elements before jurisdiction can be asserted.

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140 Mark A. Drumbl, note 118, p. 149.
141 Ibid. p. 112.
142 Ibid.
143 Ibid.

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A. The Need for an International Environmental Court

From the above mentioned evidences, it appears that establishing a new international judicial body to specialize in examining international environmental cases is necessary. This body could be an International Environmental Court (IEC).

Establishing an International Environmental Court is not a wholly new idea. Such a proposal was mooted as long ago as 1989 at a conference entitled Congress on a More Efficient International Law on the Environment and Setting up an International Court for the Environment within the United Nations took place in Room, attended by experts from 30 countries. This Conference called for a convention to establish a right to a healthy environment, and suggested that a permanent world commission on the environment be established at the U.N. level to examine violations affecting this right.

In 1991, another conference was held in Florence, in which the basic rules of procedure of this court were discussed. The establishment of an international environmental court was also discussed at a conference in Washington, D.C., sponsored by a foundation which had been set up to investigate the establishment of an international court for environment. In August 2002, during the World Summit on Sustainable Development, over 120 world’s top judges from more than sixty developed and developing countries gathered in Johannesburg. This conference of judges tackled the enforcement of international environmental law and stated that “the fragile state of global environment requires the judiciary, as the primary guardian of the rule of law, to boldly and fearlessly implement and enforce international and national laws.” In this meeting, issues ranging from training programs for national and international judges in environmental science and policy to the establishment of a new international court for the

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146 Ibid, p. 51-52.
147 International Court of the Environment Foundation, available (Online: Web), URL: http://www.ecom.it/icel/about.html.
environment were discussed and suggested in order to solve the problem of coordination and enforcement of the environmental agreements.\textsuperscript{150}

**B. Models for Establishing an IEC**

The advocates of an IEC have varying ideas of how such a court should be organized and structured. One of the earliest and most detailed proposals for an IEC was the proposal proposed by the 1989 conference held at the National Academy of Lincei in Room.\textsuperscript{151} The Conference proposed that an international environmental court would be governed by a “convention on the environment and human rights establishing an individual right to the environment,” or by proposed declaration similar to the United Nations Draft Principles on Human Rights and the Environment.\textsuperscript{152} According to the proposal, the court would have jurisdiction for disputes arising under these governing convention or declaration.\textsuperscript{153}

The proposal led to a Draft Convention, presented in 1992. According to the suggested Draft Convention, “States would be, legally responsible to the entire international community for acts that cause substantial damage to the environment in their own territory, in that of other States or in areas beyond the limits of national jurisdiction and shall adopt all measures to prevent such damage.”\textsuperscript{154} Under the Draft Convention, individual rights include: (i) the fundamental right to the environment; (ii) the right of access to environmental information, along with the duty to provide such information; (iii) the right to participate in procedures involving the environment; and (iv) the right of private sector to seek compensation for any environmental damage.\textsuperscript{155} According to the Draft Convention states have duties to (i) treat natural resources with care, as regards waste reduction and consumption; (ii) be held responsible for severe environmental damage, even within their own territories; (iii) prohibit all activities that may cause irreversible damage to ecosystems; (iv) prevent military action that procures

\textsuperscript{150} Top Judges to Fortify Environmental Law Enforcement, \textit{Ibid.}
\textsuperscript{151} See Peggy Podger Kalas, note 139, p. 232.
\textsuperscript{152} \textit{Ibid.}
\textsuperscript{153} \textit{Ibid.}
\textsuperscript{154} \textit{Ibid.}
\textsuperscript{155} \textit{Ibid}, p. 234.
irreversible environmental damage; (v) and adopt environmental standards that have been recommended at an international level. 156

The Draft Convention was then made into a Draft Treaty for the Establishment of an International Court for the Environment, in 1999. According to the Draft Treaty the Court would serve as to:

(i) Adjudicating significant environmental disputes involving the responsibility of members of the international community; (ii) adjudication disputed between private and public parties with an appreciable magnitude…; (iii) ordering emergency, injunctive and preventive measures as necessary; (iv) mediating and arbitrating environmental disputes; and (v) instituting investigation, when necessary to address environmental problems of international significance. 157

The Draft Treaty for IEC proposes a structure for the court, according to which the court would be either an independent identity, an affiliate body of the United Nations, or adjunct to another adjudicatory body, like the Permanent Court of Arbitration. 158 The U.N. Security Council would prepare a list of candidates, from which the fifteen would be chosen by the U.N., 159 to serve for a period of seven years. Judges would be eligible for reelection. The Court would be complementary to the national courts.

The United Nations Compensation Commission (UNCC) is another potential model for an IEC. 160 The UNCC was established in 1991 by the Security council Resolution of 692, in order to decide on the climes arising from the 1990-91 Persian Gulf conflict. 161 The UN member States may consider establishing a similar structure as a permanent body, either under the General Assembly or under the Security Council. 162 Such a court, however, would have much broader scope of jurisdiction than UNCC. In fact, this court would be an upgraded UNCC, which would be following the same approach followed by

156 Ibid.
159 Ibid.
161 The UN security Council Resolution 692 of 20 may 1991.
162 United Nations Environment Programme (UNEP) (2009), Protecting the Environment during Armed Conflict: An Inventory and analyzes of International Law, Nairobi, Kenia, p. 53.
UNCC in term of evaluating climes, using “equity and justice, rather than strict requirements of proof” to determine disputes.

Using this model, the proposed IEC could classify disputes based on types of claims and parties to the dispute.163 Similar to the UNCC, the court could use a number of panels among which to divide its responsibilities.164 The IEC could also use the UNCC’s method of calculating damage, applying use and non-use values.165 Market price, appraisal value, and hedonic pricing are all useful in determining use value.

Another possible model for an IEC is the dispute resolution mechanism created under the World Trade Organization (WTO).166 A range of other proposals for an international environmental court exist in different forms. These other proposals call for such things as broad jurisdiction, the power of the court to develop its own body of international law, and the ability to expand international law through its application.167 The court jurisdiction could be both voluntary and compulsory, and the court could function as inquisitor and fact finder, mediator, conciliator, and arbitrator.168 Most of these proposals allow actors ranging from states, NGOs, corporations, and individuals to have standing to appear before the court.169

Establishment of an IEC according to the UNCC model is, however, more feasible than others. The UNCC is already a successful model. The U.N. member States may consider the establishment of a similar structure as a permanent body, either under the General Assembly or under Security Council. Its mandates could be as following:

- Adjudicate upon alleged violations of international environmental law during international and non-international armed conflicts;
- Adjudicate upon disputes involving the responsibility of members of international community, as well as disputes between private and public parties;

163 Juni, note 160, p. 59.
168 Ibid.
169 Ibid.
- Handel and process compensation claims related to environmental damage as well as remediation activities;
- Prosecute individuals who are alleged to be guilty of crimes under international environmental law;
- Ordering emergency, injunctive and preventative measures as necessary;
- Instituting investigations, where necessary, to address environmental problems of international significance;
- Develop norms and mechanisms on victim assistance, international assistance and cooperation to assess and redress the environmental consequences of armed conflict.

The proposed international environmental court could be assisted by panels of experts, including Fact Finding Commission (PCA). The ICE could adjudicate on disputes arising out of the UN or other environmental treaties, including the UN Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol (KP), as well as any other applicable environmental law or customary international law.

C. Problems of Fragmentation and Forum Shopping

Since the IEC would have broad jurisdiction, it would lead to competition among the law based forums for dispute settlement and result in the fragmentation of international law. On the other hand, as no international court is designated as the ultimate decision making body on an issue, the IEC would result in multiple conflicting judgment on this issue. Thus, the establishment of an IEC would do more to fragment international law than to unify it. Furthermore, as there are many international courts and tribunals able to adjudicate on environmental issues and there is not a superior authority to which the other courts must yield, the creation of an IEC may bring about the problem of forum shopping. The addition of an IEC to the existing international

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171 Ibid, p. 751. Forum Shopping is defined as the attempt “to have an action tried in a particular court or jurisdiction where one feels one will receive the most favorable judgment or verdict.” This favorable judgment or verdict can be the result of choosing the most sympathetic substantive
adjudicatory institutions, will add to what has already been termed as a “proliferation” of international courts and tribunals, which may encourage forum shopping.

To overcome these problems, it is suggested that the IEC substitutes the existing tribunals that function under the UN environmental treaties. Ultimately, the aim would be to achieve one single court dealing with all UN environmental laws.

The other more feasible suggestion is that the IEC decides on the environmental cases that are not able to be heard in any other international court, whether because of a lack of standing in another court for a potential litigant, or because of another court’s limited jurisdiction, or because of a lack of adequate enforcement procedure. According to this proposal, IEC’s jurisdiction should be limited as to not encourage forum shopping and does not weaken existing institutions.

V. Conclusion

A successful attempt for the protection of environment during armed conflict would be consist of concluding a new treaty and reform on international environmental governance.

There are strong quests for conclusion of a new treaty which would be based on the principles of precaution, state civil responsibility and individual criminal responsibility. According to the precautionary principle, proponent of an activity which might lead to significant or irreversible harm is obliged to take appropriate measures to prevent this damage, even if there is a lack of full scientific uncertainty as to the existence or severity

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172 See Note, Forum Shopping Reconsidered, Harvard Law Review, vol. 103, p. 1677-78. It is argued that “permitting one party, after a controversy has arisen, to select the law more favorable to his position runs counter to ideas of equality that are basic to Western views of justice.” See Arthur Taylor von Mehren, Comment, Special Substantive Rules for Multistate Problems, Harvard Law Review, vol. 88, p. 1678. Some scholars and commentators, however, believe that a choice of forum would be beneficial. See ELLEN HEY, note 170, p. 10.


of the risk. According to the principle of state responsibility, the injured state is entitled to request full reparation, in the form of restitution in kind, compensation, satisfaction and assurance and guarantees of non-repetition. According to the principle of individual responsibility, a person who is found to be guilty of a crime under international law can be criminally sanctioned.

There is also steady quest for a World Environment Organization which would provide a centralized hub for monitoring and compliance, and clearer coordination between all of separate MEA secretariats and international organizations.176 Even before the COP 15 held in Copenhagen under the United Nations Framework Convention on Climate Change (UNFCCC), in a letter to the U.N. Secretary General, German Chancellor Angela Markel and French President Nickolas Sarkozy called for an overhaul of environmental governance, and asked for the Copenhagen climate talks to progress the creation of a World Environmental Organization (WEO).177 In the UNEP annual Governing Council Meeting held in April 2010 in the Indonesian island of Bali, its Executive Director, Achim Steiner stated that environmental governance reform was a key part of discussion at this annual meeting and that governments raised the possibility of a WEO. He said that a high level ministerial group had been established to continue the process with greater focus and urgency and that “the status quo . . . is no longer an option.”178

The International Environmental Court could be part of this international organization and would provide an ideal dispute resolution/enforcement mechanism for WEO. Establishment of an IEC is nictitated by the fact that the existing courts and tribunals are facing with different problems and deficiencies, which include: deficiencies in environmental expertise, problems of accessibility for some entities, and lack of jurisdiction and enforcement. To avoid overlapping jurisdiction with other already existing domestic and international courts and problem of forum shopping, the solution is to have an IEC of limited jurisdiction addressing only the gaps in current jurisdiction of existing courts.

177 Stephen Hockman QC, note 166, p. 222.
178 Ibid. p. 221.