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# Environmental Damage in Armed Conflict

*To What Extent Do the Remedies Available for Environmental Damage in  
Armed Conflict Reflect the Polluter Pays Principle? The Cases of the Jiyeh  
Power Station and the Niger Delta Conflict*

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# 1. Introduction

*Because the environment and natural resources are crucial for building and consolidating peace, it is urgent that their protection in times of armed conflict be strengthened. There can be no durable peace if the natural resources that sustain livelihoods are damaged or destroyed.<sup>1</sup>*

## 1.1 Protection of the Environment in Relation to Armed Conflict:

### Development of the Topic

The first instance of widespread public attention to environmental damage caused in armed conflicts was sparked by the United States' use of the toxic herbicide Agent Orange during the Vietnam war.<sup>2</sup> Since then, the burning of oil wells during the Iraq–Kuwait war (1990–91), the chemical contamination following the bombing of industrial sites in Kosovo (1999), and the oil leak in the Mediterranean Sea during the Israel–Lebanon war (2006) are only a few examples of environmental harm being caused during an armed conflict. From more than 20 post-conflict observations during the last two decades the UN Environmental Programme (UNEP) has concluded that significant environmental harm is caused during armed conflict.<sup>3</sup>

The issue has also been recognized by the International Law Commission. After encouragement from UNEP the topic Protection of the Environment in Relation to Armed Conflicts was put on its program of work at its sixty-fifth session in 2013.<sup>4</sup> The Special Rapporteur has to date presented three reports on the topic, resulting in a set of draft principles and commentaries provisionally adopted by the Commission.<sup>5</sup> The work is not yet concluded, and several Commissioners, as well as states, have expressed a desire for the issues of state responsibility and the responsibility of non-state actors for environmental damage caused in armed conflict to be addressed in future reports.<sup>6</sup> The need for investigating these issues further is also reflected in the suggestion by the Special Rapporteur that “questions on responsibility

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<sup>1</sup> UNEP, “Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law” (UNEP, Switzerland, 2009), inside cover: “About the Report”.

<sup>2</sup> *Ibid.*, p. 8.

<sup>3</sup> *Ibid.*, p. 4.

<sup>4</sup> International Law Commission, Report on its Sixty-Fifth Session (6 May to 7 June and 8 July to 9 August 2013), UN Doc. A/68/10, *Yearbook of the International Law Commission*, 2013, Volume II, Part Two, para 19.

<sup>5</sup> International Law Commission, Report on its Sixty-Eighth Session (2 May to 10 June and 4 July to 12 August 2016), UN Doc. A/71/10, *Yearbook of the International Law Commission*, 2016, Volume II, Part Two, paras 188 and 189.

<sup>6</sup> See *ibid.*, paras 166 and 178 for the opinions of Commissioners. On the meetings of the Sixth Committee on 1 and 2 November during the seventy-first session in 2016, this view was expressed by several States who took the floor on the subject. See for instance the statements by Lebanon, Portugal, Spain, Micronesia (UN Doc. A.C.6/71/SR.28, paras 18, 33, 43 and 59), and Iran (UN Doc. A.C.6/71/SR.29, para 92).

and liability, as well as the responsibility and practice of non-State actors and organized armed groups in non-international armed conflicts” be addressed in future reports.<sup>7</sup>

This thesis will investigate what remedies are available when environmental damage has been caused in an armed conflict.<sup>8</sup> It will also attempt to evaluate to what extent these remedies are a reflection of the widely recognized principle that the polluter should pay for damage it has caused the environment. The issue can be placed in the intersection of the law of armed conflict, international environmental law and the law of state responsibility. Clearly, the subject of this thesis falls within an area of law that both states and the foremost experts in the field agree needs to be investigated further, both in order to provide codification of applicable rules and in order to promote progressive development of international law.<sup>9</sup>

In examining the role of environmental justice in war, Okowa has concluded that the law of armed conflict focuses, perhaps excessively, on inter-state conflicts and that this body of law suffers from “significant normative gaps” when it comes to environmental protection.<sup>10</sup> She argues that the restriction to damage which is widespread, long-term and severe, under article 35(3) of the 1977 Additional Protocol I to the 1949 Geneva Conventions, renders the provision inapplicable in most conflicts.<sup>11</sup> A further such gap is the lack of provisions providing environmental protection in the 1977 Additional Protocol II to the 1949 Geneva Conventions, which applies to non-international armed conflicts. Several other scholars agree that such normative gaps exist.<sup>12</sup> On this note, it has been argued that multilateral environmental

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<sup>7</sup> International Law Commission, Report on its Sixty-Eighth Session, para 152.

<sup>8</sup> For the purposes of this thesis, the “environment” is defined as made up of natural resources, both abiotic and biotic, such as air, soil, water, fauna, and flora, and the interactions between them. These environmental components are referred to in the two Conventions adopted under the Council of Europe on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (adopted 21 June 1993) ILM 32, 1228 (Lugano Convention) and on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 March 1992, entered into force 6 October 1996), 1936 UNTS 269 (Transboundary Watercourses and International Lakes Convention). Since the thesis will not go into aspects of cultural heritage or aesthetic aspects of the landscape, the dividing line drawn by the exclusive application of some law of armed conflict provisions to the *natural* environment, will not be elaborated on further. (See B. Sjöstedt, *Protecting the Environment in Relation to Armed Conflict: The Role of Multilateral Environmental Agreements* (Diss. Lund University, 2016) pp. 42f. for a discussion. Regarding the term “armed conflict”, a distinction needs to be made between international and non-international armed conflict. The definitions of these terms will be introduced in the two cases that deal with each respectively.

<sup>9</sup> The mandate of the International Law Commission, as provided by article 13(1)(a) of the Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

<sup>10</sup> P. Okowa, “Environmental Justice in Situations of Armed Conflict” in J. Ebbesson and P. Okowa (eds.), *Environmental Law and Justice in Context* (Cambridge University Press, 2009), pp. 231–252, at pp. 247–250.

<sup>11</sup> *Ibid.*

<sup>12</sup> See M. Schmitt, “War and the Environment: Fault Lines in the Prescriptive Landscape” in J.E. Austin and C.E. Bruch (eds.), *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, digitally printed version (Cambridge University Press, 2007), pp. 87–136, at p. 104; R. Falk, “The Inadequacy of the Existing Legal Approach to Environmental Protection in Wartime” in J.E. Austin and C.E. Bruch (eds.), *The*

agreements (MEAs) concluded in peacetime can serve to fill some of the lacunas presented by protection under the law of armed conflict.<sup>13</sup> In fact, Ebbesson considers it to be primarily through multilateral agreements that international environmental law has developed over the last decades.<sup>14</sup> The inclusion of the topic Protection of the Environment in Relation to Armed Conflicts on the agenda of the International Law Commission, as well as Resolution 15 approved by consensus at the UN Environment Assembly in May 2016,<sup>15</sup> indicates that the international community is willing to revisit the question of strengthening the protection of the environment in relation to armed conflict.

With this thesis, I aim to build on the realizations by scholars that the law of armed conflict often leaves more to wish in terms of protection of the environment. How does this relate to the remedies available and their reflection of the polluter pays principle? MEAs have been identified as a productive way forward, in ensuring higher environmental protection in war. Can they offer a way forward also in terms of remedies which reflect the polluter pays principle?

## **1.2 Do the Available Remedies Reflect the Polluter Pays Principle? Purpose of the Thesis**

### *1.2.1 Purpose*

The purpose of this thesis is to investigate to what extent the remedies available in international law for environmental damage caused during armed conflict reflect the polluter pays principle, as informed by a theory on environmental justice. The scope of this purpose is narrowed down by the use of a case study-method, where two cases are used to identify specific remedies. The cases also serve to provide context to the evaluation of the extent to which the remedies reflect the polluter pays principle.

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*Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, digitally printed version (Cambridge University Press, 2007), pp. 137–155, at, p. 138.

<sup>13</sup> See Sjöstedt (2016); S. Vöneky, “Peacetime Environmental Law as a Basis of State Responsibility for Environmental Damage Caused by War” in J.E. Austin and C.E. Bruch (eds.), *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, digitally printed version (Cambridge University Press, 2007), pp. 190–225.

<sup>14</sup> J. Ebbesson, *Miljö rätt*, 3<sup>rd</sup> ed. (Iustus, 2015), p. 28.

<sup>15</sup> UN Environment Assembly of the UN Environment Programme Resolution 2/15 of 27 May 2016, “Protection of the Environment in Areas Affected by Armed Conflict”, UN Doc. UNEP/EA.2/Res.15, 4 August 2016.

### 1.2.2 Available Remedies

The remedies available under international law for environmental damage caused during armed conflict include the different forms of reparation enabled by the law of state responsibility as well as other possible remedies available under applicable MEAs. This thesis will also investigate the possibilities of enacting such responsibility from non-state actors.

In order to clarify the structure of the thesis, a few remarks on the law of state responsibility will be made here. Currently, there is no special area of international law regulating the responsibility of states for wartime environmental damage. Instead, the general rules of state responsibility are applicable. Shaw describes state responsibility as “a fundamental principle of international law, arising out of the nature of the international legal system and the doctrines of state sovereignty and equality of states”.<sup>16</sup> The state responsibility doctrine is best understood as a set of secondary rules concerned with “consequences flowing from a breach of a substantive rule of international law”.<sup>17</sup> It should also be noted that the law of state responsibility has been found to continue to apply in wartime.<sup>18</sup> For the purposes of this thesis, which seeks to evaluate the compatibility of remedies for environmental damage in armed conflict with the polluter pays principle, that means that both substantive rules of international law and the content of the law of state responsibility will be of interest.

The International Law Commission has prepared a set of draft articles on the Responsibility of States for Internationally Wrongful Acts (ILCDA), which contain a basic rule governing the allocation of responsibility between states: “Every internationally wrongful act of a State entails the international responsibility of that State.”<sup>19</sup> Article 2 goes on to clarify that “an internationally wrongful act of a state” exists when conduct or omission which is attributable to the state breaches an obligation which the state has under international law. This means that regardless of whether a state has violated an obligation encompassed in a treaty or in customary international law, responsibility is entailed. Neither article stipulates a standard of

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<sup>16</sup> M. N. Shaw, *International Law*, 7<sup>th</sup> ed. (Cambridge University Press, 2014), p. 566.

<sup>17</sup> *Ibid.*

<sup>18</sup> A. Leibler, “Deliberate Wartime Environmental Damage: New Challenges for International Law”, 23 *California Western International Law Journal* (1992), pp. 67–137, at p. 75.

<sup>19</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Report on its Fifty-Third Session (23 April to 1 June and 2 July to 10 August 2001), UN Doc. A/65/20, *Yearbook of the International Law Commission*, 2001, Volume II, Part Two, article 1. Henceforth, ILCDA. It should be noted that in 2001, the ILCDA were annexed to UN General Assembly Resolution 56/83 of 12 December 2001 “Responsibility of States for Internationally Wrongful Acts”, UN Doc. A/RES/56/83, 28 January 2002, whereby the General Assembly commended them to governments (para 3), something which should be seen as giving particular weight to the articles.

fault – *prima facie* – responsibility appears to be strict. However, the applicable material rule can set its own standard of fault. The standard of fault of the material rules which are applicable to the cases of this thesis will be addressed in the case studies below.

In the *Chorzów Factory* case, the Permanent Court of International Justice laid down the principle that the duty to make reparations should “wipe out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”.<sup>20</sup> The content of the legal relationship which arises from state responsibility is described by the International Law Commission as entailing both “cessation of the wrongful act, and reparation for any injury done”.<sup>21</sup> There are three different forms of reparation commonly recognized in international law. First, restitution, which means to restore the situation that existed before the breach, is the remedy identified by the Permanent Court of International Justice as preferable.<sup>22</sup> Second, if it is not possible to achieve restitution, the injured party should receive compensation from the party at fault. That is, “payment of a sum corresponding to the value which a restitution in kind would bear”.<sup>23</sup> To this can be added losses that are not covered by compensation corresponding to the cost of restitution in kind. Third, some form of satisfaction is an option; a formal apology, an assurance that the action will not be repeated or a formal acceptance of responsibility.<sup>24</sup> This option will be more readily referred to when damage is of a non-economic nature. These remedies are also reflected in the draft articles prepared by the International Law Commission.<sup>25</sup> Monetary compensation is arguably the most realistic way of envisaging reparation after wartime damage, since it is not very likely for former belligerents to be able to cooperate in clean-up measures and since satisfaction cannot normally be considered an adequate remedy in cases where damage can be economically quantified. Therefore, this thesis will not treat restitution or satisfaction as available remedies, but instead focus on compensation. Further limiting the consideration of the contents of state responsibility, questions of implementation or circumstances precluding wrongfulness will not be treated within the scope of this thesis.

To sum up, evaluating how well the remedy of compensation available under the law of state responsibility reflects the polluter pays principle can be said to include two levels. This two-leveled approach is reflected in the methodology of the thesis. First, an application of the

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<sup>20</sup> *Chorzów Factory Case*, Judgment of 14 September 1928, PCIJ Series A, No. 17, p. 47.

<sup>21</sup> ILCDA, General commentary, p. 31, para 3(f).

<sup>22</sup> *Chorzów Factory Case*, p. 47.

<sup>23</sup> *Ibid.*

<sup>24</sup> Shaw, p. 586.

<sup>25</sup> ILCDA, articles 31 and 34–37.



substantive rules of international law protecting the environment in armed conflict will be done in both case studies. The applicable material rules will be assessed to see if and how a breach can be established, rendering compensation under the law of state responsibility or responsibility of non-state actors an available remedy. Second, based on the findings of the cases, the concluding analysis will evaluate to what extent the remedy of compensation made available under the law of state responsibility reflects the polluter pays principle.<sup>26</sup>

### *1.2.3 Theoretical Understanding of the Polluter Pays Principle*

This section aims to clarify why it is relevant to evaluate to what extent available remedies reflect the polluter pays principle, as well as how the principle is understood for the purposes of this thesis.

The polluter pays principle signifies that the person or entity responsible for environmental damage should bear the costs that follow. When approaching the area of international environmental law, the polluter pays principle is of significant importance. It influences the making of environmental law on both a domestic and an international level.<sup>27</sup> The principle was adopted at an international level for the first time in a 1972 council recommendation from the Organisation for Economic Co-operation and Development (OECD).<sup>28</sup> It is now expressed in numerous environmental treaties.<sup>29</sup> The principle is also included in the 1992 Declaration of the UN Conference on Environment and Development.<sup>30</sup>

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<sup>26</sup> The reader is reminded that alternative remedies available under applicable MEAs will also be evaluated within the scope of the thesis.

<sup>27</sup> H.C. Bugge, "The Polluter Pays Principle: Dilemmas of Justice in National and International Contexts" in J. Ebbesson and P. Okowa (eds.), *Environmental Law and Justice in Context* (Cambridge University Press, 2009), pp. 411–428, at p. 411.

<sup>28</sup> Organisation for Economic Co-operation and Development, Recommendation of the Council on Guiding Principles Concerning International Economic Aspects of Environmental Policies and Annex, 26 May 1972, C(72)128, Annex paras 2–5.

<sup>29</sup> See, for instance, the Preambles of the International Convention on Oil Pollution Preparedness, Response and Co-operation (adopted 30 November 1990, entered into force 13 May 1995) 1891 UNTS 51 (OPRC Convention); the Protocol on Preparedness, Response and Co-Operation to Pollution Incidents by Hazardous and Noxious Substances (adopted 15 March 2000, entered into force 14 June 2007) (OPRC Convention HNS Protocol); the Convention on the Protection of the Marine Environment of the Baltic Sea Area (adopted 9 April 1992, entered into force 17 January 2000) 2099 UNTS 197 (Helsinki Convention), according to which the polluter pays principle should be taken into account as a general principle of international law. The principle is also found in the operative paragraphs of, *inter alia*, the ASEAN Agreement on the Conservation of Nature and Natural Resources (adopted 9 July 1985), article 10(d); the Convention on the Protection of the Alps (adopted 7 November 1991, entered into force 6 March 1995) 1917 UNTS 135 (Alpine Convention), article 2(1); Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (adopted 16 February 1976, entered into force 12 February 1978, amended 10 June 1995, amended version entered into force 9 July 2004) 1102 UNTS 27 (Barcelona Convention), article 4(3)(a). See De Sadeleer, N., *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press, 2002), pp. 23f. for further examples.

<sup>30</sup> Declaration of the United Nations Conference on Environment and Development (14 June 1992), UN Doc.

The polluter pays principle can be understood in different ways, and be said to have several functions.<sup>31</sup> In its narrowest sense, it serves to allocate responsibility: if environmental damage occurs, the injuring party is held responsible for the costs of the clean-up.<sup>32</sup> In a wider sense, it promotes the polluter's full internalization of environmental costs. Moreover, it can serve as a principle regulating liability and compensation.<sup>33</sup> It is in this third sense that the principle becomes interesting for the purposes of this thesis. Arguably, a widely recognized principle which serves to allocate responsibility for environmental harm, ought to be influential also on the rules allocating responsibility for environmental damage caused during armed conflict. Therefore, this thesis will consider to what extent the available remedies reflect the principle.

At this point, it is necessary to briefly evaluate the status of the polluter pays principle in international law. Considering that it forms part of several core environmental treaties and also influences the national legislation of many states,<sup>34</sup> its importance should not be understated. In fact, some scholars have considered that it may form part of customary international law.<sup>35</sup> If this were the case, an investigation into how well other rules of international law reflect the principle would be of limited value. If it forms part of customary international law, the polluter pays principle is directly applicable in its own right. However, in the environmental treaties where it is articulated, the principle is often vaguely phrased or not defined in precise terms. The principles which are encompassed in the Rio Declaration can be said to have the highest standing of international environmental legal principles.<sup>36</sup> Principle 16 of the Rio Declaration can therefore serve as a starting point in understanding the polluter pays principle:

National authorities *should endeavour to promote* the internalization of environmental costs and the use of economic instruments, *taking into account* the approach that the polluter should, in principle, bear the cost of pollution, *with due regard to the public interest and without distorting international trade and investment.*<sup>37</sup>

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A/CONF.151/26 (Vol. I), 31 ILM 874, principle 16. Henceforth Rio Declaration.

<sup>31</sup> Bugge, pp. 411f.

<sup>32</sup> *Ibid.*, p. 413.

<sup>33</sup> *Ibid.*, p. 414. A duty for the party at fault to compensate the injured party has been expressed in for instance the *Trail Smelter Case United States/Canada*, Award of 11 March 1941, Reports of International Arbitral Awards, Volume III (1941) pp. 1905–1982.

<sup>34</sup> De Sadeleer, pp. 32f.

<sup>35</sup> Shelton and Cutting suggest that “[t]he polluter pays principle is arguably a general principle of law, if not a norm of customary international law derived from Principle 21 [of the Stockholm Declaration]”, D. Shelton and I. Cutting, “If You Break It, Do You Own It? Legal Consequences of Environmental Harm from Military Activities”, 6 *Journal of International Humanitarian Legal Studies* (2015), pp. 201–246, at pp. 245f. However, de Sadeleer points out that some authors have questioned “whether, in the current state of international law, the polluter-pays principle may be considered to constitute a rule of customary international law”, de Sadeleer, p. 25.

<sup>36</sup> See E. Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart, 2017), p. 71; P. Sands, “International Law in the Field of Sustainable Development: Emerging Legal Principles” in W. Lang (ed.), *Sustainable Development and International Law* (Graham & Trotman, 1995), pp. 53–66, at p. 57.

<sup>37</sup> Rio Declaration, principle 16. Emphasis added.

The cautious wording suggests that states have objections towards applying the principle in an absolute sense at the international level. Consequently, relying on this principle as a rule of customary international law, especially in wartime, appears controversial. Beyerlin states that “only few environmental principles, if any, have cleared the hurdles of becoming norms of customary international law”.<sup>38</sup> Regarding the polluter pays principle, both Beyerlin and Sands et al. consider it not to form part of customary international law.<sup>39</sup>

Taking into account the multifaceted functions of the principle and the possible vagueness of its normative hierarchical status in international law, two elementary choices need to be made. The first choice is how to understand the nature and function of the polluter pays principle. Should it be understood as a simple method of providing corrective justice, or as a more complex principle capable of ensuring justice on several levels? The polluter pays principle has its basis in a notion of equity or justice.<sup>40</sup> Shelton considers it arguable that equity is more important in environmental law than in any other area of international law, given the aim to fairly allocate “the benefits and burdens involved in natural resources and their protection”.<sup>41</sup> She considers that seeking fair approaches in allocating such costs is not only based in morality, but “may also foster more effective action on issues of common concern”.<sup>42</sup> Therefore, this thesis will apply the polluter pays principle against the background of environmental justice theory, as will be elaborated on below in section 1.3.

The second choice concerns where to place the polluter pays principle in the hierarchy of norms. Despite its name, it is useful to ask whether it perhaps should be considered a rule rather than a principle. According to Dworkin, there are three types of norms: policies, principles, and rules. While rules are applied in a sort of “all-or-nothing”-fashion and lead to a clear result, principles do not stipulate absolute consequences in themselves. Rather, a principle should be taken into account and provide guidance, when it is relevant.<sup>43</sup> Considering that “the polluter should pay” is a straightforward statement stipulating a clear consequence for an

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<sup>38</sup> U. Beyerlin, “Different Types of Norms in International Environmental Law: Policies, Principles and Rules” in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law*, electronic ed. (Oxford University Press, 2012) pp. 425–448, at p. 438.

<sup>39</sup> *Ibid.*, p. 441; P. Sands, J. Peel, A. Fabra and R. MacKenzie, *Principles of International Environmental Law*, 3<sup>rd</sup> edition (Cambridge University Press, 2012), pp. 228ff.

<sup>40</sup> Shelton and Cutting, p. 246.

<sup>41</sup> D. Shelton, “Equity” in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law*, electronic ed. (Oxford University Press, 2012), pp. 639–662, at pp. 651f.

<sup>42</sup> *Ibid.*, p. 662.

<sup>43</sup> As Dworkin puts it: “the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another”, R. Dworkin, *Taking Rights Seriously* (Duckworth, 1977), p. 26.

unwanted behavior, it may be considered that this principle is in fact a rule.<sup>44</sup> However, as pointed out by de Sadeleer, the apparent simplicity of the polluter pays principle hides a number of ambiguities.<sup>45</sup> As formulated in the Rio Declaration, the nature of the polluter pays principle does not seem absolute. Given the obligation to also take public interest and economic considerations into account, its application becomes more of a weighing exercise. Moreover, the polluter pays principle is often treated as just that – a principle. De Sadeleer highlights that it has “become a frame of reference for law-makers” forming “the conceptual basis for a range of legal instruments at the core of environmental legislation” and has been “used as an element of interpretation by the courts”.<sup>46</sup> These circumstances lead to the conclusion that for the purposes of this thesis, it is more fitting to consider that the normative value of the polluter pays principle is that of a principle, rather than a rule.

A principle can influence a rule at several stages: from the formulation of the rule to policy making based on the rule and onwards to its interpretation in administrative application or adjudication. On this note, Beyerlin states that “principles can be understood as norms that are first and foremost designed to give guidance to their addressees for future conduct in rule-making processes as well as to shape the interpretation and application of rules already in existence”.<sup>47</sup> This thesis aims to treat the polluter pays principle as capable of influencing the making and interpretation of rules providing remedial measures for environmental damage. However, it should be noted that the aim of the thesis is not to see how well the principle is reflected in considerations of treaty-makers or adjudicators, but rather how well the potential outcomes, when applying the remedial measures, reflect the polluter pays principle.

The considerable skepticism among scholars regarding the status of the polluter pays principle forming part of customary law speaks strongly against it. In addition, the scholars mentioned above who have considered that the principle might form part of customary law have not presented convincing evidence of state use based on *opinio juris*. The vagueness of the principle as expressed in the most widely ratified document where it appears, principle 16 of the Rio Declaration, also indicates that it is more fitting to treat the polluter pays principle as a general principle, rather than as having the status of customary international law. To sum up, this thesis will address the polluter pays principle as a tool capable of furthering environmental

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<sup>44</sup> Beyerlin, p. 441. This is an assertion which does not seem to have gained wide adherence (yet). It can be noted that Sands et al., despite making reference to Beyerlin, do not mention the possibility that the normative status of the polluter pays principle should be that of a rule rather than a principle, Sands et al. pp. 228–233.

<sup>45</sup> De Sadeleer, p. 33.

<sup>46</sup> *Ibid.*, p. 22.

<sup>47</sup> Beyerlin, p. 437.

justice. Rather than forming part of customary international law, it will be considered as a general principle which can, and should, inform more specific rules. As pointed out by Shelton and Cutting: “The imposition of a duty to compensate or remediate preventable harm is not only supported by general principles of environmental law (‘polluter pays’), but is in the interest of both the military and of protecting the environment.”<sup>48</sup>

### 1.3 All is Fair in Love and War? Environmental Justice Theory

As mentioned above, environmental justice theory can be used to further a more comprehensive understanding of the polluter pays principle, as a principle capable of ensuring justice on several levels. This section outlines what considerations of justice this thesis will take into account within its understanding of the principle.

Falk argues that environmentalists have been lacking in applying a theory of environmental justice to international law, a failure which “tends to benefit the rich and powerful as well as those currently alive, and to accentuate the burdens and grievances of the poor and marginal, and the unborn”.<sup>49</sup> Environmental justice is often understood as a concept that concerns the fair distribution of environmental assets within a population, regardless of their “race, color, culture, national origin, income, and educational levels”.<sup>50</sup> Schlosberg endeavors to combine this focus on distribution with perspectives of ecological justice, in order to widen the perspective and encompass not only distributive justice.<sup>51</sup> This more inclusive understanding of environmental justice is also adopted in Ebbesson and Okawa’s anthology *Environmental Law and Justice in Context*, which holds that current discourse on environmental justice includes aspects of distributive, corrective and procedural justice.<sup>52</sup>

The idea of corrective justice was first formulated by Aristotle, and can be described as “the idea that liability rectifies the injustice inflicted by one person on another”.<sup>53</sup> In the sense of corrective justice, inequality occurs when one party receives a gain and the other party a

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<sup>48</sup> Shelton and Cutting, p. 244.

<sup>49</sup> R. Falk, “The Second Cycle of Ecological Urgency: An Environmental Justice Perspective” in J. Ebbesson and P. Okowa (eds.), *Environmental Law and Justice in Context* (Cambridge University Press, 2009), pp. 39–54, at p. 40.

<sup>50</sup> J. N. Gracia and H.K. Koh, “Promoting Environmental Justice”, 101:S1 *American Journal of Public Health* (2011), pp. 14–16, at p. 14.

<sup>51</sup> D. Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature*, electronic ed. (Oxford University Press, 2007), p. 11.

<sup>52</sup> J. Ebbesson, “Introduction: Dimension of Justice in Environmental Law” in J. Ebbesson and P. Okowa (eds.), *Environmental Law and Justice in Context* (Cambridge University Press, 2009), pp. 1–36 (2009), at p. 4.

<sup>53</sup> E.J. Weinrib, “Corrective Justice in a Nutshell”, 52 *University of Toronto Law Review* (2002), pp. 349–356, at p. 349.

corresponding loss.<sup>54</sup> Corrective justice is done when the original position between the parties is re-established – it has a rectificatory function.<sup>55</sup> Thus, in deciding on a remedy, the court should seek to undo the injustice done by one party to the other and to restore the situation as it was before the action that caused an unfair change.<sup>56</sup> Furthermore, a corrective remedy should be aimed at both parties: it should not consist solely in compensating the party who has sustained an injury or solely in taking away the gain made by the injuring party.<sup>57</sup> Corrective justice is the aspect which most readily comes to mind when examining the polluter pays principle. The party that has gained from causing environmental damage to another party should compensate the injured party, in order to ensure, as far as possible, that this party is put in the same position it would be in if the damage had not occurred.

Rather than setting out that a party who has gained something from causing damage should make good this injustice to the injured party, distributive justice deals with the equal distribution of divisible qualities or goods.<sup>58</sup> Justice in this sense should be based on the merits that each party has to the divisible good.<sup>59</sup> Inequality occurs when the distribution does not measure up with the merits of the parties.<sup>60</sup> In this case we are concerned with the distribution of the benefit of enjoying a high quality environment. The right to a clean and healthy environment is set out in numerous international treaties.<sup>61</sup> However, it is evident that environmental quality is currently not evenly distributed between or within states. Regrettably, environmental degradation in armed conflict often takes place in locations where the environment is already fragile. In armed conflict, areas designated as protected zones due to their rich natural resources or their fragility are particularly vulnerable.<sup>62</sup> Deciding on merits which could warrant people and states different rights to a clean environment appears to be an injustice in itself. This thesis will therefore use the assumption that all people and states should enjoy an equal right to a clean environment of the highest quality possible. In this sense, the

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<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*, p. 350.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*, p. 349.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> For instance, the African Charter of Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58, article 24 (African Charter); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Adopted 17 November 1988, entered into force 16 November 1999) OAST No. 69, 28 ILM 161 (ESC Protocol), article 11. In addition, Shelton and Cutting point out that more than half of UN member states include such a provision among their constitutional guarantees, Shelton and Cutting, p. 230.

<sup>62</sup> Sjöstedt (2016), pp. 231f.

polluter pays principle should work not to enhance these inequalities by allowing environmental degradation in exchange for financial compensation. Instead, a fair remedy should work to reach a just distribution of environmental quality both within and between states, or at the very least not to enhance current inequality.

Procedural justice is most readily described as the access to a fair and effective tribunal, but it should also be considered that “the institutional arrangements must not be so complicated, time-consuming and costly that, while available in principle, the persons concerned are effectively barred for economic or social reasons from making use of them”.<sup>63</sup> Procedural justice has been understood as instrumental for achieving justice also in the corrective and distributive senses.<sup>64</sup> International law tends to be heavily centered on states. Ebbesson considers that a more proactive approach would be to assess corrective, distributive and procedural effects from the perspective of the individual in order to understand their effects within states.<sup>65</sup> Here, it needs to be considered that in cases of pure ecological damage, the environment itself can be considered to be the injured party.<sup>66</sup> The question of who is regarded as the injured party; a state, an individual or a community, or the environment itself, can influence the reflection of the polluter pays principle in the remedies available.

In summary, this thesis will address the polluter pays principle based on a theory of environmental justice which includes three dimensions: corrective, distributive and procedural justice. This theoretical framework will enable viewing the chosen situations from a critical perspective and pointing to problems that go beyond the simplest understanding of the polluter pays principle. The polluter pays principle, understood as positioned in the intersection of the three considerations of environmental justice, should enable mechanisms for the injured party to receive reparations from the damaging party, work to enable fairness (or at least not enhance inequality) in distribution of environmental quality – both within and between states – and lastly, provide the possibility for an injured party to bring their case before a fair and effective tribunal. The thesis will investigate how well existing remedies in international law applicable to the bombing of the Jiyeh power station in 2006 and the ongoing conflict in the Niger Delta measure up with this standard. This investigation will enable an evaluation of the extent to which the remedies available for the chosen cases reflect the polluter pays principle, as

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<sup>63</sup> J. Ebbesson, “Piercing the State Veil in Pursuit of Environmental Justice” in J. Ebbesson and P. Okowa (eds.), *Environmental Law and Justice in Context* (Cambridge University Press, 2009), pp. 270–293, at p. 276.

<sup>64</sup> *Ibid.*

<sup>65</sup> Ebbesson (2009), “Introduction: Dimension of Justice in Environmental Law”, p. 5.

<sup>66</sup> De Sadeleer, pp. 52f.

understood from a framework of environmental justice theory. The next section will elaborate on the case study method as well as how and why these two cases were chosen.

#### **1.4 Performing Qualitative Case Study Research: Method and Material**

In the initial phase of researching this topic, I noted that the intersection of the law of armed conflict and international environmental law is often discussed in hypothetical terms, sometimes far removed from the situations where they actually apply.<sup>67</sup> This sparked my interest to look closer into two situations of environmental damage in armed conflict and see how the remedies available work when applied to real cases. There are numerous rules and remedies that may arguably be of relevance to a more general study on the topic.<sup>68</sup> Performing a case study allows me to narrow down the scope of applicable rules. This is done by allowing the cases to work as identifiers of the relevant rules. The cases allow for a consideration of various possibilities, while still not claiming to evaluate all rules applicable to environmental damage in armed conflict. In addition, it should be noted that this thesis will not venture into the rules of international criminal law,<sup>69</sup> or those of human rights law.<sup>70</sup>

My case study is designed to identify the material rules that may give rise to responsibility for a state or a non-state actor. Based on the material available, an assessment will be made of whether or not, as well as how, a breach of these rules can be established in each of the two cases. Remedies offered by applicable MEAs will also be assessed for both cases. For reasons of context and coherence, these steps cannot be performed in an identical way in the two case studies. In the concluding analysis, an evaluation will be made of the extent to which the identified remedies reflect the polluter pays principle understood as encompassing considerations of corrective, distributive and procedural justice.

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<sup>67</sup> A notable exception to this is the case study on the Virunga National Park performed by Sjöstedt (2016), pp. 271–307.

<sup>68</sup> Especially considering the large amount of environmental treaties in force, which are not necessarily defunct in wartime. The number of MEAs in force has been estimated to between 500 and 700, Special Rapporteur M.G. Jacobsson, Third Report on the Protection of the Environment in Relation to Armed Conflicts, UN Doc. A/CN.4/700, 3 June 2016, para 100.

<sup>69</sup> The war crime encompassed in article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90, is of potential relevance in an international armed conflict. It should be noted that neither of the cases in this treaty actualize this provision, since the unrest in the Niger Delta is not of an international character and since Israel has not ratified the Rome Statute.

<sup>70</sup> There are several rules aimed at protecting human rights, which are also influential on environmental protection. See section 4.2.3 on suggestions for further research.



### 1.4.1 Choosing the Cases

Based on a model constructed by Flyvbjerg, it is useful for my study to identify examples of both the “most likely” and the “least likely” scenario to occur.<sup>71</sup> According to Flyvbjerg, the least likely case is useful mainly to gain more information on what is perceived to be unusual situations, and what happens in them.<sup>72</sup> The most likely case is primarily useful in order to make logical deductions and to draw conclusions.<sup>73</sup> In this context, including two cases of very different natures also has the potential of allowing for comparisons of what rules are applicable and if they reflect the polluter pays principle to different extents. This choice also serves to ensure that this thesis can be broad in identifying problems – both those that could have been foreseen by the lawmaker, since they are attached to the most likely case, and those which have been perceived as more improbable. Further, including two very different cases increases the possibility of making generalizations based on the findings. To some extent, falsification is another possible outcome. If the available remedies do not comply with the polluter pays principle even in the most likely case, it is unlikely that they will do so in very many other cases, since it is probable that the remedies have been constructed with this case in mind.

When seeking to identify what the most and least likely cases might be, the perspective of the law-maker was used, in order to identify what scenario was envisaged as being the most likely when drafting the rules that are central to environmental protection in armed conflict. A breach of one of these rules can enable compensation under the law of state responsibility. As is familiar, the Geneva Conventions and their Additional Protocols lie at the center of the law of armed conflict. Provisions which aim to protect the environment specifically are found in article 35(3) and article 55 of Additional Protocol I.

Article 35(3) reads: “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” and article 55 reads:

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.<sup>74</sup>

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<sup>71</sup> B. Flyvbjerg, “Five Misunderstandings About Case-Study Research”, 12:2 *Qualitative Inquiry* (2006), pp. 219–245, at p. 230.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3

Looking closer at these provisions, the criteria of intent or foreseeability presupposes that there is a clearly identifiable offender, capable of making an assessment of the damage that may be caused. Moreover, both provisions are only applicable in international armed conflict. It is clear that the scenario is a war between states and that the damage caused should be a direct result of the warfare waged by one, or both, of the parties.

Considering the drafting of these provisions, the bombing of the storage tanks of the Lebanese Jiyeh power station by Israel in 2006 appears to fit with how the drafters of Additional Protocol I imagined the most likely scenario of environmental harm occurring in armed conflict. The bombing of the power station, introduced in greater detail in section 2 below, entails a conflict between two states, where the military actions of one directly inflicts harm on the environment of the other. It is difficult to say whether this type of scenario in reality is the most likely to occur, but it represents the type of situation that articles 35(3) and 55 of Additional Protocol I refer to. For this reason, precisely, it is interesting to study this case in order to investigate whether or not the available system of rules offers a solution that is compatible with the polluter pays principle.

Going on to identify the case that is least likely to occur, I have chosen a case of civil unrest with several actors involved, where the allocation of responsibility is more complex. The struggle for control over natural resources in the Niger Delta is causing oil spills where the offender is not always easily identifiable. Is it the fault of the Nigerian Federal Government, who some argue are not implementing domestic laws on environmental protection effectively enough? Or might local armed groups be the main offender, accused of causing oil spills through hijacks and sabotage? Could the multinational oil corporations be to blame, who some claim are depleting the natural resources of the local population and not taking their responsibility for cleaning up spills caused by breakdowns of outdated equipment? In any case, the environmental damage caused in the conflict is vast. International law becomes relevant to this case to the extent that the situation meets the criteria for a non-international armed conflict, which will be elaborated on further in the case study. At first glance the cases of the Jiyeh power station and the Niger Delta conflict are similar in that they both concern oil spills, which might facilitate comparisons between them. However, the main reason for choosing these cases is that they are each other's opposite: they represent the most likely case and the least likely case, respectively.

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(Additional Protocol I).

The Jiyeh power station case has been investigated through the lens of wartime environmental damage by several scholars before.<sup>75</sup> By looking at the case through an environmental justice point of view and assessing the compatibility of the available remedies with the polluter pays principle, I hope to build on this research. The Niger Delta case has also been placed on the map of environmental law and conflict before, but most often as an example of how poor environmental policy and a struggle for natural resources can lead to conflict.<sup>76</sup> The impact of the conflict itself on the environment has often been overlooked.<sup>77</sup> Further, while studies have concluded that Nigerian environmental law has not provided remedies to any considerable extent,<sup>78</sup> scholars have not evaluated the remedies available under international law. In this sense, it is my expectation that this thesis will serve to fill a gap in the literature regarding these two cases.

#### *1.4.2 Reflections on the Case Study Method*

My choice of method has its basis in the initial wish to be able to look at real cases, rather than engage in hypothetical speculation on how the law might apply. In my opinion, there is a considerable strength in discussing environmental law and the law of armed conflict in a context not too far removed from the situations where they apply. This becomes especially important since my theoretical framework consists of environmental justice theory and the very concrete situations of how corrective, distributive, and procedural justice can be achieved. While the cases certainly serve as examples in a general discussion of the available remedies, I also hope that they can be illustrative of some of the difficulties met in situations that are similar to them.

Using case studies as a method is sometimes criticized on the basis of the assumption that it is not possible to draw conclusions and generalize based on a single case, or in this context, on two cases. In response to this criticism, Flyvbjerg claims that the possibility to draw

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<sup>75</sup> See, for instance, R. Falk and A. Ü. Bâli, “International Law at the Vanishing Point”, 241 *Middle East Report* (2006), pp. 34–41, 48; M.L. Tucker, “Mitigating Collateral Damage to the Environment in Naval Warfare: An Examination of the Israeli Naval Blockade of 2006”, 57 *Naval Law Review* (2013), pp. 161–202; and A. A. Takshe, I. Van der Molen and J. C. Lovett, “Examining the Lack of Legal Remedies for Environmental Damage in the 2006 Lebanon–Israel War”, 22 *Environmental Policy and Governance* (2012), pp. 27–41.

<sup>76</sup> See, for instance, A. O. Benedict, “Tragedy of Commons: Analysis of Oil Spillage, Gas Flaring and Sustainable Development of the Niger Delta of Nigeria”, 4:2 *Journal of Sustainable Development* (2011), pp. 200–210; F. Allen, *Implementation of Oil-Related Environmental Policy in Nigeria: Government Inertia and Conflict in the Niger Delta* (Diss. University of Kwazulu-Natal, 2010); and E. E. Courson, *Spaces of Insurgency: Petro-Violence and the Geography of Conflict in Nigeria’s Niger Delta* (Diss. University of California, Berkeley, 2016).

<sup>77</sup> I.S. Ibaba, “Violent Conflicts and Sustainable Development in Bayelsa State”, 36:122 *Review of African Political Economy* (2009), pp. 555–573, at p. 555.

<sup>78</sup> See, for instance, Allen.

conclusions based on cases depends on how the cases have been chosen.<sup>79</sup> This holds true for studies irrespective of the number of cases and the nature of the study – qualitative or quantitative.<sup>80</sup> Flyvbjerg further holds that it is often possible to make generalizations based on a single case, if strategically chosen.<sup>81</sup> Another common misconception of the case study-method is the assumption that it is more subjective than other methods and therefore more prone to verification bias. However, this is yet another problem that cannot be considered to be particular for the case study-method.<sup>82</sup> In fact, Flyvbjerg reaches the conclusion that the nature of the case study – coming close to the actual situation and being able to test hypotheses on phenomena as they play out in real life – tends to lead the scholar to question their preconceived notions and falsifying their hypothesis, rather than succumbing to verification bias.<sup>83</sup> Therefore, subjectivity or lack of generalizability should be viewed as concerns not specific to the case study as such.

Something which does, however, constitute a limitation to my research is the lack of first-hand information. Since I am not able to travel to either of the sites in order to conduct field studies, I will have to rely on secondary sources of information. This may prove especially difficult in the case of the Niger Delta. While UNEP has carried out field research in the Ogoniland region and UNDP touches on environmental issues in a human development assessment of the Niger Delta, the overall mapping of the environmental impacts of the conflict is admittedly sparse for this case. In contrast, the oil spill caused by the bombing of the storage tanks at Jiyeh Power Station has been meticulously mapped in post-conflict environmental impact assessments<sup>84</sup> by UNEP and the UN Development Programme (UNDP), and through two estimations of the economic impact by the World Bank.

#### *1.4.3 Material and Applicable Legal Sources*

The material used in the case studies has been found through searches on the Gothenburg University search engine on different combinations of the terms: “Niger Delta”, “conflict”, “oil

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<sup>79</sup> Flyvbjerg, p. 225.

<sup>80</sup> *Ibid.*, pp. 224f.

<sup>81</sup> *Ibid.*, p. 228.

<sup>82</sup> *Ibid.*, pp. 234f.

<sup>83</sup> *Ibid.*, pp. 235f.

<sup>84</sup> UNEP defines the purpose of post-conflict environmental assessments as seeking “to provide an objective scientific assessment of the environmental situation in a country immediately following a conflict. They aim to inform the general public on environmental risks associated with the conflict, and to provide guidance to local government on priority issues to be addressed. They also help the international community to channel funding and technical assistance to the key areas of environmental management”. UNEP, “Lebanon Post-Conflict Environmental Impact Assessment” (UNEP, Kenya, 2007), p. 26.

spill” “Orashi”, “Apoi”<sup>85</sup>, “environment”, “armed groups”, “oil companies”, “polluter pays”, “remedies” and “Jiyeh”, “environment”, “Lebanon war 2006 [or] Israel–Lebanon war [or] Israel–Hezbollah war”, and “oil spill”, “polluter pays”, “remedies” respectively. Naturally, these searches generated an abundance of results in the form of *inter alia* books, articles, reports and essays. When choosing what material to use for my study, a method of sequential criteria-based selection was used throughout the research.<sup>86</sup> This means that information was valued based on how well it related to the purpose of the thesis, and that material was collected continuously – often material was found through using the references of another source.

In order to obtain trustworthy material, material from official sources, such as articles published in academic journals and dissertations, has been prioritized. Environmental impact assessments and economic assessments conducted by established actors have also been of great importance. In the case of the Niger Delta conflict, there are not as many assessments by established actors conducted in the subject area of my thesis. Reliance on un-published academic works and on news media sources is therefore greater in this case study. I have sought to lessen this shortcoming by confirming information in various sources. News media-searches were made for both cases using the same search terms as stated above.

Regarding the legal sources applicable to the cases, I have identified a series of relevant provisions under the law of armed conflict: articles 35(3) and 55(1) of Additional Protocol I, thereto related rules of customary international law, and the general principles of military necessity, distinction and proportionality. The MEAs identified as relevant are the 1971 Ramsar Convention on the protection of wetlands, the 1976 Barcelona Convention and the 1981 Abidjan Convention, both aiming *inter alia* to reduce marine pollution from oil spills. The legal sources raise questions of the applicability of MEAs in wartime and how to treat a situation where the obligations under an MEA contradict those of the law of armed conflict, which will be addressed below.

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<sup>85</sup> Upper Orashi Forests and Apoi Creek Forests are the designated Ramsar sites in the Delta region. Information available at <http://www.ramsar.org/wetland/nigeria>.

<sup>86</sup> S. B. Merriam, *Fallstudien som forskningsmetod* (Studentlitteratur, 1994), pp. 61–64.

## 2. The Jiyeh Power Station

*Plant personnel estimated that approximately 60,000 m<sup>3</sup> of fuel oil may have burned as a worst case scenario. A total quantity of heavy fuel oil in the order of 15,000 m<sup>3</sup> is assumed to have spilled to the sea, causing one of the major environmental disasters experienced by Lebanon.*<sup>87</sup>

### 2.1 Introducing the Case: “...an oil slick that covered the entirety of the Lebanese coastline”<sup>88</sup>

The armed conflict between Israel and Hezbollah taking place between 12 July and 14 August of 2006 was precipitated by Hezbollah fighters firing diversionary missiles into Israeli border towns and infiltrating the border, killing soldiers and injuring civilians. Two soldiers were taken hostage by Hezbollah, who demanded the release of Lebanese soldiers captured by Israel. Israel held the Lebanese government accountable for the kidnappings and the raids, since the operations were carried out from Lebanese territory and since two representatives of Hezbollah were serving in the government. These events prompted Israeli aerial bomb raids of both Hezbollah and Lebanese targets, and a ground invasion of south Lebanon. Meanwhile, Hezbollah conducted guerrilla warfare, primarily through launching rockets into northern Israel.<sup>89</sup>

During the conflict, one of the most high-profile incidents was the Israeli bombing of the storage tanks at Jiyeh electric power plant, located 30 km south of Beirut. On 13 and 15 July the storage tanks of Jiyeh were targeted by two strikes from the Israeli Airforce and a subsequent estimate of 12–15,000 tons of oil were spilled into the Mediterranean Sea.<sup>90</sup> The spill resulted in a 150 km long oil slick along the Lebanese coastline and into the Syrian Arab Republic.<sup>91</sup> Israel proceeded to impose a maritime blockade, rendering it difficult for Lebanon to mitigate the effects of the spill until the month of September 2006.<sup>92</sup> The results were

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<sup>87</sup> UNDP, “Lebanon Rapid Environmental Assessment for Greening Recovery Reconstruction and Reform” (UNDP, Lebanon, 2007), p. xv.

<sup>88</sup> UN General Assembly Resolution 69/212 of 19 December 2014 “Oil Slick on Lebanese Shores”, UN Doc. A/RES/69/212, 28 January 2015, preambular para 5.

<sup>89</sup> C. Urquhart, “Computerized Weaponry and High Morale”, *The Guardian* (11 August 2006), <https://www.theguardian.com/world/2006/aug/11/syria.israel>, accessed 7 April 2017; G. Myre and S. Erlanger, “Clashes Spread to Lebanon as Hezbollah raids Israel”, *International Herald Tribune* (12 September 2006), <https://web.archive.org/web/20090129193940/http://iht.com/articles/2006/07/13/africa/web.0712mideast.php>, accessed 7 April 2017.

<sup>90</sup> UNDP, “Report on the Measurement & Quantification of the Environmental Damage of the Oil Spill on Lebanon” (UNDP Lebanon, 2014), para. 1.

<sup>91</sup> *Ibid.* See Figure 1 in the Annex to this thesis for a map illustrating the extent of the spill.

<sup>92</sup> *Ibid.*

devastating to the already fragile environment of Lebanon.<sup>93</sup> The UN General Assembly stated that the spill “heavily polluted the shores of Lebanon and consequently had serious implications for human health, biodiversity, fisheries...”.<sup>94</sup> The environmental harm has been assessed by several actors, such as UNEP, UNDP, and the Government of Lebanon.<sup>95</sup> The World Bank has published two studies quantifying the cost of the damage caused by the the oil spill.<sup>96</sup> Thus, there is plenty of material to assess the effects of the oil spill and even to quantify the damage in economic terms.

Some delimitations to this case have to be made in order to reach meaningful results in assessing the compatibility of the available remedies with the polluter pays principle. There are several aspects to this conflict that are better investigated in other contexts. For instance, Israel’s right to self-defense under the rules of *jus ad bellum* and how such a right applies towards Lebanese targets and Hezbollah targets respectively. The harm done to the civilian population: 1,200 deaths, over 4,400 injured and a quarter of the population in displacement,<sup>97</sup> as well as destruction of infrastructure and housing, benefits studies from a human rights in armed conflict perspective. Further, the Hezbollah bombings of Israeli forests causing 2,000 acres of woodland to burn to the ground, described by the Israeli government as “an ecological disaster” estimated to take 50–60 years before reaching full recovery,<sup>98</sup> is another instance of environmental damage in armed conflict that could benefit from further research elsewhere. Lastly, the damage done to the environment of the Syrian Arab republic has been excluded here, in order to fully focus on the relationship between Israel and Lebanon.

## 2.2 State Responsibility

After the oil spill, clean-up and restoration of the Lebanese coast line was carried out by the Government of Lebanon, members of the international community, as well as actors from the

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<sup>93</sup> M. Sarraf, L. Croitoru, M. El Fadel, K. El-Jisr, E. Ikäheimo, E. Grundlach and S. Al-Duaij, “Oil Spill and Waste due to Conflict: The Case of Lebanon” in L. Croitoru L. and M. Sarraf (eds.) *The Cost of Environmental Degradation – Case Studies from the Middle East and North Africa* (World Bank, 2010), pp. 89–145, at p. 89.

<sup>94</sup> UN General Assembly Resolution 61/194 of 20 December 2006 “Oil Slick on Lebanese Shores”, UN Doc. A/RES/61/194, 6 February 2007, para 2.

<sup>95</sup> A table of organizations who performed damage assessments after the end of hostilities is found in World Bank, “Republic of Lebanon Economic Assessment of Environmental Degradation Due to July 2006 Hostilities”, Report No. 39787-LB (World Bank Sustainable Development Department, Middle East and North Africa Region, 2007), p. 5.

<sup>96</sup> World Bank (2007) and Sarraf et al., see p. xii.

<sup>97</sup> Sarraf et al., p. 89.

<sup>98</sup> Jewish National Fund, “More Press for JNF’s Work in the North” (9 August 2006), available at [https://web.archive.org/web/20081120221045/http://www.jnf.net/blogs/securityblanket/2006/08/more\\_press\\_for\\_jnfs\\_work\\_in\\_th/](https://web.archive.org/web/20081120221045/http://www.jnf.net/blogs/securityblanket/2006/08/more_press_for_jnfs_work_in_th/), accessed 5 May 2017.

civil society.<sup>99</sup> A conservative estimate by the World Bank put the cost of clean-up operations, loss of biodiversity, damage to protected sites as well as losses of revenues from *inter alia* fishing, tourism and natural resources at US \$203.1 million.<sup>100</sup> The costs of the spill are also reflected in the UN General Assembly resolutions estimating the value of the damage incurred by Lebanon at US \$856.5 million and requesting Israel to pay adequate compensation.<sup>101</sup> This estimation, based on a report by the UN Secretary-General, also includes the passive use value of coastal resource and is adjusted for inflation and interest.<sup>102</sup> Could Israel be obligated under the law of state responsibility to provide compensation for these losses?

As stated above, under the law of state responsibility an internationally wrongful act entails an act or omission which is attributable to the state and which constitutes a breach of a rule of international law that is binding on that state.<sup>103</sup> In this context, there is little point in dwelling on the attribution of the acts to the state; the bombing of the tanks at Jiyeh power station was carried out by the Israeli state air force on behalf of the state of Israel. The responsibility of a state for actions carried out by its military is reflected in article 3 of the 1907 Hague Convention IV, in article 91 of Additional Protocol I, and also recognized as part of customary international law.<sup>104</sup> In short, the act is attributable to the state of Israel. What is more interesting is to consider whether or not the environmental damage caused constitutes an internationally wrongful act. Thus, the availability of compensation under state responsibility hinges on an interpretation of the material rules of international law that are applicable in relation to wartime environmental damage.

Taking into consideration the facts of the case, the material rules of the law of armed conflict that are most relevant are the prohibition to cause widespread, long-term and severe damage to the environment, the obligation to pay due regard to the environment in military operations, and the obligation to apply the principles of distinction, necessity and proportionality in warfare. In addition, the Barcelona Convention on environmental protection

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<sup>99</sup> UNEP (2007), p. 6.

<sup>100</sup> World Bank (2007), p. 39.

<sup>101</sup> UN General Assembly Resolution 71/218 of 21 December 2016 “Oil slick on Lebanese Shores”, UN Doc. A/Res/71/218, 3 February 2017, paras 4 and 5. The resolutions passed by the UN General Assembly on the matter will be addressed shortly in section 2.6.

<sup>102</sup> Report of the UN Secretary-General “Oil Slick on Lebanese Shores”, UN Doc. A/69/313, 14 August 2014, para 10.

<sup>103</sup> ILCDA, article 2.

<sup>104</sup> M. Jabbari-Gharabagh, “Type of State Responsibility for Environmental Matters in International Law”, 33:1 *Revue Juridique Thémis de l’Université de Montréal* (1999), pp. 59–121, at p. 121. It is also supported by article 4 of the ILCDA, which holds that “the conduct of any state organ shall be considered an act of that state under international law”.



of the Mediterranean Sea is relevant. Whether the application of these instruments to the case can give rise to compensation under the law of state responsibility, or other remedies, is investigated in subsections 2.3–2.5 below.

## **2.3 The Prohibition of Widespread, Long-term and Severe Environmental Damage and the Obligation of Paying Due Regard to the Environment**

This section will apply two rules that both provide direct environmental protection during armed conflict: the prohibition to cause widespread, long-term and severe environmental damage and the obligation of paying due regard to the environment. Since these rules are similar in origin and nature, they will be discussed jointly below.

### *2.3.1 Source of the Rules*

The aftermath of the environmental destruction caused in the Vietnam war, combined with a growing awareness of environmental issues during the 1970s brought considerations of environmental protection in wartime into the negotiations of Additional Protocol I.<sup>105</sup> As a result, articles 35(3) and 55 of Additional Protocol I deal directly with environmental damage in wartime.<sup>106</sup> Additional Protocol I is applicable in international armed conflict. In *Tadić*, the International Criminal Tribunal for the former Yugoslavia (ICTY) confirmed the already prevailing opinion that an international armed conflict is at hand “whenever there is a resort to armed forces between states”.<sup>107</sup> This means that any level of hostile violence between the armed forces of two states is enough to establish that an international armed conflict is taking place. Clearly, this is the case at hand. However, Israel is not a party to Additional Protocol I. Hence, articles 35(3) and 55(1) of the Protocol are not binding on Israel. Only if these rules form part of customary international law could a breach be used as a basis for state responsibility.

Okowa argues that article 35(3) of Additional Protocol I is widely recognized as forming part of customary international law.<sup>108</sup> Support for this statement is also offered by the Customary International Humanitarian Law Study conducted by the International Committee

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<sup>105</sup> Sjöstedt (2016), pp. 70f.

<sup>106</sup> See p. 16 above for the wording of article 35(3) and 55(1) of Additional Protocol I. Article 55(2) prohibits attacks against the natural environment by way of reprisals, which is not the situation in this case.

<sup>107</sup> *Tadić* case, Decision on the Defense Motion for Interlocutory Appeal on jurisdiction, 2 October 1995, IT-94-I-AR72 (Appeals Chamber, ICTY), para 70.

<sup>108</sup> Okowa, p. 241.

for the Red Cross (ICRC),<sup>109</sup> which prohibits “[t]he use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment” in the first sentence of rule 45.<sup>110</sup> According to the ICRC, since the adoption of Additional Protocol I “significant practice has emerged to the effect that this prohibition has become customary”.<sup>111</sup> The prohibition is set forth in military manuals and constitutes an offence in many states, including in states that are not parties to Additional Protocol I.<sup>112</sup> Sjöstedt also points out that many scholars tend to treat the rule formulated by the ICRC Customary Law Study as part of customary law.<sup>113</sup> In 2005, Bothe even considered that given the increase in attestation to environmental damage in war and persistent criticism of restrictive interpretations of the rule, a customary rule which awards higher environmental protection than the rule contained in article 35(3) of Additional Protocol I might have developed.<sup>114</sup>

However, there is also evidence to the contrary. The United States, France and the United Kingdom have denied that the prohibition forms part of customary international law.<sup>115</sup> The fact that these states are large military powers could speak against the formation of a rule. Nevertheless, the ICRC Customary Law Study points out that these states have not been entirely consistent in their position. In some contexts, particularly their military manuals, practice indicates that the rule is binding so far as it does not apply to nuclear weapons.<sup>116</sup> The study also holds that the United States, France and the United Kingdom cannot be considered specially affected states in relation to the application of this rule to conventional weapons. Since custom does not have to be entirely uniform for a rule of customary international law to exist, the objections are “not enough to have prevented the emergence of this customary rule”.<sup>117</sup> Lastly, it is possible that rather than preventing the emergence of a rule of customary

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<sup>109</sup> J-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law Vol I-II* (Cambridge University Press, 2005) and database available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home> (last updated 2016). Henceforth ICRC Customary Law Study.

<sup>110</sup> ICRC Customary Law Study, rule 45, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter14\\_rule45](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter14_rule45), accessed 5 May 2017.

<sup>111</sup> *Ibid.*

<sup>112</sup> For instance, the Israeli Defence Forces have reported not to utilize or condone the use of methods or means of warfare which are intended, or may be expected to cause widespread, long-term and severe damage to the environment, *ibid.*

<sup>113</sup> Sjöstedt (2016), p. 125.

<sup>114</sup> M. Bothe, “Customary International Humanitarian Law: Some Reflections on the ICRC Study”, 8 *Yearbook of International Humanitarian Law* (2005), pp. 143–178, at p. 168.

<sup>115</sup> ICRC Customary Law Study, rule 45.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

international law, these countries are to be regarded as persistent objectors to the rule.<sup>118</sup>

Regarding the obligation that “[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage” found in article 55(1) of Additional Protocol I, the ICRC has formulated a related obligation in rule 44:

Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions.<sup>119</sup>

At first glance, rule 44 of the ICRC Customary Law Study seems reflective of the rule encompassed in article 55(1) of Additional Protocol I. However, the customary rule is phrased in terms of “paying due regard” rather than “taking care” and does not include the requirement of widespread, long-term and severe damage. Hulme holds that the customary rule to pay due regard sets a lower standard than the obligation to take care found in article 55(1); it simply obliges belligerents to balance the interest of protecting the environment with that of military interests.<sup>120</sup> Sjöstedt argues that despite this, the customary rule provides higher protection, since the threshold requirement is omitted.<sup>121</sup> Regarding its status as customary international law, Hulme expresses doubts,<sup>122</sup> and Sjöstedt draws the conclusion that while it is most likely that a rule obligating states to pay attention to the environment during warfare exists, its contents are not clear.<sup>123</sup> Sjöstedt also points out that while states are generally unwilling to adopt new environmental regulation within the law of armed conflict, their practice shows a growing trend of paying regard to the environment.<sup>124</sup> In addition, Koppe supports the conclusion of the ICRC that a customary rule with this content has developed.<sup>125</sup>

In conclusion, scholarly support for whether, and if so how, to treat these rules as customary law is not uniform. All scholars do not consider their exact content to be clear, but

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<sup>118</sup> J.-M. Henckaerts, and E. Debuf, “ICRC & Clarification of Customary International Humanitarian Law” in B.D. Leard (ed.), *Reexamining Customary International Law* (Cambridge University Press, 2017), pp. 161–188, at p. 187.

<sup>119</sup> ICRC Customary Law Study, rule 44, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter14\\_rule44](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter14_rule44), accessed 5 May 2017.

<sup>120</sup> K. Hulme, “Taking Care to Protect the Environment Against Damage: A Meaningless Obligation?”, 92:879 *International Review of the Red Cross* (2010), pp. 675–691, at p. 686.

<sup>121</sup> Sjöstedt (2016), p. 131.

<sup>122</sup> Hulme, p. 686.

<sup>123</sup> Sjöstedt (2016), p. 134.

<sup>124</sup> Of course, such practice must also be accompanied by *opinio juris*, which Sjöstedt considers to be less easily established in this case, *ibid.* pp. 133f.

<sup>125</sup> E.V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict* (Gildeprint, 2006), p. 199.

evidence of their existence is considerable. Moreover, special weight should be afforded to the ICRC Customary Law Study, which was conducted with a mandate from the international community and has been widely used by practitioners, academics, courts, governments, and UN organs to identify custom.<sup>126</sup> In the following, the prohibition of widespread, long-term and severe environmental damage in war and the obligation of paying due regard to the environment will therefore be treated as forming part of customary international law. Hence, a breach of either one of these obligations in the case at hand could give rise to state responsibility.

### *2.3.2 The Prohibition of Widespread, Long-term and Severe Environmental Damage*

This section will provide an application of the customary rule prohibiting widespread, long-term and severe environmental damage to the case of the oil spill at Jiyeh power station. At the outset, it should be noted that this rule has never been interpreted by a court in either its treaty-form or as customary law. This constitutes a considerable difficulty when seeking to apply the rule. An additional difficulty is that most scholars addressing the prohibition have done so in relation to the provision found in Additional Protocol I. Here, the customary rule is to be applied. However, the first sentence of rule 45 of the ICRC Customary Law Study is formulated “The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited.”<sup>127</sup> It is, in effect, a replication of the prohibition found in both article 35(3) and 55(1) of Additional Protocol I. Regardless of whether relying on the ICRC formulation or not, the rule of customary international law has arisen out of the treaty provision, or at least in close relationship to it. It could therefore be assumed to have roughly the same content.<sup>128</sup> Sources interpreting the prohibition in Additional Protocol I are therefore of relevance to an assessment of the customary rule as well.

The first requirement of the rule is for the damage to be caused by means or methods of warfare. According to the ICRC Commentary to Additional Protocol I, “methods and means”

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<sup>126</sup> Henckaerts and Debuf, pp. 168–178.

<sup>127</sup> ICRC Customary Law Study, rule 45. The second sentence: “Destruction of the natural environment may not be used as a weapon” stems from the object and purpose of the Convention for the Prohibition of Military or Other Hostile Use of Environmental Modification Techniques (adopted 10 December 1976, entered into force 5 October 1978) 1108 UNTS 151 (ENMOD Convention), and is not relevant for the case at hand. While the ENMOD Convention is not actualized within the scope of this thesis, Sjöstedt (2016) provides a useful analysis on its role in protecting the environment in relation to armed conflict on pp. 76–82.

<sup>128</sup> This is not entirely uncontroversial. Sjöstedt considers that rule 45 of the ICRC Customary Law Study “may not be considered an exact reflection of the customary law (...) Nevertheless, a rule establishing that it is prohibited to cause ‘widespread, long-term and severe’ damage during international armed conflict appears to exist, although the precise scope of such a rule remains unclear.”, Sjöstedt (2016), p. 126.

refers to weapons in a broad sense, as well as the way they are used.<sup>129</sup> This is fairly easily established in the case at hand, since the oil spill is a direct result of a chosen method of warfare: aerial bombings targeting the storage tanks of a power plant. The method employed could therefore be unlawful, if the other criteria are fulfilled. Second, the use of the words “intended, or may be expected, to cause” implies that intent is not necessary; foreseeable collateral damage is included as well. The ICRC Commentary confirms that the provision protects the environment against effects which are incidental.<sup>130</sup> The assessment of what constitutes foreseeable collateral damage should be based on information available at the time of the attack.<sup>131</sup> Given that large-scale oil spills have occurred numerous times in the past, with ample proof of their detrimental effect on the environment,<sup>132</sup> and the fact that the tanks were located within approximately 30 meters of the shoreline,<sup>133</sup> it seems unlikely that the environmental consequences of bombing the storage tanks should not have been foreseeable.

Turning now to the cumulative threshold of widespread, long-term and severe. In terms of being widespread, several reports examining the effects of the oil spill state that it covered an area of approximately 150 km along the coastline.<sup>134</sup> The precise area is more difficult to ascertain, but UNDP report that an early estimation totaled 143.438 km<sup>2</sup> of shore affected.<sup>135</sup> The estimation cannot be considered to reflect the entire spread of oil contamination on the shores, as it only includes sites investigated by the Lebanese Ministry of Environment shortly after the spill and exact measurements were not available for all investigated sites.<sup>136</sup> To the damage on shores can be added the less readily quantifiable amounts of oil that sunk to the seabed. UNEP reports that “a substantial part of the oil released from the tanks sank to the bottom of the sea in the immediate vicinity of the power plant, most likely smothering the biota in the sediment and significantly affecting the seabed at Jiyeh”.<sup>137</sup> In addition, the bombings caused oil fires burning for 27 continuous days which generated a “plume of smoke reportedly reaching 60 km”.<sup>138</sup>

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<sup>129</sup> Y. Sandoz, C. Swinarski and B. Zimmermann (eds.) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, 1987), p. 398, para 1402.

<sup>130</sup> *Ibid.*, p. 410, paras 1440 and 1441.

<sup>131</sup> Sjöstedt (2016), p. 111.

<sup>132</sup> For instance, the effects of the Persian Gulf War, the 1989 *Exxon Valdez* spill and the 1999 *Erika* spill.

<sup>133</sup> Tucker, pp. 161f.

<sup>134</sup> UNDP (2007), p. 11-7; UNEP (2007), p. 10; Report of the UN Secretary-General “Oil Slick on Lebanese Shores”, para 4.

<sup>135</sup> UNDP (2007), p. 7-3.

<sup>136</sup> *Ibid.*

<sup>137</sup> UNEP (2007), p. 143.

<sup>138</sup> UNDP (2007), p. 7-1.

The ICRC commentary on Additional Protocol I does not provide an elaboration on how “widespread” should be defined, and neither does the ICRC Customary Law study. Hulme and Sjöstedt both suggest turning to the 1976 ENMOD Convention,<sup>139</sup> which contains a provision with a similar threshold for damage: “widespread, longlasting or severe”.<sup>140</sup> For the purposes of ENMOD, widespread has been defined as “several hundred square kilometres”.<sup>141</sup> Relying on this interpretation, the damage caused could probably be considered to be widespread in the meaning of the rule.

The requirement that the damage has to be long-term also poses some difficulties to assess. The effect over time of an oil spill is notoriously difficult to measure, and time frames may vary widely depending on the quantity and type of oil as well as the type of ecosystem affected by the spill.<sup>142</sup> Shortly after the conflict, the World Bank and UNDP provided estimates that the serious impact on marine biodiversity from the oil spill might last between ten to fifty years.<sup>143</sup> The catastrophic impact on shores was expected to last between one to ten years.<sup>144</sup> These estimates are also referred to in the UNDP valuation from 2014 of the costs of the oil spill.<sup>145</sup> In 2015, the UN General Assembly concluded that “Lebanon is still engaged in the treatment of wastes and the monitoring of recovery” due to the spill.<sup>146</sup> In the context of article 35(3) of Additional Protocol I, “long-term” has often been interpreted to mean several decades. This interpretation is the result of some participants expressing this view at the diplomatic conference regarding the adoption of the Additional Protocols.<sup>147</sup> Sjöstedt argues that it is problematic that this view should be considered authoritative, since it does not reflect a consensus reached among the drafters.<sup>148</sup> Instead, she suggests that the rule found in Additional Protocol I could be interpreted in light of the definition of “longlasting” for the purposes of the ENMOD Convention,<sup>149</sup> which entails “a period of months, or approximately a season”.<sup>150</sup> However, this reasoning is based on the treaty interpretation rules of the 1969 Vienna Convention on the Law of Treaties (VCLT), and is therefore difficult to directly transfer to a

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<sup>139</sup> Hulme, p. 683; Sjöstedt (2016), p. 96f.

<sup>140</sup> ENMOD Convention, article 1

<sup>141</sup> Understandings section of the ENMOD Convention.

<sup>142</sup> World Bank (2007), p 19.

<sup>143</sup> *Ibid.*, pp. 19f; UNDP (2007), p. xviii.

<sup>144</sup> *Ibid.*

<sup>145</sup> UNDP (2014), para 44(b).

<sup>146</sup> UN General Assembly Resolution 69/212, para 8.

<sup>147</sup> Sandoz et al., pp. 416f, para 1454.

<sup>148</sup> Sjöstedt (2016), p. 98.

<sup>149</sup> *Ibid.*, pp. 96f. Sjöstedt also acknowledges the slight difference between the terms “long-lasting” and “longterm” and considers that this may have been a conscious choice to separate the scope of the provisions.

<sup>150</sup> Understandings section of the ENMOD Convention.

rule of customary international law.<sup>151</sup> At present, evidence of state use and *opinio juris* that reflects state practice which defines long-term as a period of months, does not exist.

In its final report to Congress on the conduct of the Gulf War, the US Department of Defense questioned whether the damage caused by the burning of oil wells lived up to the requirement of being long-term, since the prohibitions “in Protocol I were not intended to prohibit battlefield damage caused by conventional operations”.<sup>152</sup> Using this line of reasoning, the damage caused by Israel in Lebanon would arguably also be excluded from the scope of application. However, there is reason to be critical of this assessment. The interpretation is based on a statement which was made at the diplomatic conference in relation to “short-term damage, such as artillery bombardment”.<sup>153</sup> This brings to mind the image of the environment being directly affected by the use of conventional weapons, for instance, by limited artillery bombardment of a forested area affecting the fauna and flora at the site. It appears arbitrary to equate this scenario with the collateral damage of vast amounts of oil spilling into the sea. Moreover, if the two are to be equated, the environmental damage covered by the rule diminishes to the point where it is difficult to see that anything would be protected. Especially considering that it is questionable whether the rule at all covers damage from non-conventional weapons.<sup>154</sup> This simply cannot be the intention of the drafters of Additional Protocol I, nor the content of the customary rule. Its exact content, however, remains unclear. If interpreted to mean several decades, the damage caused by the oil spill might live up to this requirement. As noted above, some estimations have anticipated damage lasting for as long as fifty years. Another area of interpretation that remains cloudy is how serious the long-term damage is required to be. If the most critically pressing issues are dealt with relatively quickly, but aftereffects on ecosystems and biodiversity are felt for a period of several decades, does that live up to the threshold requirement?

Lastly, an evaluation of whether or not the damage is severe needs to be carried out. The effects of the oil spill in Lebanon are commonly characterized as an environmental disaster.<sup>155</sup>

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<sup>151</sup> Sjöstedt concludes that “the most plausible interpretation of the terms in Protocol I are the definitions found in the ENMOD Convention, because it is the only instrument using similar language that can assist as a source of information to determine the ordinary meaning” in line with Article 31(1) of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), Sjöstedt (2016), p. 99.

<sup>152</sup> US Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* (1992), p. 625.

<sup>153</sup> Sandoz et al., p. 417, para. 1454.

<sup>154</sup> I.e. nuclear weapons. ICRC Customary Law Study, rule 45.

<sup>155</sup> Report of the UN Secretary-General “Oil Slick on Lebanese Shores” (2014), para 2. See also UNDP (2007), which considers the environmental impact from the oil spill to be unprecedented in the region, p. xxiv. UNDP further reports that the Lebanese Ministry of Environment considered the spill “the most significant

The Palm Islands Nature Reserve, a “unique ground for spawning fish and sponges” and “a resting area for rare and globally endangered migratory birds” was one of the sites that were seriously impacted by the spill.<sup>156</sup> In their rapid recovery report, UNDP utilized a scale for assessing environmental damage caused in the conflict, allowing it to be classified as negligible, marginal, critical-nonsignificant, critical-significant, serious, or severe.<sup>157</sup> The assessment includes two elements: impact effect and duration.<sup>158</sup> The impact effect on sensitive ecosystems due to the oil spill is classified as “serious”, and considering the estimate of 10–50 years duration, this damage is considered “severe”.<sup>159</sup> Similarly, the impact of oil pollution on shores is classified as “catastrophic” and although its impact is only expected to last for 1–10 years, the damage is concluded to be “severe”.<sup>160</sup> In addition, UNEP recognizes that the burning oil fires released toxic pollutants which “could be expected to cause a significant degree of environmental pollution”.<sup>161</sup> Although this was probably among the most serious environmental impacts of the conflict, UNEP was not able to scientifically determine the environmental impact due to a lack of data.<sup>162</sup>

The UNDP classification of the damage as “severe” does not mean that the damage is necessarily to be considered severe in the meaning of the legal term. The US Department of Defense considered the damage done in the Gulf War to be severe in the layman’s sense, but not necessarily in the legal sense intended by the term in Additional Protocol I.<sup>163</sup> However, the meaning of the legal term is not defined in the ICRC commentary to Additional Protocol I, nor in the ICRC Customary Law Study. Despite the strong wording of the impact assessment carried out by the UNDP, the severity of the damage in relation to the applicable rule is therefore exceedingly difficult to assess.

Evidently, it is difficult even to assess whether or not environmental damage that has been carefully mapped and evaluated lives up to the threshold. Indeed, the threshold requirements have been criticized for being both unclear and setting a too high standard.<sup>164</sup> The case of the Jiyeh Power station oil spill confirms this conclusion.

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environmental disaster that ever struck the country”, UNDP (2007) p. 11-7.

<sup>156</sup> UNDP (2007), p. 11-11.

<sup>157</sup> *Ibid.*, p. xviii.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*

<sup>161</sup> UNEP (2007), p. 46.

<sup>162</sup> *Ibid.*

<sup>163</sup> US Department of Defense, p. 625.

<sup>164</sup> See, for instance, Sjöstedt (2016), p. 84; UNEP (2009), p. 4.



### *2.3.3 The Obligation to Pay Due Regard to the Environment*

Based on the previous conclusion that the obligation to pay due regard to the environment in military operations forms part of customary international law, it is theoretically also a basis for state responsibility. The requirement to pay due regard to the environment is an obligation of conduct, which could serve to ensure that military operations putting the environment at risk are preceded by, for instance, an environmental impact assessment. Considering that environmental damage was foreseeable, it is arguable that Israel may have violated its obligation to pay due regard to the environment in conducting the operation. It should be noted that due regard is to be paid irrespective of the level of damage anticipated. However, as Hulme points out, if the expected damage is low, the regard paid to the environment can be equally low.<sup>165</sup> In this case, however, considerable damage to the environment ought to have been expected. Accordingly, a high level of regard should have been paid towards protecting the environment in carrying out the military operation. Hulme considers that the obligation to pay due regard to the environment in practice involves a balancing exercise in the use of means and methods of warfare, which takes into account the need for environmental protection.<sup>166</sup> Other than this, she considers that the rule is “quite vague about what states need to do” to make sure that due regard is paid.<sup>167</sup> Whether or not such regard to the environment was paid is therefore difficult to speculate on, but it would have to be proved for the remedies under state responsibility to become available.

Therefore, while in theory offering a different kind of protection than the protection offered by the prohibition of widespread, long-term and severe environmental damage, it is also difficult to base state responsibility on the obligation to pay due regard to the environment in military operations.

## **2.4 The Duty to Apply the Principles of Military Distinction, Necessity, and Proportionality**

General rules of military conduct can also serve to indirectly protect the environment in armed conflict. Consensus is high that the principles of military distinction, necessity, and proportionality form part of customary international law.<sup>168</sup> Sjöstedt argues that these rules

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<sup>165</sup> Hulme, p. 686.

<sup>166</sup> *Ibid.*, pp. 685f.

<sup>167</sup> *Ibid.*, p. 686.

<sup>168</sup> Sjöstedt (2016), p. 141.

provide the environment with broader protection than the rule prohibiting excessive environmental damage examined in section 2.3.2.<sup>169</sup> This can be explained through the fact that even when damage is not widespread, long-term and severe, these principles still have to be applied.

The principle of distinction obliges belligerents to differentiate between military and civilian targets in order not to direct attacks against civilian objects.<sup>170</sup> It is possible that the Jiyeh power plant should be considered a valid military target. Many objects which are intended for civilian use can also be used for military purposes; roads and bridges utilized by civilians can also be vital to support a military effort, thereby constituting valid military targets.<sup>171</sup> The same holds true for a power plant, providing electrical power to both civilians and military efforts. Relying on the ICRC List of Categories of Military Objectives, the legitimacy hinges on whether or not the fuel contained in the tanks was mainly used for military consumption.<sup>172</sup> Israel has claimed that the site was targeted as “a broader campaign against infrastructure used by Hezbollah guerillas”,<sup>173</sup> but allegations have also been made that the power station in fact had few ties to the Hezbollah guerilla movement.<sup>174</sup>

As established by the International Court of Justice in the *Nuclear Weapons Opinion* “[r]espect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality”.<sup>175</sup> Considering first the principle of necessity, the ICRC commentary to Additional Protocol I considers that violence above “the level which is strictly necessary to ensure the success of a particular operation in a particular case” is not permitted.<sup>176</sup> Sjöstedt points out that the application of the principle demands an understanding of the attacker’s motive, as well as the military advantage

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<sup>169</sup> *Ibid.*

<sup>170</sup> ICRC Customary Law Study, rule 7, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule7](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule7), accessed 5 May, 2017.

<sup>171</sup> US Department of Defense, p. 612.

<sup>172</sup> Draft Rules for the Limitation of Dangers incurred by the Civilian Population in Time of War (International Committee of the Red Cross, Geneva, 1956). The List of Categories of Military Objectives According to Article 7, paragraph 2 includes “(e) installations providing energy mainly for national defence, e.g. coal, other fuels, or atomic energy, and plants producing gas or electricity mainly for military consumption”, Commentary, List of Categories of Military Objectives according to Article 7, paragraph 2.

<sup>173</sup> NBC News, “Lebanon still digging out from oil spill” (21 September 2006), [http://www.nbcnews.com/id/14937105/ns/world\\_news-world\\_environment/t/lebanon-still-digging-out-oil-spill/#.WQszKIRDzq0](http://www.nbcnews.com/id/14937105/ns/world_news-world_environment/t/lebanon-still-digging-out-oil-spill/#.WQszKIRDzq0), accessed 6 May 2017.

<sup>174</sup> See *ibid.* and S. Zunes, “The Other Oil Spill”, *Huffington Post*, [http://www.huffingtonpost.com/stephen-zunes/the-other-oil-spill\\_b\\_709029.html](http://www.huffingtonpost.com/stephen-zunes/the-other-oil-spill_b_709029.html), accessed 6 May 2017.

<sup>175</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, p. 226, paras 30–32.

<sup>176</sup> Sandoz et al., p. 396, para 1395.

anticipated in carrying out the attack.<sup>177</sup> If relying on the following statement from the Israeli government, the objective in bombing the Jiyeh power plant was to reduce the supply of fuel to Hezbollah:

Terrorist activity is dependent, inter alia, on a regular supply of fuel without which the terrorists cannot operate. For this reason a number of fuel depots which primarily serve the terrorist operations were targeted. From intelligence Israel has obtained, it appears that this step has had a significant effect on reducing the capability of the terrorist organizations.<sup>178</sup>

Considering the aim of the operation and the resulting military advantage claimed by Israel, it may have been acceptable under the principle of necessity to bomb the tanks at the power plant. Regarding what amount of anticipated military advantage gives rise to military necessity, Leibler has argued that considerable uncertainty prevents the principle “from operating in practice as a deterrent”.<sup>179</sup> In sum, the necessity to perform an attack must be based on the attacker’s objective of gaining a military advantage, but the uncertainty in the level of military advantage required makes it difficult to establish a breach unless it is clear that an attack could not be anticipated to bring military advantage. If the tanks did constitute a legitimate military target based on their supply of fuel to the Hezbollah, the goal of the Israeli army to cut off fuel supplies leads to the conclusion that such clarity is not the case here.

Even if an attack is directed against a military objective and is necessary to conduct, it is prohibited if it may be expected to cause damage to civilian objects which is disproportionate to the concrete and direct military advantage anticipated.<sup>180</sup> Koppe argues that this principle gives rise to a rule of customary international law prohibiting excessive collateral environmental damage in an international armed conflict,<sup>181</sup> and the ICRC Customary Law Study confirms that attacks that may be expected to cause collateral environmental damage which is excessive in relation to the “concrete and direct military advantage anticipated” is prohibited.<sup>182</sup> Given that the assessment of a military advantage is not restricted to the gains of

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<sup>177</sup> Sjöstedt (2016), p. 150.

<sup>178</sup> Israel Ministry of Foreign Affairs, “Responding to Hizbullah attacks from Lebanon: Issues of proportionality”, (26 July 2006), available at: <http://mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/Responding%20to%20Hizbullah%20attacks%20from%20Lebanon-%20Issues%20of%20proportionality%20July%202006.aspx>, accessed 30 April 2017.

<sup>179</sup> Leibler, p. 98.

<sup>180</sup> ICRC Customary Law Study, rule 14, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14), accessed 5 May 2017.

<sup>181</sup> E. V. Koppe, “Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict” in G. Nystuen, S. Casey-Maslen and A. Golden Bersagel (eds.), *Nuclear Weapons under International Law* (Cambridge University Press, 2014), pp. 247–268, at p. 259.

<sup>182</sup> ICRC Customary Law Study, rule 43, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter14\\_rule43](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter14_rule43), accessed 30 April 2017.

a particular operation, but also considers the context of the war strategy in its entirety,<sup>183</sup> it is often difficult to ascertain whether collateral damage is disproportionate. Sjöstedt also points out that since the test is to be performed based on knowledge available at the time of launching an attack, the difficulties in predicting the scale and effect of environmental damage complicates the assessment.<sup>184</sup> In this case, it is arguable that not much prior knowledge other than that the tanks contain oil, that they are in close proximity with the shoreline and that massive oil spills typically have a detrimental effect on the marine environment is needed to understand that significant collateral environmental damage would ensue.<sup>185</sup> However, in balancing the expected collateral damage with the military objective, it must be noted that these values are not homogenous.<sup>186</sup> Rather, a comparison between the military value of denial of fuel to the enemy and the environmental value of avoiding severe impact on a fragile marine ecosystem, is confounded due to the inherent dissimilarity in these values. Schmitt concludes that applying the principle of proportionality “absent a common currency against which to measure dissimilar values” proves difficult.<sup>187</sup> In addition to an inherent dissimilarity, Sjöstedt notes that environmental values “have not been properly accommodated in the proportionality assessment”.<sup>188</sup>

In conclusion, even though these principles do not require the environmental damage caused to be widespread, long-term and severe, they attribute high weight to military objectives in relation to other values worthy of protection. While it is possible that the Jiyeh power plant was not a legitimate military target, and even if it was, that the collateral environmental damage was disproportionate, a definitive conclusion is difficult to draw.

## 2.5 Multilateral Environmental Agreements

### 2.5.1 *Applying Multilateral Environmental Agreements in International Armed Conflict*

The International Court of Justice has held that since the law of armed conflict is specially designed for dealing with situations of armed conflict, it applies as *lex specialis* when there is a normative conflict with peacetime law.<sup>189</sup> The application of the law of armed conflict as *lex specialis* has sparked considerable debate regarding whether or not MEAs concluded in

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<sup>183</sup> US Department of Defense, p. 611.

<sup>184</sup> Sjöstedt (2016), pp. 152f.

<sup>185</sup> See reasoning above in section 2.3.2 along with footnotes 132 and 133.

<sup>186</sup> Schmitt, p. 114.

<sup>187</sup> *Ibid.*

<sup>188</sup> Sjöstedt (2016), p. 156.

<sup>189</sup> *Legality of the Threat or Use of Nuclear Weapons*, paras 24 and 25.

peacetime continue to apply when an armed conflict breaks out.<sup>190</sup> The International Court of Justice has stated that “the international law on the environment does not cease to apply once an armed conflict breaks out”.<sup>191</sup> Further, in its work on the topic Effects of Armed Conflict on Treaties, the International Law Commission has stated that the outbreak of armed conflict does not *ipso facto* terminate or suspend the operation of a treaty.<sup>192</sup> In fact, treaties concerning international environmental protection are presumed to continue to apply.<sup>193</sup> MEAs which do not contain an express provision providing for their disapplication in the event of hostilities breaking out, can therefore be presumed to continue to apply to the extent that they do not contradict the law of armed conflict, which applies as *lex specialis*.

Scholars are of different views regarding how useful MEAs are when it comes to the protection of the environment in armed conflict. Critique has been directed towards the lack of concrete obligations.<sup>194</sup> Sjöstedt takes a different view and argues that the vague phrasing is a result of MEAs being drafted as flexible frameworks, offering a system through which the state party can determine what the appropriate action is, sometimes with the help of decisions or recommendations of a treaty body.<sup>195</sup> Practically all MEAs create some form of institution for long-term cooperation between parties.<sup>196</sup> Therefore, while the lack of concrete and specific obligations in MEAs can make it difficult to base state responsibility on them,<sup>197</sup> they could offer other types of remedies.

### 2.5.2 *The Barcelona Convention*

Both Israel and Lebanon are parties to the 1978 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention), aiming, *inter alia*, to protect the Mediterranean Sea and its coastal environment from pollution. It does

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<sup>190</sup> Sjöstedt (2016), p. 193

<sup>191</sup> *Legality of the Threat or Use of Nuclear Weapons*, para 30.

<sup>192</sup> International Law Commission, Draft Articles on the Effect of Armed Conflicts on Treaties, Report on its Sixty-Third Session (26 April to 3 June and 4 July to 12 August 2011), UN Doc. A/66/10/Add.1, Yearbook of the International Law Commission, 2011, Volume II, Part Two, draft article 3.

<sup>193</sup> International Law Commission, Draft Articles on the Effect of Armed Conflicts on Treaties, draft article 7 and Annex, subcategory (g): Treaties relating to the international protection of the environment.

<sup>194</sup> Leibler, pp. 80f; A-L. Bunker, “Protection of the Environment During Armed Conflict: One Gulf, Two Wars”, 13:2 *Review of European Community & International Environmental Law* (2004), pp. 201–213, at p. 211.

<sup>195</sup> Sjöstedt (2016), p. 18.

<sup>196</sup> Ebbesson (2015), p. 28.

<sup>197</sup> B. Sjöstedt, “The Role of Multilateral Environmental Agreements in Armed Conflict: 'Green-keeping' in Virunga Park. Applying the UNESCO World Heritage Convention in the Armed Conflict of the Democratic Republic of the Congo” 82 *Nordic Journal of International Law*, (2013), pp. 129–153, at p. 138.

not contain any provisions excluding its application in armed conflict. In accordance with the line of reasoning above, it is therefore presumed to stay in force between the parties to the extent that it does not contradict the law of armed conflict.

After the Jiyeh power station oil spill, a request of support in accordance with article 12 of the Emergency Protocol to the Barcelona Convention, was quickly answered by ten of the contracting parties.<sup>198</sup> The Convention also serves as the legal framework for the Mediterranean Action Plan under UNEP (UNEP-MAP). The Regional Marine Pollution Emergency Response Centre (REMPEC) under UNEP-MAP was significantly involved in responding to the spill and the clean-up which sought to remediate its consequences. In fact, the “reliable national systems for preparedness and response” which REMPEC helps establish in the Mediterranean area has been considered the most important factor for an effective and successful response to marine pollution incidents.<sup>199</sup> Initially, at the request of the Lebanese government, REMPEC provided technical advice on shoreline cleaning.<sup>200</sup> Subsequently, REMPEC and the national authorities of Lebanon cooperated in the co-ordination of the response operations at the regional level.<sup>201</sup> UNEP-MAP also cooperates with various international organizations and non-governmental organizations, enabling capacity building and technical support for the implementation of the Barcelona Convention.<sup>202</sup>

The obligations under the Convention are general in nature and aim at fostering cooperation between the states parties in order to combat pollution. For instance, parties are to “take all appropriate measures” in order to “prevent, abate, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area”.<sup>203</sup> It is noticeable that measures are to be “appropriate” and that pollution shall be eliminated “to the fullest possible extent”. These formulations serve to make the obligation less absolute and allow for leeway based on relevant circumstances. Considering that the law of armed conflict applies as *lex specialis* in this case,

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<sup>198</sup> REMPEC, “Lessons Learnt from the Marine Pollution Incident in the Eastern Mediterranean During the Summer 2006”, REMPEC/WG.28/9/3, 8<sup>th</sup> Meeting of the Focal Points 7–11 May 2007, para 4; UNEP News Centre, Press Releases 2006, available at <http://new.unep.org/Documents.Multilingual/Default.asp?DocumentID=484&ArticleID=5328&l=en>, accessed 5 April 2017.

<sup>199</sup> Information from REMPEC on Preparedness, available at [http://www.rempec.org/rempec.asp?theIDS=2\\_162&theName=RESPONSE&theID=9&daChk=1&pgType=1](http://www.rempec.org/rempec.asp?theIDS=2_162&theName=RESPONSE&theID=9&daChk=1&pgType=1), accessed 10 May 2017.

<sup>200</sup> REMPEC, “Lessons Learnt from the Marine Pollution Incident in the Eastern Mediterranean During the Summer 2006”, paras 4, 5 and 17.

<sup>201</sup> REMPEC, “Lessons Learnt from the Marine Pollution Incident in the Eastern Mediterranean During the Summer 2006”, para 7.

<sup>202</sup> Information from UNEP-MAP on their partnerships, available at <http://www.unep.org/unepmap/what-we-do/partnerships>, accessed 10 May 2017.

<sup>203</sup> Barcelona Convention, article 4(1).

this provision is not likely to lead to an interpretation which does not allow for an attack of a military target resulting in proportionate collateral environmental damage. Moreover, parties shall “apply the polluter pays principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by the polluter, with due regard to the public interest”.<sup>204</sup> However, the use of the terms “prevention, control and reduction measures” indicates that this provision primarily aims at precautionary work to reduce pollution.

While Sand has suggested that the Barcelona Convention establishes accountability for pollution of the marine environment *erga omnes partes*, he does not specify what provision Israel would be in breach of or how such a provision relates to the law of armed conflict.<sup>205</sup> In contrast to this statement, UNDP considers that the Barcelona Convention does not provide for compensation in individual cases, and that none of its protocols cover the situation of an oil spill from facilities on the shore due to a military operation.<sup>206</sup> Supporting this conclusion, a report by the UN Secretary-General states that no conventions capable of entailing liability in this case are applicable in wartime.<sup>207</sup>

Without doubt, the cooperation between parties and the organizational framework offered by UNEP-MAP and REMPEC was highly useful to quickly assess the damage and orchestrate the clean-up after the spill. These operations can be seen as remedies which serve to ensure that the damage done to the environment is mitigated to the fullest extent possible. However, in terms of state responsibility, there do not seem to be rules that provide specific enough obligations on which to base liability.

## 2.6 Note on the UN General Assembly Resolutions

In a series of eleven resolutions on the “Oil Slick on Lebanese Shores”, the UN General Assembly has expressed great concern about “the environmental disaster caused by the destruction by the Israeli Air Force on 15 July 2006 of the oil storage tanks in the direct vicinity of El-Jiyeh electric power plant in Lebanon”.<sup>208</sup> It also called on the government of Israel to assume responsibility and pay damages, which have been estimated by the Secretary-General

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<sup>204</sup> *Ibid.*, article 4(3)(b).

<sup>205</sup> P. H. Sand, “Catastrophic Environmental Damage and the Gulf War Reparation Awards: The Experience of the UN Compensation Commission”, 105 *American Society of International Law Proceedings* (2011), pp. 430–433, at pp. 432f.

<sup>206</sup> UNDP (2007), p. 13–16.

<sup>207</sup> Report of the UN Secretary-General “Oil Slick on Lebanese Shores” UN Doc. A/62/343, 24 October 2007, para 23. While the language of para 23 is slightly misleading, since for instance the Barcelona Convention does not contain a provision which excludes its application in times of armed conflict, this is how it must be interpreted.

<sup>208</sup> UN General Assembly Resolution 71/218, preambular paras 1 and 5.

in a 2014 report to amount to US \$856.4 million.<sup>209</sup> The resolutions also note that the Rio Declaration stipulates that “the polluter should, in principle, bear the cost of pollution”.<sup>210</sup>

The resolutions of the UN General Assembly are not binding on the party they are directed towards, so not complying with a resolution cannot give rise to state liability. Although not legally binding, these resolutions do serve to express the opinion of the international community. The resolutions of the UN General Assembly can also be seen as state practice capable of giving rise to customary international law if paired with *opinio juris*. In this context however, the resolutions are most usefully viewed as a reflection of the opinion of the international community that remedies for environmental damage in war should reflect the polluter pays principle.

## 2.7 Concluding the Case

The above evaluation has shown that it is difficult even to assess whether or not environmental damage which has been carefully mapped and evaluated lives up to the threshold of widespread, long-term and severe damage, as set out in the customary rule prohibiting the use of means and methods of warfare leading to such damage. The case of the Jiyeh power station oil spill confirms previous conclusions that the requirements are both unclear and set the standard too high. Considering that a high level of environmental damage was foreseeable, it could be argued that Israel violated its obligation under customary international law to pay due regard to the environment. A high level of foreseeable damage means that a high level of regard should have been paid to the environment. However, whether or not such regard was paid is difficult to speculate on. Therefore, while in theory offering a different kind of protection than the prohibition of widespread, long-term and severe environmental damage, the obligation to pay due regard to the environment in military operations is also difficult to base state responsibility on in this case.

There is a possibility that the actions taken by Israel constitute an internationally wrongful act under the general principles of distinction or proportionality. First, it is possible that tanks at the power station were not a legitimate military target. This is dependent on whether or not the fuel in the tanks was used mainly to sustain military operations. Second, the proportionality of the damage in relation to the military advantage gained can be questioned. However, the considerable room for interpretation makes it difficult to establish a clear breach

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<sup>209</sup> *Ibid.*, paras 4 and 5; Report of the UN Secretary-General “Oil Slick on Lebanese Shores” (2014), para. 11.

<sup>210</sup> UN General Assembly Resolution 71/218, preambular para 4.



of the principle of proportionality. Even though these principles do not require the environmental damage caused to be widespread, long-term and severe, they attribute high weight to military objectives in relation to other protected values.

These results are not out of the ordinary. There are few instances of international claims for state responsibility for environmental damage.<sup>211</sup> In fact, the only known instance where such claims have been made for damage caused during armed conflict is after the 1990–91 Gulf War, when the Iraqi invasion of Kuwait caused catastrophic environmental damage: some 3.5 million tons of crude oil were spilled in the desert and 800,000 tons into the Persian Gulf.<sup>212</sup> Compensation through the law of state responsibility appears difficult to obtain in the case at hand, hence the situation itself is not reflective of the polluter pays principle. Since there is a slight chance that an internationally wrongful act is at hand, the compatibility of the remedy of compensation under the law of state responsibility with the polluter pays principle will nevertheless be examined in the concluding analysis in section 4.

While the Barcelona Convention does not lend itself to base state liability on in this case, the institutional structure established by the treaty enabled a quick and well-coordinated response with cooperation from several state parties. The cooperation between parties to the treaty and the organizational framework offered by UNEP-MAP and REMPEC seems to have been highly useful in order to quickly assess the damage and organize clean-up operations. These operations function as remedies which serve to ensure that damage done to the environment is mitigated to the fullest extent possible.

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<sup>211</sup> A. Boyle, Introductory Remarks at Panel on “International Law and the Liability for Catastrophic Environmental Damage”, 105 *American Society of International Law Proceedings* (2011), pp. 423–427, at p. 423.

<sup>212</sup> Sand, p. 430.

### 3. The Niger Delta

*[I]nequities in the allocation of resources from oil and gas and the degradation of the Niger Delta environment by oil spills and gas flares continue to adversely affect human development conditions. The inequities fan increasingly intense and frequent conflicts.*<sup>213</sup>

#### 3.1 Introducing the Case: “Gas flaring and oil spills are the key causes of damage to the environment in the Niger Delta”<sup>214</sup>

Exploration for oil in the Niger Delta began as early as 1939, with commercial production taking off in 1958.<sup>215</sup> According to the Organization of Petroleum Exporting Countries (OPEC), petroleum exports now make up US \$41,818 million of Nigeria’s total export value of US \$45,365 million,<sup>216</sup> making Nigeria the largest oil producing country in Africa.<sup>217</sup> The Niger Delta region comprises around 98 % of the transport channels for oil in the country.<sup>218</sup> Given that production and sales of oil is a necessity for the economic continuation of the Nigerian state,<sup>219</sup> it is easy to understand that keeping the presence of multinational oil corporations in the Delta is of great value to the government. However, negative effects arising from oil exploitation is one of the reasons that the region has seen a prolonged violent conflict.<sup>220</sup> One scholar argues that environment-related conflicts in the region have their basis in the lack of implementation of environmental policies from government and multinational oil corporations, resulting in frustration among local population.<sup>221</sup> Another traces conflict in the region to several different tensions: environmentalism in opposition of the harm caused by oil exploitation, distributional injustice, inequalities between culturally defined groups, as well as political marginalization.<sup>222</sup>

Opposition against the presence and practices of multinational oil corporations has gone on for a long time. During the early 1990s, the Movement for the Survival of Ogoni People worked through peaceful means such as petitions, demonstrations and litigations, with leader

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<sup>213</sup> UNDP, “Niger Delta Human Development Report” (UNDP, Nigeria, 2006), p. 11.

<sup>214</sup> Allen, p. 17.

<sup>215</sup> S. J. Eke, “Running to Fight Another Day: Commodification of Peace and the Resurgence of Violence in Post-Amnesty Niger Delta”, 9:2 *African Security* (2016), pp. 136–159, at p. 140.

<sup>216</sup> OPEC, Nigeria Facts and Figures, available at [http://www.opec.org/opec\\_web/en/about\\_us/167.htm](http://www.opec.org/opec_web/en/about_us/167.htm), accessed 6 May 2017.

<sup>217</sup> Eke, p. 140.

<sup>218</sup> *Ibid.*, p. 141.

<sup>219</sup> V. Ojatorotu and U. Okeke-Uzodike, “Oil, Arms Proliferation and Conflict in the Niger Delta of Nigeria”, 6:2 *African Journal on Conflict Resolution* (2006), pp. 85–106, at p. 93.

<sup>220</sup> *Ibid.*, p. 94.

<sup>221</sup> Allen, pp. xiif.

<sup>222</sup> Eke, pp. 142f.

Ken Saro-Wiwa at the forefront.<sup>223</sup> According to Eke, repressive tactics from the government, culminating in Saro-Wiwa's hanging in 1995, left no more space for peaceful opposition – “violent engagement became the only viable route”.<sup>224</sup> Since then, different minority groups in the region have confronted the Federal Government and the multinational oil corporations, resulting in the militarization of the region.<sup>225</sup> Over the years, there have been numerous armed groups fighting for independence, or for enhanced local benefit of the rich natural resources.<sup>226</sup> In late 2005 and early 2006 the Movement for the Emancipation of the Niger Delta (MEND) started to use military force to attack oil installations and kidnap foreign oil workers.<sup>227</sup> Among the strategies of the group are to cut revenues from oil production through oil theft and the sabotage of pipelines, both resulting in spills.<sup>228</sup> MEND consists of a changing mass of groups, whose motivations differ from criminally seeking to enrich themselves to political and ideological, in attempting to bring attention to the environmental and economic hardships suffered by the people of the Delta due to oil exploitation.<sup>229</sup> The Nigerian Federal Government has responded to the rise of armed groups by setting up the Joint Task Force, a special security force consisting of army, navy, air force and police units, that is charged with the mission of combatting the illicit activities of armed groups in the Delta.<sup>230</sup>

The conflict in the Niger Delta has been characterized as “a complex blend of state-driven political conflicts, ethnic violence, youth unrest, chieftancy (sic) tussle, political citizenship, and intra and inter-community tensions and criminality”.<sup>231</sup> Oil companies have been said to exert considerable influence on the Federal Government,<sup>232</sup> while local communities also believe them to have played part in sponsoring armed groups to intimidate local communities.<sup>233</sup> In 1979, the Nigerian Federal Government established that oil deposits

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<sup>223</sup> *Ibid.*, p. 143.

<sup>224</sup> *Ibid.*, p. 144.

<sup>225</sup> Ojatorotu and Okeke-Uzodike, pp. 86f.

<sup>226</sup> J. Burdin Asuni, “Working Paper: Understanding the Armed Groups of the Niger Delta” (The Council on Foreign Relations, 2009), p. 56.

<sup>227</sup> *Ibid.*, pp. 17f.

<sup>228</sup> Eke, pp. 149–151.

<sup>229</sup> Burdin Asuni, p. 3

<sup>230</sup> C. Katsouris and A. Sayne, “Nigeria’s Criminal Crude: International Options to Combat the Export of Stolen Oil” (Chatham House, 2013), pp. 5 and 7.

<sup>231</sup> Courson, p. 14. It should be noted that this thesis does not aim to treat the intra- and inter-community violence which is also present in the region.

<sup>232</sup> D. Smith, “WikiLeaks Cables: Shell’s Grip on Nigerian State Revealed”, *The Guardian* (8 December 2010), <https://www.theguardian.com/business/2010/dec/08/wikileaks-cables-shell-nigeria-spying>, accessed 8 May 2017.

<sup>233</sup> Burdin Asuni, p. 25.

are a national asset, effectively removing local ownership and control.<sup>234</sup> As mentioned, the government has great interest in ensuring that oil companies continue to operate successfully. In fact, it has considered “threats to sustained exploration and production of the oil as a threat to national security”.<sup>235</sup> At the same time, government officials and members of the Joint Task Force are accused of taking a share in the profits from oil theft committed by armed groups in exchange for not exerting justice.<sup>236</sup>

In September 2009, shortly after an amnesty deal for militants was introduced by the Federal Government, the Council on Foreign Relations characterized the conflict as a “threat not only to the people of the region, but to the stability of Nigeria and the surrounding West Africa Region”.<sup>237</sup> It concluded that the government had largely failed in its efforts to broker peace and that neither the large scale crack-down on military camps of May 2009 nor the subsequent amnesty, which offered former militants a monthly pay check in exchange for handing over their weapons, have overcome the tensions nor addressed the core problems causing the conflict.<sup>238</sup> Recent industry reports confirm the prediction that the amnesty deal would not be capable of brokering long-term peace. In 2014, the biggest operator in the region, Shell Nigeria, reported 139 incidents of oil spills due to sabotage; in 2015, the number was 93.<sup>239</sup> Shell further reported that in 2015, 85 % of identified oil spills from its facilities were due to “crude oil theft, sabotage and illegal refining”,<sup>240</sup> activities which are typically carried out by armed groups. Recently, groups have taken to off shore piracy while also pursuing their earlier strategies of conducting kidnappings for ransom and armed robberies.<sup>241</sup> Shell concludes that security in the region is a major concern.<sup>242</sup> It is clear that the amnesty program has not successfully eliminated the militancy in the region.

Since early 2016 there are reports of a new group of militants, The Niger Delta Avengers, who demand an independent state and want the multinational oil companies to leave the region.<sup>243</sup> They are thought to comprise, at least to some part, former rebels who have

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<sup>234</sup> *Ibid.*, p. 6.

<sup>235</sup> Allen, p. 8, footnote 8.

<sup>236</sup> Katsouris and Sayne, pp. 5–7.

<sup>237</sup> Burdin Asuni, p. 1

<sup>238</sup> *Ibid.*

<sup>239</sup> Shell in Nigeria, “Security, Theft, Sabotage and Spills” (Shell, 2015), available at <http://s04.static-shell.com/content/dam/shell-new/local/country/nga/downloads/pdf/security-theft-em.pdf>, accessed 4 April 2017

<sup>240</sup> *Ibid.*

<sup>241</sup> B. Monnet (filmmaker), *Pirates: Threatening Global Trade* (2016).

<sup>242</sup> Shell in Nigeria, “Security, Theft, Sabotage and Spills”.

<sup>243</sup> *Vanguard*, “Who are the Niger Delta Avengers?” (1 June 2016), <http://www.vanguardngr.com/2016/06/niger-delta-avengers-2/>, accessed 8 May 2017; T. DiChristopher, “The ‘Niger Delta Avengers’ Have a Message for Big Oil”, *CNBC* (3 November 2016), <http://www.cnbc.com/2016/11/03/niger-delta-avengers-and-insurgents->

returned to militancy from the amnesty program.<sup>244</sup> While President Buhari has stated that he intends to “re-engineer” the amnesty program, he has also increased the presence of government troops in the Niger Delta region.<sup>245</sup> Continued conflict and re-escalation of violence since 2009 have also been reported by scholars. Eke claims that “the direct exchange of cash for peace in 2009 and beyond propelled the new wave of violence in the Niger Delta”.<sup>246</sup> Okonofua also concludes that violence in the region has steadily resurfaced, and points to a possible connection with the outcome of the 2015 elections.<sup>247</sup>

Regarding the impact of the conflict on the environment, there is no study quite as comprehensive and conclusive as those on the Jiyeh power station.<sup>248</sup> The difference in available material can be attributed to the difference in scope between the cases: the bombing of the Jiyeh power station is one isolated event, whereas the Niger Delta conflict consists of many events, spread over a long period of time and a large area. In part, the lack of comprehensive studies could also be a result of the fact that the conflict in the Delta is still ongoing, with periods of relative calm followed by increased violence. Notably, there is also a lack of extensive research into the issue of the effect of conflict on the environment in this case. Most research has focused on the inverse relationship: namely how the existence of rich natural resources in the area has played a part in sparking conflict.<sup>249</sup> However, there is some research on the matter which concludes that the environmental impact of the conflict is serious. Ibaba concludes that “violent conflicts have undermined environmental quality through pollution and unsustainable exploitation of resources”.<sup>250</sup>

Limiting this study in time and space is not as easily done as with the first case study of this thesis. While a report from the Office of the Prosecutor of the International Criminal Court, which will be addressed further in section 3.2.3 below, indicates that the time period from 2009 until today is more interesting from a law of armed conflict perspective, it must be noted that

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[turn-up-the-pressure-on-nigerias-buhari-and-big-oil.html](#), accessed 8 May 2017

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

<sup>246</sup> Eke, p. 137.

<sup>247</sup> B. A. Okonofua, “The Niger Delta Amnesty Program: The Challenges of Transitioning from Peace Settlements to Long-Term Peace”, 6:2 *SAGE Open* (2016), pp. 1–16, at p. 3.

<sup>248</sup> In 2006, UNDP conducted a study on human development in the Niger delta region, which to some extent addresses environmental problems and conflict, but does not explore the link between them extensively. The study concludes that the conflicts over resources among communities, as well as between communities and oil companies, poses challenges to human development, see p. iii. See also UNEP, “Environmental Assessment of Ogoniland” (UNEP, Kenya, 2011), which assesses the environmental effects of oil spills on the Ogoniland region.

<sup>249</sup> Ibaba, p. 558.

<sup>250</sup> *Ibid.*, p. 555.

the environmental damage in the region has been accumulating over several more decades. Moreover, there is a lack of environmental impact assessments which comprehensively track the impact of oil spills in a manner that is geographically and temporally limited. With this in mind, the resurgence of violence after the 2009 amnesty will be the main temporal focus of the case study. The Ramsar Convention sites of Upper Orashi Forests and Apoi Creek Forests are located in Rivers state and Bayelsa state respectively. During 2013 and 2014, these states suffered from the largest amount of oil spilled in the region.<sup>251</sup> To some extent, the study will therefore focus on these geographical areas. In order not to lose sight of the complexities of the conflict or the environmental impact on the region, more general facts will also be brought in.

## 3.2 Non-International Armed Conflict

### 3.2.1 *Failure of Domestic Law*

The most evident difference between the conflict in the Niger Delta and the bombing of the Jiyeh power station is the fact that the Nigerian conflict is just that – Nigerian, internal, non-international. Rather than two states, a complex set of actors is involved, with three sub-groups discernable: The Nigerian Federal Government, local armed groups and multinational oil corporations. At the outset of addressing this case, it is relevant to point out that domestic law has proved to be largely unsuccessful in regulating the environmental degradation connected to the conflict in the Niger Delta. Allen states that “oil-related legislations on the environment are hardly implemented or enforced in Nigeria”.<sup>252</sup>

Moreover, access to procedural justice for the local population is lacking. This is evidenced by the fact that several claimants seeking to sue multinational oil corporations have turned to the domestic court system of the parent company.<sup>253</sup> In addition, Ojakorotu and Okeke-Uzodike claim that rather than restoring the environment or compensating ordinary citizens, claims for compensation in Nigeria has turned into a business where community elite and local leaders devise methods to make personal gains from compensation offered by government, oil corporations, or international relief agencies.<sup>254</sup> These circumstances present a challenge both in the sense that affected persons seeking justice in different jurisdictions might

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<sup>251</sup> O. Anejionu, P-A. Ahiamunnah and C. J. Nri-ezedi, “Hydrocarbon Pollution in the Niger Delta: Geographies of Impacts and Appraisal of Lapses in Extant Legal Framework”, 45 *Resources Policy* (2015), pp. 65–77, at p. 68. See Figure 2 in the Annex to this thesis for maps depicting recorded oil spill incidents in 2013–2014.

<sup>252</sup> Allen, p. 8.

<sup>253</sup> See further section 3.3.2 below.

<sup>254</sup> Ojakorotu and Okeke-Uzodike, p. 102.

not enjoy equal compensation, and in the sense that money is not always used to remediate environmental damage.

### 3.2.2 *Applicable Rules of International Law*

International environmental law has traditionally been concerned with transboundary issues and kept an indifferent view to what states do with their own environment.<sup>255</sup> Further, the law of armed conflict is mostly concerned with conflicts between states. However, it is widely accepted that the law of armed conflicts applies, to some extent, to non-international conflict as well. Regarding treaty law, Additional Protocol II and Common Article 3 of the Geneva Conventions, which regulate non-international armed conflict, do not contain any provisions directly protective of the environment.<sup>256</sup> The 1980 Conventional Weapons Convention, which was amended in 2001 to also apply to non-international armed conflict, recalls the prohibition of wide-spread, long-term and severe environmental damage in its preamble.<sup>257</sup> However, Nigeria is not a party to this Convention. In addition, the non-international nature of the conflict renders the provisions of Additional Protocol I inapplicable. Therefore, the assessment will have to be based on customary law.

The ICRC Customary Law study considers it “less clear than for international armed conflicts” that the prohibition of means or methods of warfare causing intentional or foreseeable widespread, long-term and severe damage to the natural environment should apply to conflicts of a non-international nature.<sup>258</sup> It identifies that even if this rule has not yet crystallized into a rule of customary international law, present trends point towards such a development in the future.<sup>259</sup> Sjöstedt considers that there is not enough evidence of state practice and *opinio juris* supporting an application of this rule to non-international armed conflict.<sup>260</sup> Thus, this thesis

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<sup>255</sup> A. Nollkaemper, “Sovereignty and Environmental Justice in International Law” in J. Ebbesson and P. Okowa (eds.), *Environmental Law and Justice in Context* (Cambridge University Press, 2009), pp. 253–269, at p. 253.

<sup>256</sup> However, there might be provisions of Additional Protocol II which aim primarily at protecting human rights that can serve to indirectly protect the environment. For instance, article 14 on the protection of objects indispensable to the survival of the civilian population, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of War Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II). See section 4.2.3 on suggestions for further research regarding such provisions.

<sup>257</sup> 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 (and Protocols) (adopted 10 October 1980, entered into force 2 December 1983, amended 21 December 2001) 1342 UNTS 137 (Conventional Weapons Convention), preambular para 4.

<sup>258</sup> ICRC Customary Law Study, rule 45.

<sup>259</sup> *Ibid.*

<sup>260</sup> Sjöstedt (2016), p. 137.

will not apply the prohibition of widespread, long-term and severe environmental damage to the conflict in the Niger Delta. Regarding the obligation to pay due regard to the environment, it could be argued to apply in cases where transboundary harm has occurred in non-international conflicts,<sup>261</sup> but the present case concerns damage within one state. The application of customary international law to a non-international armed conflict to states and non-state actors has also been charted by the International Commission of Inquiry on Darfur. The Commission identified 24 rules of customary international law applicable to non-international armed conflict. Among those were the military principles of distinction, necessity and proportionality.<sup>262</sup> This conclusion is also supported by scholarly writings and by the ICRC Customary Law Study.<sup>263</sup> The duty to pay due regard to the environment and the prohibition on causing widespread, long-term and severe environmental damage were not included amongst the applicable rules.<sup>264</sup> It should be noted, however, that the Commission only mentioned the rules it deemed relevant and applicable to the conflict in Darfur.<sup>265</sup>

### *3.2.3 The Threshold Requirement of a Non-International Armed Conflict*

In *Tadić*, the ICTY concluded that while an international conflict encompasses just about any amount of violence between two states, a non-international armed conflict consists in “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.<sup>266</sup> For civil unrest to be classified as a non-international armed conflict, setting the rules of the law of armed conflict in motion, there are evidently two elements that need to be fulfilled. First, there is a need for sufficient organization within the armed groups. Second, there is a need for violence to reach a certain level of protraction.

When considering the situation in the Niger Delta in 2013, the Office of the Prosecutor of the International Criminal Court found that the armed groups in the area did fulfil the

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<sup>261</sup> ICRC Customary Law Study, rule 44.

<sup>262</sup> The report considered, amongst others, the following rules to be applicable: “(vi) the prohibition of attacks against civilian objects; (vii) the obligation to take precautions in order to minimize incidental loss and damage as a result of attacks, such that each party must do everything feasible to ensure that targets are military objectives and to choose means or methods of combat that will minimise loss of civilians; (viii) the obligation to ensure that when attacking military objectives, incidental loss to civilians is not disproportionate to the military gain anticipated; (ix) the prohibition on destruction and devastation not justified by military necessity”. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, UN Doc. S/2005/60, 1 February 2005, para 166.

<sup>263</sup> Sjöstedt (2016), p. 182; ICRC Customary Law Study, rules 7, 14 and 43.

<sup>264</sup> Henckaerts and Debuf, p. 165; Report of the International Commission of Inquiry on Darfur to the UN Secretary-General, para 166.

<sup>265</sup> Report of the International Commission of Inquiry on Darfur to the UN Secretary-General, para 166.

<sup>266</sup> *Tadić* case, para 70.



conditions of sufficient organization, but that there was not sufficient evidence to establish that violence in the area had reached the required level of protraction.<sup>267</sup> When conducting this assessment, the Office of the Prosecutor looked at two specific time periods: June to September 2008 and January to July 2009, for the purposes of investigating crimes against humanity and war crimes.<sup>268</sup> The conclusion that violence did not reach the required level of protraction was drawn because the available information was insufficient; the circumstances of the attacks investigated were not clear enough to assess the intensity of the violence.<sup>269</sup> However, as already mentioned, since the amnesty issued to the militants by the government in 2009, violence has once again escalated in the region. An interview-study with 224 militants who had entered the peace deal reveals that 99 % of respondents admit that their organizations only handed over “a fraction of their arms” to the government.<sup>270</sup> This is reflected in a report of the operations of groups affiliated with MEND between March 2011 and July 2013. During this time period, they had conducted 47 attacks, including blowing up pipelines, destroying oil wells, hijacking boats, killing police officers, Nigerian soldiers and sailors, as well as taking hostages.<sup>271</sup> This indicates that at some point after the 2009 amnesty, the required level of protracted violence might have been reached.

From an environmentalist perspective, there is reason to be critical of the investigation by the Office of the Prosecutor. The report does not mention the large scale environmental damage which is, at least to some extent, a direct effect of the conflict. Article 8(2)(b)(iv) of the 1998 Rome Statute stipulates that intentional excessive environment harm constitutes a war crime.<sup>272</sup> As such, the environment should be viewed as an objective worthy of protection and consideration when assessing whether or not violence is protracted. The attacks committed by armed groups on oil installations has been incessant for at least a decade and continues to cause environmental damage. When also considering that the nature of the conflict in the Niger Delta is characterized by the struggle for control over oil resources, it is notable that the report does not take environmental damage into consideration in its assessment of the conflict.

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<sup>267</sup> The Office of the Prosecutor, “Situation in Nigeria: Article 5 Report” (International Criminal Court, 2013), para 120.

<sup>268</sup> *Ibid.*, paras 124 and 125.

<sup>269</sup> *Ibid.*, para 120.

<sup>270</sup> Okonofua, pp. 9 and 11.

<sup>271</sup> Eke, pp. 149–151.

<sup>272</sup> Article 8(2)(b)(iv) of the Rome Statute reads: “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 which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”.

Sjöstedt argues that it is not always possible to tell when civil unrest passes the threshold of international armed conflict, and that it sometimes goes back and forth.<sup>273</sup> While it is not possible to say with certainty that the situation in the Niger Delta between 2009 and today has reached the threshold level for a non-international armed conflict, there is a possibility that at some point, it has.

Before moving on to apply the relevant norms of international law to the case, it is useful to shortly sum up this section. To the extent that the conflict in the Niger delta reaches the threshold of a non-international armed conflict, an application of the general principles of distinction, necessity and proportionality should be made. This will be done in section 3.3.1 below. In addition, there are MEAs, which apply both in peacetime and in wartime, to the extent that they do not contradict the *lex specialis* of the law of armed conflict. These will be discussed further in section 3.4.

### 3.3 Responsibility of Non-State Actors

It is not useful to assess whether the counter operations of the Nigerian Federal Government through its Joint Task Force is causing environmental damage in this conflict, as there is little evidence pointing in that direction. However, under article 8 of the ILCDA, the actions of a non-state actor can be attributed to the state if it has exercised sufficient control over the actions of the group. Although state level government and members of the military have been accused of condoning oil theft and sabotage by armed groups in exchange for political support or money,<sup>274</sup> this cannot be considered to reach the high threshold of effective control required for the government to be held responsible.<sup>275</sup>

Apart from the state, there are two groups of actors whose responsibility are of interest to examine in the context of the Niger Delta conflict: the armed groups and the multinational oil corporations. Considering that the applicable law of armed conflict has been narrowed down to the general principles of distinction, necessity and proportionality, these will be considered in the following sub-section in relation to the armed groups. The oil companies are private entities, which are not bound by the rules of the law of armed conflict. In section 3.3.2 below,

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<sup>273</sup> Sjöstedt (2016), p. 46.

<sup>274</sup> Burdin Asuni, pp. 13f.

<sup>275</sup> In *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, merits, Judgment of 27 June 1986. I.C.J Reports 1986, p. 14, at para 115 the International Court of Justice held that “effective control of the operations in the course of which the alleged violations were committed” must be exercised.

the responsibility of private entities under international law is considered, and a short digression into international private law is made.

### *3.3.1 Responsibility of Armed Groups: Applying Customary International Law*

An estimate made in 2007 put the number of armed groups in the region at 48, possibly including as many as 60,000 rebels with an arsenal of 10,000 weapons.<sup>276</sup> Although internal alliances of the groups are constantly shifting,<sup>277</sup> their methods of warfare and their goals coincide with one another. As already mentioned, methods include stealing oil, sabotaging pipelines and conducting kidnappings. Goals include obtaining regional self-determination and control over natural resources, as well as achieving financial gain.<sup>278</sup> Increased environmental protection against the exploitation of the oil companies is another common stated goal of these organizations.<sup>279</sup>

The armed groups could be held responsible under article 10 of the ILCDA. The article states both that the actions of “an insurrectional movement which becomes the new government shall be considered an act of that State” and that if such a movement “succeeds in establishing a new state”, it can be held accountable. As mentioned, it has been reported that the Niger Delta Avengers aim to establish an independent state. However, it does not seem very likely that either of these two scenarios will play out in the Niger Delta. The constantly shifting nature of alliances within and between the armed groups speak against organization on a level where they are capable of taking over government or establishing their own state.

Even if the groups are not successful in establishing an autonomous state in the Niger Delta, the general principles of the law of armed conflict are binding on combatting non-state actors once they have reached a sufficient level of organization.<sup>280</sup> The report by the Office of the Prosecutor of the International Criminal Court found that the groups operating under the MEND-umbrella reached the level of organization before the amnesty program was introduced.<sup>281</sup> The fact that the armed groups have entered into an amnesty deal with the government stipulating ceasefire, albeit of limited success, further strengthens the conclusion that they reach the sufficient level of organization.

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<sup>276</sup> Burdin Asuni, p. 3.

<sup>277</sup> *Ibid.*, pp. 17–21.

<sup>278</sup> *Ibid.*, p. 21.

<sup>279</sup> Allen, p. 2.

<sup>280</sup> Report of the International Commission of Inquiry on Darfur to the UN Secretary-General, para 172.

<sup>281</sup> The Office of the Prosecutor, “Situation in Nigeria: Article 5 Report”, paras 121–123.

The type of military operations which are conducted by the armed groups are arguably less traditional than the operations which the general principles have evolved in relation to. When considering the principle of distinction, it is notable that the very aim of conducting sabotage can be to attack non-military targets. In this case, the oil installations which are attacked are undoubtedly of civilian nature. To a small extent, the revenues from oil could serve to support the government forces which strive to suppress the armed groups, but this cannot be considered enough to turn them into legitimate military targets.<sup>282</sup> The conclusion that they do not constitute legitimate military targets in a conflict between armed groups and government forces is further supported by the aims of the attacks, which are more geared towards stealing oil or disturbing the operations of oil corporations than towards decreasing the capabilities of the national military.

Moreover, it seems unlikely that the attacks on oil installations resulting in oil spills are proportionate in relation to the military advantages gained. The environmental damage in the region due to oil spills include large scale water poisoning and destruction of vegetation and agriculture lands.<sup>283</sup> The nutrient values of farmlands have been negatively affected, resulting in poor crop yields, and marine life has been destroyed, resulting in a decrease in fishing revenues.<sup>284</sup> In fact, the Niger Delta has been described as “one of the world’s most severely impacted ecosystem by petroleum”.<sup>285</sup> Already in 2006, approximately nine to thirteen million barrels of oil had been spilled into the wetlands, which is equivalent to 50 times the volume caused by the Exxon Valdez spill in 1989, an often cited example of large-scale destruction due to an oil spill.<sup>286</sup> It has to be noted that not all damage is a direct result of sabotage or accidental spills occurring during oil theft by armed groups, but these operations are most certainly contributing to the degradation.<sup>287</sup> In comparison, the military advantage gained by the armed groups seems slim. They succeed in part in decreasing the revenues of both oil corporations

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<sup>282</sup> The reader recalls that the ICRC List of Categories of Military Objectives includes “[i]nstallations providing energy mainly for national defence”. See footnote 172 above.

<sup>283</sup> Eke, p. 141.

<sup>284</sup> Ibaba, p. 558.

<sup>285</sup> C. N. P. Okonkwo, L. Kumar and S. Taylor, “The Niger Delta Wetland Ecosystem: What Threatens It and Why Should We Protect It?”, 9:5 *African Journal of Environmental Science and Technology* (2015), pp. 451–463, at p. 460.

<sup>286</sup> *Ibid.*

<sup>287</sup> Relying on information provided by Shell, 85 % of identified oil spills from its facilities in 2015 were due to such operations, Shell in Nigeria, “Security, Theft, Sabotage and Spills”. Scholars support the conclusion that sabotage is a major source of oil spills. See, *inter alia*, O. Adekola, S. Whanda and F. Ogwu, “Assessment of Policies and Legislation that Affect Management of Wetlands in Nigeria”, 32 *Wetlands* (2012), pp. 665–677, at p. 670; Benedict, p. 201.

and the federal government,<sup>288</sup> and in one area, violent protests have resulted in the oil corporations ceasing their operations.<sup>289</sup> However, the argument has been made that nowadays, these attacks are in reality performed solely for the rebels to enrich themselves, while using environmental concerns, striving for independence, or local control of natural resources as veils behind which to hide in order to lend greater legitimacy to the operations.<sup>290</sup> As a UNDP report from 2006 puts it: “Conflict has become a booming business”.<sup>291</sup>

A breach of the general principles of distinction or proportionality could incur liability on part of the armed groups, applying “state” liability by analogy. If this solution were to be sought, however, the Nigerian Federal Government would have to recognize the groups as an actor possessing international personality and identify the situation as one of non-international armed conflict. In cases of civil unrest, the established regime will often want to avoid according insurgency groups any kind of legitimacy. Recognizing the armed groups fighting in the Niger Delta as possessing international personality in the form of a warring party in a non-international armed conflict is most likely far from an option for the Nigerian government. On the contrary, the groups have been portrayed as criminals, without a legitimate cause to fight the regime.<sup>292</sup>

### *3.3.2 Responsibility of Multinational Oil Corporations*

Apart from the government and the armed groups, there is one additional group of actors operating in the Niger Delta which is of interest: the multinational oil corporations. Companies play a limited role on the arena of public international law. While the OECD has adopted guidelines for multinational enterprises regarding their conduct in relation to environmental protection, these are not legally binding.<sup>293</sup> Their success is therefore dependent on the domestic legislation implementing them. Ong has concluded that in countries where domestic legal measures leave more to wish “there is [also] a lack of international mechanisms that are directly enforceable against these private transnational economic actors to hold them accountable for

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<sup>288</sup> UNDP (2006), p. 124.

<sup>289</sup> UNEP reports that as “a consequence of the ensuing violence, oil exploration and production activities in Ogoniland ceased in 1993”, UNEP (2011), p. 25.

<sup>290</sup> Eke, pp. 145–153.

<sup>291</sup> UNDP (2006), p. 127.

<sup>292</sup> Katsouris and Sayne, p. 6: “Nigerian politicians and the press like to speak of bunkering ‘barons’ and ‘kingpins’, or to describe oil-theft rings as mafias or syndicates.”

<sup>293</sup> OECD, Guidelines for Multinational Enterprises 2008, available at [www.oecd.org](http://www.oecd.org). Guidelines on environmental matters are found in Section V on pp. 19f.

their environmental damage”.<sup>294</sup> The lack of accountability is pertinent in times of armed conflict, perhaps especially so during civil war or unrest, since companies exploring for natural resources have an opportunity to use the collapse of domestic institutions to their benefit, and are able to profit by operating in conflict zones.<sup>295</sup> It could be argued that at least some of the responsibility should rest on the companies choosing to continue their operations in a region where spills caused by sabotage are well-known to result in environmental damage.

Setting aside the limited attention paid to private entities in the sphere of public international law, their role in the concrete case of environmental damage in the Niger Delta conflict cannot be overlooked. The role of multinational oil corporations in the conflict is arguably very complex, and an exhaustive attempt to understand the dynamics of the conflict or the relationship between the companies and the other actors is not made here. The responsibility of oil companies for spills caused by the conflict is also diffuse. According to Nigerian law, they are not obliged to pay damages for spills caused by sabotage.<sup>296</sup> They are, however, required to perform clean-up measures regardless of the origin of a spill.<sup>297</sup> The Nigerian state is dependent on the continued operation of the oil companies, and domestic environmental legislation and control has been argued to be almost non-existent, resulting in poor implementation of this obligation.<sup>298</sup> Complicating the matter further are the allegations that oil companies are hiding behind sabotage spills and oil theft to avoid as much responsibility as possible.<sup>299</sup> A Chatham House report recently observed that “[i]n June 2013, an NCP panel in the Netherlands issued a statement criticizing Shell for publishing data that exaggerated oil theft’s role as a cause of oil spills in the Niger Delta”.<sup>300</sup>

From a perspective of international private law, if the reader will allow a small digression from the scope of the thesis, the transboundary aspect found in the corporate structure of the multinational oil corporations operating in the region is interesting. Institutional structures which separate the company acting in Nigeria from the national jurisdiction in which

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<sup>294</sup> D. M. Ong, “Regulating Environmental Responsibility for the Multinational Oil Industry: Continuing Challenges for International Law”, 11:2 *International Journal of Law in Context* (2015), pp. 153–173, at p. 154.

<sup>295</sup> On this topic, see for instance J. Banfield, “From Fuelling Conflict to Oiling the Peace: Harnessing the Peace-Building Potential of Extractive-Sector Companies Operating in Conflict Zones” in R. Sullivan (ed.), *Business and Human Rights: Dilemmas and Solutions* (Greenleaf, 2003) pp. 220–231.

<sup>296</sup> Oil Pipeline Act of 1990, Volume XIX Chapter 338, Laws of the Federation of Nigeria (1990), Part III, article 11(5).

<sup>297</sup> Federal Environmental Protection Agency Act of 1988, Volume VIII Chapter 131, Laws of the Federation of Nigeria (1990), Part II, section 22, article 2(b).

<sup>298</sup> Adekola et al., pp. 665f.

<sup>299</sup> Ojaborotu and Okeke-Uzodike, p. 94.

<sup>300</sup> Katsouris and Sayne, p. 63.

the parent company operates provide an advantageous setting for oil companies not to prevent, restore or compensate for harm resulting from the conflict.<sup>301</sup> Further, there is a history of the biggest operator in the region, the Nigerian branch of Shell, not complying with the rulings of Nigerian court decisions in claims for compensation regarding environmental degradation.<sup>302</sup>

Attempts by Niger Deltans to sue in foreign jurisdiction have been made on at least three occasions recently.<sup>303</sup> There are two interconnected hurdles to clear in such cases. First, the corporate structure establishing a subsidiary based in the local jurisdiction. Second, a claim can be rejected based on the principle of *forum non conveniens*: a case should be brought before the court best suited to try it. In this case, it could be argued that a claim against a Nigerian subsidiary, operating in Nigeria, which is brought by Nigerian claimants should be settled in a Nigerian domestic court. This rule can, and Ebbesson argues in some cases should, be set aside when there is a lack of access to justice in the state where the harm took place.<sup>304</sup> Either by setting aside the presumption of *forum non conveniens* and holding the Nigerian subsidiary responsible in foreign jurisdiction, or by looking through the corporate veil and establishing *de facto* control over the subsidiary by the parent company and holding it responsible in its domestic jurisdiction. Lack of access to justice was a problem for the claimants from the Niger Delta “due to several possible reasons, including an inability to fund lawyers and experts to represent them in their local courts, as well as the persecution of claimants, and corruption”.<sup>305</sup> A new development is discernible in the *Akpan* and *Bodo* cases, where courts have set aside the presumption of *forum non conveniens* and concluded that “it is the failure to protect/prevent the relevant oil wellhead/pipeline from acts of sabotage that cause oil spill damage that can give rise to liability on the part of the operating oil company”.<sup>306</sup>

However, the option to bring a case against an oil company before the courts of the jurisdiction of the parent company, is in all likelihood a far-fetched option for the vast majority of locals who have suffered losses due to the environmental damage from oil spills. In conclusion, there are few measures available to hold multinational oil corporations accountable.

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<sup>301</sup> See Ebbesson (2009) “Piercing the State Veil in Pursuit of Environmental Justice”, pp. 270–273.

<sup>302</sup> Ong, p. 166.

<sup>303</sup> The cases are *Akpan v. Royal Dutch Shell plc/SPDC (Nigeria)*, Judgment of 30 January 2013, LJN: BY9854, Rechtbank’s-Gravenhage, C/09/337050/HA ZA 09-1580. An unofficial English translation is available at: <https://milieudedefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-akpan-vs-shell-oil-spill-ikot-ada-udo/view>, last accessed 9 May 2017; *Kiobel v. Royal Dutch Petroleum Co.*, Decision of 17 April 2013, 133 US Supreme Court. 1659; *The Bodo Community v. Shell Petroleum Development Company of Nigeria Ltd*, Judgment of 20 June 2014, [2014] EWHC 1973 (TCC).

<sup>304</sup> Ebbesson (2009) “Piercing the State Veil in Pursuit of Environmental Justice”, pp. 290–292.

<sup>305</sup> Ong, p. 163.

<sup>306</sup> *Ibid.*, p. 167.

### 3.4 Multilateral Environmental Agreements

#### 3.4.1 *Applying Multilateral Environmental Agreements in a Non-International Armed Conflict*

A general discussion on the application of MEAs in armed conflict is available above in section 2.5.1. In a non-international armed conflict, given that the law of armed conflict applies as *lex specialis*, consideration must be had to the state party needing to resort to military means to defeat the armed groups that it is fighting. Likewise, if a non-state actor is recognized as possessing international personality, it operates under the law of armed conflict and is awarded the same leeway for its military purposes as the government. Nigeria is a signatory to two relevant MEAs which contain provisions that are presumed to continue to apply during wartime: The Ramsar Convention and the Abidjan Convention.

#### 3.4.2 *The Ramsar Convention*

The Ramsar Convention aims to protect wetlands and waterfowl of international significance. The protection of wetland habitats is important because of their “fundamental ecological functions (...) as regulators of water regimes and as habitats supporting a characteristic flora and fauna, especially waterfowl”,<sup>307</sup> making them especially interesting when considering the oil pollution in the Niger Delta. Under the Convention, wetlands are defined as “areas of marsh, fen, peatland, or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres”.<sup>308</sup>

The Ramsar Convention is especially promising when it comes to ensuring protection to the environment during armed conflict, for several reasons. In part, it is promising because it is centered around the designation of protected zones. Sjöstedt identifies three reasons for why treaties which designate areas as protected zones are particularly useful in the context of armed conflict. First of all, the designation of a protected zone can be used as a tool to “identify and preserve biological ‘hot-spots’ of international significance”.<sup>309</sup> The areas protected under the Ramsar Convention are chosen specifically for their fundamental ecological function. By ensuring that such areas are specifically protected, the Ramsar Convention contributes to “preserve endangered species and rare ecosystems, and prevents the loss of biodiversity on a

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<sup>307</sup> Convention on Wetlands of International Importance Especially as Waterfowl Habitat (adopted 2 February 1971, entered into force 21 December 1975) 996 UNTS 245 (Ramsar Convention), preambular para 2.

<sup>308</sup> *Ibid.*, article 1.

<sup>309</sup> Sjöstedt (2016), p. 230.



global scale”.<sup>310</sup> Second, the protected areas under the Convention constitute defined geographical zones, which make their protection more tangible than a more abstract environmental component.<sup>311</sup> Moreover, the law of armed conflict already offers a similar protection measure in the form of demilitarized zones as well as hospital and safety zones.<sup>312</sup> It will be easier to avoid environmental damage to a designated environmentally protected zone, since this practice is already applied to other types of protected zones. It will also be easier to detect and pinpoint damage done to areas that are protected. Changes in the ecological area which is under the protection of the Ramsar Convention should also be tracked by the ratifying country.<sup>313</sup> Consequently, any environmental degradation due to an armed conflict in such an area will be easier to point to once it has occurred. Designating environmental zones as protected is also a suggestion in the ongoing work of the International Law Commission on the topic.<sup>314</sup> Third, areas that have been designated special protection under the Ramsar Convention are vulnerable, that is part of the reason for why they are designated such protection. In times of conflict, this vulnerability is intensified.<sup>315</sup>

In Nigeria, there are 11 sites protected under the Ramsar Convention, which entered into force in the state on 2 February 2001. Two of these sites are located in the Niger Delta: the Upper Orashi Forests (Rivers state) and the Apoi Creek Forests (Bayelsa state). On the website of the Convention, it is noted that “[o]pportunities for tourism, education and research are currently hampered by ethnic militancy, insecurity, poaching and uncontrolled logging” in the Upper Orashi Forests.<sup>316</sup> Further, the Nigerian Federal Ministry of Environment confirms that the Ramsar sites in the Niger Delta have been negatively affected by the oil spills resulting from the ongoing conflict.<sup>317</sup> In fact, the most pressing threats to the sites are stated to be oil spills and militancy.<sup>318</sup> However, due to a lack of funding, there is no management plan in place for either of the sites,<sup>319</sup> which could have served to lay out strategies for mitigating these threats.

The Ramsar Convention treaty body (Conference of the Parties) has the power to make

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<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid.*, p. 231.

<sup>312</sup> *Ibid.*

<sup>313</sup> Ramsar Convention, article 3(2).

<sup>314</sup> Draft Principle 5, provisionally adopted by the Commission in 2016 reads: “States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.” International Law Commission, Report on its Sixty-Eighth Session, para 188.

<sup>315</sup> Sjöstedt (2016), p. 231.

<sup>316</sup> The Annotated Ramsar List: Nigeria (2010) available online at <http://ramsar.org>, accessed 30 April 2017.

<sup>317</sup> Information provided by national focal point Ndaman Shehu at the Department of Forestry in email to author on 19 April 2017.

<sup>318</sup> *Ibid.*

<sup>319</sup> *Ibid.*

recommendations that the parties must take into consideration.<sup>320</sup> This opens up for the treaty body to make recommendations to Nigeria on how best to protect its wetland environments during conflict. However, it might be difficult for the treaty body to pinpoint the exact needs for conservation efforts in the Niger Delta, since the impact of armed conflict on wetlands is currently not identified as a threat within the treaty system. In the national reports filled out by governments, Nigeria makes no mention of the conflict in the Niger Delta region as a potential threat to the wetlands.<sup>321</sup> This is most likely because the questionnaire does not ask about it, since the Nigerian national focal point of the Convention has confirmed that militancy and oil spills constitute the most pressing threats to both sites.<sup>322</sup> By not specifically recognizing armed conflict as a threat to wetland environments, the treaty body has less specific information on which to base its decision on whether or not to make a recommendation, and what such a recommendation should consist in.

The application of an environmental treaty is made more difficult in a state where institutional systems are affected by both armed conflict and corruption.<sup>323</sup> Sjöstedt points out that armed conflict often brings with it “inadequate infrastructure and non-functional state organs” obstructing even a minimum level of environmental protection.<sup>324</sup> This is where a treaty such as the Ramsar Convention becomes particularly useful. The treaty structure could help reinforce the weak institutions, as well as involve other actors in the conservation work. State involvement can be limited, while relying more heavily on “other treaty bodies, UN agencies, non-governmental organisations, or private enterprises”.<sup>325</sup> The Ramsar Convention could offer remediate measures by acting as a platform for projects to improve the environmental quality, provide funding, and organize education for the purposes of improving conservation methods for wetlands that have been negatively affected by oil spills connected to the conflict in the Niger Delta. Such supportive measures could be carried out during an armed conflict as well as after the cessation of hostilities.<sup>326</sup>

Today, only around 550 km<sup>2</sup> is protected by the Convention, which represents less than

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<sup>320</sup> Ramsar Convention, articles 6(2)(d), (f) and 6(3).

<sup>321</sup> Nigeria National Report on the Implementation of the Ramsar Convention on Wetlands submitted to the 12<sup>th</sup> Meeting of the Conference of the Contracting Parties, Uruguay, 2015. Available at [http://www.ramsar.org/sites/default/files/documents/2014/national-reports/COP12/cop12\\_nr\\_nigeria.pdf](http://www.ramsar.org/sites/default/files/documents/2014/national-reports/COP12/cop12_nr_nigeria.pdf).

<sup>322</sup> Ndaman Shehu in email to author.

<sup>323</sup> The 2016 index from Transparency International puts Nigeria at shared place 136 out of 176 states, and rates Nigeria 28 on a scale where 1 is highly corrupt and 100 is very clean. Information retrieved from [http://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](http://www.transparency.org/news/feature/corruption_perceptions_index_2016), accessed 30 April 2017.

<sup>324</sup> Sjöstedt (2016), p. 267.

<sup>325</sup> *Ibid.*, pp. 267f.

<sup>326</sup> *Ibid.*, p. 268.

1 % of the total Niger Delta area of 70,000 km<sup>2</sup>, and implementation seems to be progressing somewhat slowly.<sup>327</sup> Regarding a possible expansion of areas protected by the Ramsar Convention, the Department of Forestry states that all of Ogoniland, a region located in Rivers state, is considered for designation as a site.<sup>328</sup> This is in line with a UNEP report, which concludes that oil spills have had a detrimental effect on the environment in the Ogoniland region.<sup>329</sup> Moreover, neither one of the wetlands in the Delta region is inscribed on the Montreux Record over wetlands where “changes in ecological character have occurred, are occurring or are likely to occur”.<sup>330</sup> As a consequence, the Ramsar Advisory Mission, capable of assisting parties with management and conservation of wetlands where the ecological character is threatened, is currently not concerned with either of the Niger Delta sites.<sup>331</sup> While the Conference of the Parties has the potential to step in and make recommendations more useful to further the conservation of Upper Orashi Forests and Apoi Creek Forests, to date, it has not. However, it should also be considered that there are few sanctions for a state party which does not accept the recommendations of an MEA treaty body.<sup>332</sup>

The breach of a multilateral treaty could generate consequences under the law of treaties. Under the Ramsar Convention, Nigeria is obligated to implement a plan for the conservation of designated wetlands, as well as staying informed of any actual or likely changes in ecological character and passing such information on to the Convention secretariat.<sup>333</sup> It is possible to question whether Nigeria is currently fulfilling these obligations. The latest report made to the Ramsar secretariat shows that a national wetlands policy or equivalent instrument is not yet being implemented and the ecological status of the Ramsar sites has not been updated since 2008.<sup>334</sup> Under article 60(3)(b) of the VCLT, a breach of a provision which is essential to the accomplishment of the object or purpose of a treaty constitutes a material breach, giving rise to possibilities for other parties to suspend or terminate the treaty under article 60(2) of the

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<sup>327</sup> According to Ndaman Shehu in email to author, there is no management plan in place for either Upper Orashi Forests or Apoi Creek Forests, both Ramsar sites since 2008, due to a lack of funding. The last update in the Ramsar Information Service was done on their date of designation, 30 April 2008, see [https://rsis.ramsar.org/ris-search/?f\[0\]=regionCountry\\_en\\_ss%3ANigeria](https://rsis.ramsar.org/ris-search/?f[0]=regionCountry_en_ss%3ANigeria), accessed 6 May 2017.

<sup>328</sup> Ndaman Shehu in email to author.

<sup>329</sup> UNEP (2011), pp. 9f.

<sup>330</sup> The Montreux Record is available at: [http://archive.ramsar.org/cda/en/ramsar-documents-montreux-montreux-record/main/ramsar/1-31-118^20972\\_4000\\_0](http://archive.ramsar.org/cda/en/ramsar-documents-montreux-montreux-record/main/ramsar/1-31-118^20972_4000_0), accessed 6 May 2017.

<sup>331</sup> Applications of the Ramsar Advisory Mission, available at: [http://archive.ramsar.org/cda/en/ramsar-documents-rams/main/ramsar/1-31-112\\_4000\\_0](http://archive.ramsar.org/cda/en/ramsar-documents-rams/main/ramsar/1-31-112_4000_0), accessed 6 May 2017.

<sup>332</sup> Sjöstedt (2016), p. 268.

<sup>333</sup> Ramsar Convention, articles 3, 4(1) and (4).

<sup>334</sup> Nigeria National Report on the Implementation of the Ramsar Convention on Wetlands submitted to the 12<sup>th</sup> Meeting of the Conference of the Contracting Parties, question 1.3.1; Annotated Ramsar List: Nigeria (2010) available online at <http://ramsar.org>.

VCLT. However, considering that the aim of the Ramsar Convention is to further the protection of wetlands, such actions do not seem productive. Cutting off a state that is struggling with conservation efforts, due to both internal conflict and a lack of funding, from the Ramsar treaty system does not promote the furtherance of environmental protection. In line with this consideration, the Convention is characterized by a spirit of cooperation; trust is placed in each party striving to eventually reach the goals.<sup>335</sup> Measures under the law of treaties therefore do not appear to provide any remedies for environmental damage.

The breach of an obligation under an MEA could also lead to state responsibility. For this to be an available remedy, damage most often needs to be of a transboundary nature. Compensation can be sought by an injured state,<sup>336</sup> and for obvious reasons, the injured state cannot be the same as the state at fault. However, the situation where an obligation is owed to a group of states and aims to protect a collective interest of this group, constitutes an important exception,<sup>337</sup> sometimes referred to as obligations *erga omnes partes*. Goodwin has argued that an obligation under the World Heritage Convention applies *erga omnes partes* based on the emphasis that the preamble puts on the international importance of protecting world heritage sites.<sup>338</sup> A similar line of reasoning could be applied to the Ramsar Convention. The preamble of the Convention considers “the fundamental ecological functions of wetlands” the loss of which “would be irreplaceable” and considers that waterfowl constitute “an international resource”.<sup>339</sup> Using this line of reasoning, any of the other parties could invoke state responsibility against Nigeria for breaching its obligations under the Convention. However, it is doubtful whether this is a useful way forward in terms of providing remedies for environmental damage. As Goodwin argues, even if it is possible for another state party to invoke state responsibility, reparations for loss of cultural heritage in such a case are “highly likely to amount simply to an acknowledgement of the breach coupled with an apology and assurances as to future conduct”.<sup>340</sup> Here, an analogy can be made between cultural heritage and ecological values. In any case, seeking to establish state responsibility does not seem

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<sup>335</sup> Nigeria National Report on the Implementation of the Ramsar Convention on Wetlands submitted to the 12<sup>th</sup> Meeting of the Conference of the Contracting Parties. See question 1.3.1 on whether the states have a national wetland policy in place offers the option “In preparation” and question 1.3.5 on whether amendments to national legislation has been made to reflect Ramsar commitments offers the option “Planned”.

<sup>336</sup> ILCDA, article 42.

<sup>337</sup> *Ibid.*, article 48(a).

<sup>338</sup> E. J. Goodwin, “The Consequences of Deleting World Heritage Sites”, 21:2 *King’s Law Journal* (2010), pp. 283–309, at p. 303.

<sup>339</sup> Ramsar Convention, preambular paras 2, 4 and 5.

<sup>340</sup> Goodwin, p. 304.

fruitful in the case at hand, especially since the reason for slow implementation of the Ramsar Convention in Nigeria has been said to result at least in part from a lack of funding.<sup>341</sup>

### 3.4.3 *The Abidjan Convention*

Nigeria is also a party to the Abidjan Convention, a treaty aiming *inter alia* to stem oil pollution of the seas in the West and Central African region. The treaty covers “the marine environment, coastal zones and related inland waters” of the contracting parties, making it applicable to the inland waters of the Niger Delta as well as the coastal areas where the river Niger has its outlets.

Like the Ramsar Convention, the Abidjan Convention contains few specific obligations. The Convention does, however, contain a provision which obligates the parties to “take all appropriate measures (...) to prevent, reduce, combat and control pollution of the Convention area and to ensure sound environmental management of natural resources (...) in accordance with their capabilities”.<sup>342</sup> With consideration to the implementation and enforcement of environmental laws in Nigeria, it can be questioned whether this obligation is currently met:

The enforcement of environmental laws, especially those that deal with wetland areas, remains poor since most of the violators are hardly caught, prosecuted or punished. Despite massive and continuous degradation of wetlands, by individuals and corporate entities, there is hardly any record of anybody serving punishment for violating environmental standards in wetlands in Nigeria.<sup>343</sup>

The measures available under the law of treaties, considered above, show that suspension or termination of the treaty will not provide useful remedies. As with the Ramsar Convention, it is of interest to consider whether this obligation is applicable *erga omnes partes*. While the preamble of the Convention recognizes the “economic, social and health value of the marine environment” and the responsibility of the parties to “preserve their natural heritage”,<sup>344</sup> it does not refer to these values as a collective interest of the contracting parties. However, Cardesa-Salzman argues that global environmental goods protected in an MEA, such as the marine and coastal environment of a geographical region, are implicitly regarded to be of common concern

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<sup>341</sup> Ndaman Shehu in email to author; Nigeria National Report on the Implementation of the Ramsar Convention on Wetlands submitted to the 12<sup>th</sup> Meeting of the Conference of the Contracting Parties, in which very limited financial resources is stated as one of the five greatest difficulties Nigeria has had in implementing the Convention.

<sup>342</sup> The Convention for Cooperation in the Protection, Management and Development of the Marine and Coastal Environment of the Atlantic Coast of the West, Central and Southern Africa Region (adopted 23 March 1981, entered into force 5 August 1984) 20 ILM 729 (Abidjan Convention), article 4.

<sup>343</sup> Adekola et al., pp. 665f.

<sup>344</sup> Abidjan Convention, preambular paras 1 and 2.

to the parties.<sup>345</sup> As such, it is arguable that the obligation under article 4 of the Abidjan Convention could be used as a basis for invoking state responsibility, *erga omnes partes*. The obligation is flexible, as it allows parties to identify the appropriate measures and obligates them only as far as their capabilities permit. As such, this obligation allows for an application which does not counter to the law of armed conflict, which should be applied as *lex specialis* during time periods when the unrest in the Niger Delta reaches the threshold requirement of a non-international armed conflict. However, as previously identified, this flexibility is also what might render it difficult to establish a breach which gives rise to state responsibility.

Considering the remedies available within the framework of the Convention, the meeting of the contracting parties has the ability to make recommendations, but unlike the Ramsar Convention, there is no mention that these recommendations must be taken into account by the parties.<sup>346</sup> The meeting of the contracting parties also has the competence to establish working groups related to any matters concerning the Convention and to establish co-operative activities to be undertaken within the framework of the Convention.<sup>347</sup> Hence, there is potential for establishing a working group or another form of co-operative activity within the framework of the Convention to support the Nigerian state in dealing with the pollution in the Niger Delta.

A meeting of the contracting parties was held in March 2017. At the conference, the parties approved the drafting of an additional protocol on sustainable mangrove management and encouraged a meeting for its adoption to take place as soon as possible.<sup>348</sup> The draft protocol aims to establish modalities for environmental protection of mangrove ecosystems and includes identification and mapping of degraded sites as well as development of techniques and cooperation for their restoration and rehabilitation.<sup>349</sup> The implementation of this protocol, if adopted by Nigeria, could improve the environmental protection of the wetland areas in the Niger Delta, where mangrove ecosystems are currently heavily impacted by oil pollution.<sup>350</sup>

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<sup>345</sup> A. Cardesa-Salzmänn, “Constitutionalising Secondary Rules in Global Environmental Regimes: Non-Compliance Procedures and the Enforcement of Multilateral Environmental Agreements”, 24:1 *Journal of Environmental Law* (2011), pp. 103–132, at p. 104.

<sup>346</sup> Abidjan Convention, article 17.

<sup>347</sup> *Ibid.*

<sup>348</sup> Twelfth meeting of the Contracting Parties to the Abidjan Convention (27 March to 31 March 2017), Draft Decisions, UN Environment (Ecosystems Division)/ABC-WACAF/COP.12/6, 27 March 2017, Draft decision CP12/5.

<sup>349</sup> Twelfth meeting of the Contracting Parties to the Abidjan Convention (27 March to 31 March 2017), Draft Additional Protocol to the Abidjan Convention on Sustainable Mangrove Management, UN Environment (Ecosystems Division)/ABC-WACAF/COP.12/9, 27 March 2017, articles 6(ii), 8(iii), (vi), and 9.

<sup>350</sup> Okonkwo et al., p. 454.

### 3.5 Concluding the Case

Several scholars who have delved into the environmental issues of the Niger Delta point to the natural resource-curse in the area: while it is hugely rich and provides the nation as well as multinational oil corporations with plentiful wealth, the local communities are becoming poorer and the environment is steadily becoming more degraded.<sup>351</sup> To this can be added that it is evident that the polluter(s) is not paying in a way that reflects environmental justice.

The actors most readily identified as the polluter in this situation are the armed groups conducting operations of sabotage and oil theft. The government cannot be said to exert enough control over these groups for responsibility under article 8 of the ILCDA to be actualized. Nevertheless, in times where the level of violence exceeds the threshold requirement for a non-international armed conflict, it is likely that their actions constitute breaches of both the principle of military distinction and that of proportionality. However, the constantly shifting nature of alliances within and between the groups speak against organization on a level where they are capable of taking over government or establishing their own state. Responsibility under article 10 of the ILCDA is therefore not likely to become applicable. Moreover, the unlikelihood that the Nigerian Federal Government will recognize these groups as possessing international personality makes exerting responsibility based on these rules an improbable path forward.

Apart from individual criminal responsibility, there are no legally binding norms of international law under which the multinational oil corporations could be held accountable. Theories on how to exert the equivalent of “state” responsibility from multinational companies therefore remain hypothetical and do not present viable alternatives for remedies. For local people affected by the environmental degradation, the possibility of suing an oil company in the domestic courts of their parent company means engaging in a long and difficult process. Despite recent success, there is no guarantee of displacing the principle against accepting claims relating to a foreign jurisdiction.<sup>352</sup> Thus, there are few measures available to hold multinational oil corporations accountable.

Holding the Nigerian state responsible for failing to correctly implement its obligations under the Ramsar Convention or the Abidjan Convention on its own territory could be possible for other parties to these treaties since both Conventions contain obligations which arguably apply *erga omnes partes*. However, it is questionable both whether such an alternative is a fruitful remedy in terms of offering actual environmental remedies and whether a breach of the

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<sup>351</sup> See, *inter alia*, Ojakorotu and Okeke-Uzodike, p. 86; Eke, pp. 136f; Burdin Asuni p. 6; Courson, p. 1.

<sup>352</sup> Ong, p. 161.

obligations, which are vaguely phrased, can be established. In this case, resorting to measures of suspending or terminating an MEA under the law of treaties does not offer any useful remedies. For a state struggling with conservation efforts due to both internal conflict and a lack of funding to be cut off from the system does not promote the furtherance of environmental restoration.

Restoration, through local environmental and development projects, could be a better way forward for the environment itself as well as benefit a broader spectrum of local population. Working through the frameworks of the Ramsar Convention and the Abidjan Convention offers important opportunities which are currently not being utilized to the fullest. While the Conference of the Parties under the Ramsar Convention has the potential to step in and make recommendations more useful to further the conservation of Upper Orashi Forests and Apoi Creek Forests, to date, it has not. It is notable that by not specifically recognizing armed conflict as a threat to wetland environments, the treaty body has less specific information on which to base its decision on whether or not to make a recommendation, and what such a recommendation should consist in. There is also a need for allocating more sites in the Niger Delta as protected zones under the Ramsar Convention. Better monitoring and data-collection of the status of the sites would also have to be carried out in order to determine what measures are most suitable to enhance their protection. If such measures are successfully put in place, they have the potential of mitigating the damage done to the Niger Delta through oil spills occurring in the ongoing conflict.



## 4. In Conclusion

### 4.1 Concluding Analysis

This section will use the findings of the case studies to evaluate the compatibility of available remedies with the polluter pays principle, understood to incorporate considerations of corrective, distributive and procedural justice. The analysis will be done in four steps. First, I will consider whether compensation under the law of state responsibility based on a breach of the law of armed conflict is achievable in the cases. Second, whether it is achievable based on a breach of the applicable MEAs. Third, an evaluation of how well the remedy of compensation under the law of state responsibility reflects the polluter pays principle will be done. Lastly, the extent to which alternative remedies provided by the MEAs reflect the polluter pays principle will be evaluated.

#### *4.1.1 Basing State Responsibility on the Law of Armed Conflict*

Even in the “most likely” case – the bombing of the tanks at Jiyeh power station – the availability of remedies under the law of state responsibility does not reflect the polluter pays principle to any significant extent. Notably, the examined rules for environmental protection available under the law of armed conflict are vague, and tend to set high demands for establishing a breach. As long as this is true of the material rules, although theoretically possible, the law of state responsibility will seldom be resorted to.

In a non-international armed conflict, such as the unrest in the Niger Delta, few rules protecting the environment in armed conflict are applicable. The general principles of the law of armed conflict apply to armed groups waging war in a non-international armed conflict, but the regime they are opposing is often reluctant to see such groups as legitimate actors of international law, thus rendering compensation under the law of state responsibility an unlikely remedy to achieve. Out of the rules of the law of armed conflict examined in the case studies above, the general principles of distinction, proportionality and necessity were the most useful in the context of protecting the environment in armed conflict. This is because they apply in situations of non-ratification of Additional Protocol I as well as in non-international armed conflict. Perhaps more importantly, they do not set the both high and vague threshold that environmental damage has to be widespread, long-term and severe in order to be prohibited.<sup>353</sup>

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<sup>353</sup> The reader recalls that this threshold is found in articles 35(3) and 55(1) of Additional Protocol I, as well as in the customary rule prohibiting excessive environmental damage, as encompassed in the ICRC Customary Law

#### *4.1.2 Basing State Responsibility on Applicable MEAs*

As was seen in the case study on the Niger Delta, holding a state responsible for failing to implement obligations under an MEA resulting in damage on the state's own territory is possible if the obligations apply *erga omnes partes*. Other parties to both the Barcelona Convention and the Abidjan Convention could resort to remedies under state responsibility since both Conventions contain obligations that arguably apply *erga omnes partes*. However, it is questionable both whether such an alternative is a fruitful remedy in terms of offering actual environmental protection and whether a breach of the obligations, which are vaguely phrased, can be actually be established. The difficulty in basing state responsibility on MEAs is primarily due to their general nature and lack of concrete obligations.

The case study on the Jiyeh power station shows that a breach of a provision, resulting in harm to another state party, could in theory lead to state responsibility. However, the law of armed conflict applies as *lex specialis*. This means that where an obligation under a treaty provision obligates the parties to mitigate pollution, the law of armed conflict allows for proportionate collateral environmental damage in pursuit of legitimate military objectives. Not mitigating pollution caused by a military operation beyond the level required by the law of armed conflict can in such a case hardly be considered a breach of the treaty provision.

Both the Barcelona Convention and the Abidjan Convention make references to the polluter pays principle, but their application in these cases do not give rise to remedies that reflect the principle in a satisfactory way. However, it should be recognized that the framework of the treaties is aimed at fostering long-term cooperation between the parties, rather than setting out rules based on which the parties can claim liability from one another.

#### *4.1.3 Does the Remedy of Compensation Under the Law of State Responsibility Reflect the Polluter Pays Principle?*

Through the remedy of compensation under the law of state responsibility, there is a potential of exerting corrective justice; the faulting state can be made to compensate the injured state. In the sense of corrective justice, the use of compensation as a remedy under the state responsibility regime reflects the polluter pays principle. However, in terms of distributive and procedural justice, the law of state responsibility can be problematic.

Seen from the perspective of distributive justice, the polluter pays principle ought to

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Study, rule 45.

ensure, to the highest extent possible, that an equally high quality of environment is enjoyed between states, as well as within the state that has been injured. At the very least, it should not promote further injustice. However, compensation poses some fundamental difficulties when considering the distributive justice perspective, both on an international and a domestic level. On an international level, it can be considered unfair to be able to pay one's way out of having caused environmental damage in another state. There is a risk of this coming to mean that once compensation is awarded, damage that goes un-remediated or is irreparable will be considered acceptable. For instance, UNDP considers that the severe effect of sunken oil caused on the benthic ecosystem close to Jiyeh Power Station "may well be irreversible in nature".<sup>354</sup> On a domestic level, the risk of corruption in the state receiving the compensation has to be considered. A high level of corruption could mean there is a risk that compensation does not reach the activities seeking to remediate environmental damage. Transparency International considers the corruption in Lebanon to be high.<sup>355</sup> Even in a state where corruption is lower, the local population in damaged areas who have less resources and rely on fishing, farming or tourism for their livelihood run the risk of not benefitting from the payments to an extent where their damage is fully mitigated. Since more than a decade has passed since the damage occurred in the case of the Jiyeh power station, restoration measures have already been taken. It is the costs of these efforts that can be covered by compensation from the injuring state. A fair application of state responsibility, would therefore rely on the Lebanese government distributing the compensation between actors who have sustained costs in carrying out clean-up measures, local population who have suffered losses from environmental damage, and measures aiming to restore the environment to the extent that it has not already been restored.

Further, the remedy of compensation presents a clear lack in procedural justice in two ways. First, since the process is state-centered, there is a lack of access to justice for individuals or communities whom have suffered environmental damage. They have to rely on their government to take measures to ensure that remedies reach affected areas and individuals. Moreover, a state-centered process might lead to the environment being viewed simply as property, which the state can chose to restore or not to restore. Second, it is excessively difficult to prove a breach of material rules that are so vague, resulting in a lack of justice for a state seeking to claim damages. Vagueness of obligations of environmental protection is

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<sup>354</sup> UNDP (2007), p. xv.

<sup>355</sup> The 2016 index from Transparency International puts Lebanon at shared place 136 out of 176 states, and rates Lebanon 28 on a scale where 1 is highly corrupt and 100 is very clean. Information retrieved from [http://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](http://www.transparency.org/news/feature/corruption_perceptions_index_2016), accessed 30 April 2017.

characteristic both for the law of armed conflict provisions and for the MEAs investigated in this thesis. However, while all states are sovereign and equal in theory, procedural justice between states cannot be considered a reality in other instances either. The example of the UN Security Council condemnation of Iraq's illegal invasion of Kuwait in the 1990–91 Gulf War can be seen as an indicator that environmental damage committed by a state without close allies within the five permanent members of the Council will more readily be the subject of liability than other such damage.<sup>356</sup>

#### *4.1.4 Do Alternative Remedies Provided by Applicable MEAs Reflect the Polluter Pays*

##### *Principle?*

The measures which were provided through the Barcelona Convention after the Jiyeh power plant oil spill are useful from the point of view of ensuring actual remediation of the environment. In practice, this works to provide an equal distribution of a clean environment – or at least to prevent enhanced inequality. In fact, the most effective way of achieving distributive justice might not be for responsibility to take the form of monetary compensation to the state or to individuals. Restoration, through local environmental and development projects, could be a better way forward for the environment itself as well as benefit a broader spectrum of local population. This can work to ensure a greater degree of distributive justice, since restoration will actually take place, something monetary compensation through state liability does not guarantee. Such an approach works to ensure that the unfair distribution of a clean environment is not enhanced. When considering the situation in the Niger Delta, working through the framework of the Ramsar Convention and the Abidjan Convention offer important opportunities which are currently not being utilized to the fullest.

A drawback which these remedies present is the lack of corrective justice exerted. In the case of Lebanon corrective justice is manifestly lacking since the costs of the clean-up are not born by Israel, but rather by the government, assisting states, and international organizations. In the case of the Niger Delta, neither the armed groups, the oil companies nor the government is made to pay for the pollution if relying on external organizations through the Ramsar Convention or the Abidjan Convention to ensure environmental protection during armed conflict. In order to achieve a higher degree of compatibility with the polluter pays principle, programs could be envisaged where former militants are educated to work with

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<sup>356</sup> UN Security Council Resolution 687, UN Doc. S/RES/687, 3 April 1991.

environmental restoration. This could be beneficial in preventing future damage as well, considering that unemployment has been identified as one of the reasons for why rebels take to arm.<sup>357</sup> A role for multinational oil corporations in such a solution could also be envisaged. Here, payment of the polluter could be achieved through their sponsoring of programs under the Ramsar Convention or Abidjan Convention. This is especially relevant given that the Department of Forestry states that the reason for not having management plans in place for the current Ramsar sites is a lack of funding.

It has been suggested that MEAs can serve to fill some of the normative gap presented by protection under the law of armed conflict. On their own, however, they do not present remedies that fully reflect the polluter pays principle. Below, an alternative approach which combines protection under MEAs that designate protected zones and compensation under the law of state responsibility, will be considered.

## 4.2 Going Forward

The following section will provide two suggestions for enhancing the compatibility of remedies for environmental damage caused in armed conflict with the polluter pays principle: combining protection under MEAs with state responsibility and building on the approach of the UN Compensation Commission. This section will also provide suggestions for further research on the topic.

### *4.2.1 Combining Protection under MEAs with State Responsibility*

While neither system of remedies is capable of fully reflecting the polluter pays principle on its own, it is possible that a combination of remedies under MEAs and state responsibility can be fruitful. The use of state responsibility primarily has the potential to ensure corrective justice between states. Remedial measures available coordinated within the framework of an MEA can step in to ensure greater distributive environmental justice. This also works in favor of the environment *per se* and for individuals who have been affected by degraded environment in their near surroundings. Rather than a sum of money being paid to a government, compensation can be directed towards clean-up measures orchestrated within the framework of an MEA.

The combination of MEAs and state responsibility offer further interesting solutions. Hulme argues that designation of protected zones coupled with the obligation set out to care for

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<sup>357</sup> Okonofua, pp. 11f.

the environment in article 55(1) of the Additional Protocol I offers an effective protection of the environment in armed conflict.<sup>358</sup> Arguably, the same applies to the customary rule requiring due regard to be paid to the environment in military operations. If due regard is to be paid to the environment when planning an attack, the fact that an area is designated as a protected zone under an MEA which continues to apply in wartime should be considered in the process. In order to ensure that remedies can be attached to this, a more concrete rule prohibiting or limiting the targeting of protected zones is preferable. In the International Law Commission project on Protection of the Environment in Relation to Armed Conflicts, provisionally adopted draft principle 13 reads: “An area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective.”<sup>359</sup> To the extent that such a provision is included in multilateral treaties, or evolves to form part of customary international law, this system of rules could work to ensure that the remedy of compensation under the law of state responsibility is more available. A military operation causing damage to a protected zone that does not contain a military objective can then more readily be established as an internationally wrongful act, giving rise to state responsibility.

#### 4.2.2 *The Example of the UN Compensation Commission*

When it comes to quantifying environmental damage, the UN Compensation Commission, established after the 1990–91 Gulf War, sets an important precedent.<sup>360</sup> The Commission represents the only time, to date, that state responsibility has regulated environmental damage caused in war. Here, some reflections on the work of the UN Compensation Commission will serve to seek an understanding of state responsibility which better coheres with the polluter pays principle informed by environmental justice theory.

The UN Compensation Commission was established pursuant to Security Council Resolution 687, holding Iraq liable for *inter alia* environmental damage.<sup>361</sup> The Governing Council established that for the purposes of the Commission, environmental damage entailed:

losses or expenses resulting from abatement and prevention of environmental damage [...] reasonable measures already taken to clean and restore the environment [...] reasonable

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<sup>358</sup> Hulme, pp. 677f.

<sup>359</sup> International Law Commission, Report on its Sixty-Eighth Session, para 188.

<sup>360</sup> R. Costanza, “Liability for Environmental Damages: Toward Principles of Sustainable Governance” in C. Payne and P. H. Sand (eds.), *Gulf War Reparations and the UN Compensation Commission: Environmental Liability*, electronic ed. (Oxford University Press, 2011), pp. 258–264, at p. 258.

<sup>361</sup> UN Security Council Resolution 687, paras 16, 18 and 19.

monitoring and assessment of environmental damage for the purpose of evaluating and abating the harm and restoring the environment.<sup>362</sup>

States and international organizations were entitled to make claims for environmental damage under these criteria to the so-called F4 Panel. The F4 claims made included both environmental damage and depletion of natural resources done to states in the region of the conflict, as well as claims from states that had incurred costs when providing assistance seeking to mitigate the damage.<sup>363</sup> The final sum awarded for environmental claims was US \$5.26 billion.<sup>364</sup> This included claims for expenses for monitoring and assessment projects, measures that were taken during or immediately after the conflict, reasonable future measures to be taken to clean and restore the environment, and claims for public health, loss, or depletion of natural resources and loss of cultural heritage.<sup>365</sup>

Caron argues that the foundation of environmental claims differs from other claims, such as claims for damaged property.<sup>366</sup> This is not to say that there cannot be claims related to damage of property because of environmental disruption on that property.<sup>367</sup> What lies at the heart of the difference is the question of how the claims process concerns the environment *per se*, rather than the legal entity that “owns” the environment. If the state that is compensated for ecological damage does not use an awarded compensation to restore the environment, this question has not been satisfactorily resolved. The claim has then been treated as any other claim where property has been damaged, and not as an environmental claim.<sup>368</sup> Consideration of this question is reflected in how the F4 Panel strived towards ensuring that the damages awarded were used to restore the environment.<sup>369</sup>

Caron holds that in cases of environmental claims, the state should be viewed as an agent, acting for the environment, rather than as a principal, which owns the environment that has been damaged.<sup>370</sup> He demonstrates how the UN Compensation Commission can serve as

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<sup>362</sup> UN Compensation Commission, Governing Council Decision 7, UN Doc. S/AC.26/1991/7/Rev.1, 28 November 1991 (as revised 17 March 1992), para. 35.

<sup>363</sup> Sands et al., p. 722.

<sup>364</sup> Sand, p. 430.

<sup>365</sup> J. Klee, “The Process” in C. Payne and P. H. Sand (eds.), *Gulf War Reparations and the UN Compensation Commission: Environmental Liability*, electronic ed. (Oxford University Press, 2011), pp. 29–66, at p. 38.

<sup>366</sup> D. D. Caron, “The Profound Significance of the UNCC for the Environment” in C. Payne and P.H Sand (eds.), *Gulf War Reparations and the UN Compensation Commission: Environmental Liability*, electronic ed. (Oxford University Press, 2011), pp. 265–276, at pp. 267f.

<sup>367</sup> One such example is the *Trail Smelter* case. Provisions of the law of armed conflict which primarily aim to protect property can constitute useful indirect protection of the environment. See section 4.2.3 on suggested further research.

<sup>368</sup> Caron, p. 268.

<sup>369</sup> *Ibid.*

<sup>370</sup> *Ibid.*, pp. 268f.

an example to further such practice through its shifting of perspectives from the classic interstate point of view to one which focuses on the relevant communities and the environment that has been damaged.<sup>371</sup> Such a shift represents a possible way to ensure a greater degree of distributive justice within a state, since it works to actively ensure that restoration actually takes place. It can also lead to a greater degree of procedural justice, since the environment is treated as the principal in the case. Being treated as the principal, rather than a possession, could represent an increase in respect for the environment as a legal entity. If the environment, rather than the government, is viewed and treated as the principal of an environmental claim, the government cannot neglect to spend the money awarded on restoring the environment.<sup>372</sup> It could also mean that the actor representing the environment can be flexible, depending on the legal arena. One possible such actor is UNEP, which would “perhaps more naturally have an eco-systemic perspective encompassing several states”.<sup>373</sup> It should be pointed out that this perspective does not rule out that claims for compensation for market losses can be made as well: “a state could assert claims as both principal and agent – principal for its loss of legitimate use, agent for what it holds in trust for a broader community.”<sup>374</sup> Another benefit of this shift in perspective is that it can serve to bring more attention to the claims that are based on “foundational, long-term and often yet unknown damage”, rather than those based only on market interest.<sup>375</sup> Additionally, the shift in perspective can offer guidance in prioritizing claims. The clean-up of an area which is critical from an ecological perspective may cost the same as the clean-up of a less critical area. Considering the environment as the relevant agent provides a tool for prioritizing a critical area over a less critical one.<sup>376</sup>

One aspect which speaks against using the Compensation Commission as a future model for handling reparations for environmental damage is that it dealt mostly with non-environmental claims. In fact, 90 % of the roughly US \$52 billion awarded in total by the Commission concerned other types of claims.<sup>377</sup> Another limit to its precedential value is that there was no need for the Commission to find liability on the part of Iraq. It had already been determined by UN Security Council resolution 687 and unequivocally accepted by Iraq, as part of the ceasefire agreement, that Iraq was liable for “any direct loss, damage, including

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<sup>371</sup> *Ibid.*, p. 275.

<sup>372</sup> *Ibid.*, p. 270.

<sup>373</sup> *Ibid.*, p. 271.

<sup>374</sup> *Ibid.*, p. 270.

<sup>375</sup> *Ibid.*, p. 272.

<sup>376</sup> *Ibid.*

<sup>377</sup> Sand, p. 430.



environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations.”<sup>378</sup>

Despite these concerns, the work of the panel is undeniably beneficial in two ways. First, as pointed out by Shelton and Cutting, the methods used to estimate environmental damage can be used in future cases of state responsibility for environmental damage, regardless of the rule breached giving rise to liability.<sup>379</sup> Second, the panel saw its work as responding to “the common concern for the protection and conservation of the environment”, entailing obligations “toward the international community and future generations”.<sup>380</sup> As outlined above, this provides a useful shift in perspective towards viewing the state as an agent acting on behalf of the environment, something which could serve to ensure a fuller reflection of the polluter pays principle in cases of state responsibility for environmental damage.

#### *4.2.3 Suggestions for Further Research*

There are various legal instruments that set out the rights of people to live in a healthy environment. Such provisions aimed at protecting human rights can serve to provide indirect protection of the environment in armed conflicts. In fact, estimations show that more than half of UN Member states have adopted constitutional environmental guarantees, such as the right to a certain quality of environment.<sup>381</sup> Concern for the quality of environment in which humans live is also reflected in article 54 of Additional Protocol I and article 14 of Additional Protocol II, which prohibit damage to the natural environment that is indispensable for the survival of the local population.

The African Charter of Human and Peoples’ Rights provides that “[a]ll peoples shall have the right to a general satisfactory environment favorable to their development”.<sup>382</sup> In addition, the African Commission has stated that even in a situation of civil war, derogations from the rights in the Charter are not permitted.<sup>383</sup> In *Social and Economic Rights Centre (SERAC) v. Nigeria* the African Commission found the Nigerian Federal Government responsible for violations of the right to a healthy environment under the Charter due to the

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<sup>378</sup> UN Security Council Resolution 687, para 16.

<sup>379</sup> Shelton and Cutting, p. 241. It should be pointed out here that responsibility in the case of the Gulf War was based on Iraq’s breach of article 2(4) of the UN Charter. Iraq is not a party to Additional Protocol I or to the ENMOD Convention and there is disagreement between scholars on whether either instrument would have applied, due to their narrow scope of application. See Sjöstedt (2016), p. 70.

<sup>380</sup> Sand, p. 431.

<sup>381</sup> Shelton and Cutting, p. 230.

<sup>382</sup> African Charter, article 24.

<sup>383</sup> Shelton and Cutting, pp. 235f.

military activities in the Niger Delta.<sup>384</sup> The right to a healthy environment under article 24 of the African Charter is clearly of great interest to further studies on remedies for environmental damage in the region.

As touched upon in section 1.3, environmental justice theory has been used in ways to point out inequalities between different groups of people concerning the quality of the environment in which they live. The theory of environmental justice applied in this thesis is therefore particularly well suited for further research on this topic. Therefore, a possible area for further research could be to ask to what extent provisions aiming to protect human rights contribute to finding remedies that reflect the polluter pays principle and provide environmental justice. Special consideration could then be taken to the possible tensions between compensating for economic loss of humans and compensating pure ecological damage.

An additional such area is the protection offered by provisions primarily aiming to protect property or cultural property during armed conflict. Scholars have considered the potential of such provisions to provide indirect protection to the environment.<sup>385</sup> Such provisions are especially interesting in relation to state responsibility and the polluter pays principle, since there is relatively well-developed case law on liability for environmental property damage.<sup>386</sup> Both the protection of property and human rights in relation to environmental protection in armed conflict have also been addressed in the reports prepared on the topic Protection of the Environment in Relation to Armed Conflicts in the International Law Commission.<sup>387</sup>

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<sup>384</sup> *Social and Economic Rights Centre (SERAC) v. Nigeria*, Decision, Case No. 155/96, African Commission on Human Rights, 27 October 2001.

<sup>385</sup> A discussion relating to the obligation not to destroy enemy property is found in L. Low and D. Hodgkinson, "Compensation for Wartime Environmental Damage: Challenges to International Law After the Gulf War", 35 *Virginia Journal of International Law* (1994–1995), pp. 405–483, at pp. 434–441. For a discussion on rules relating to cultural property offering indirect protection to the environment, see Sjöstedt (2016) on pp. 173–176.

<sup>386</sup> See, for instance, the overview provided by Special Rapporteur M.G. Jacobsson, paras 17 and 195–205.

<sup>387</sup> *Ibid.* See also paras 121–129 on the rights of indigenous peoples, an area of law where environmental protection is closely connected to human rights.

## 5. Annex



Figure 1. Map adapted from UNEP (2007) showing the maximum oil extent of the spill resulting from the bombing of the storage tanks at Jiyeh electrical power plant in 2006.

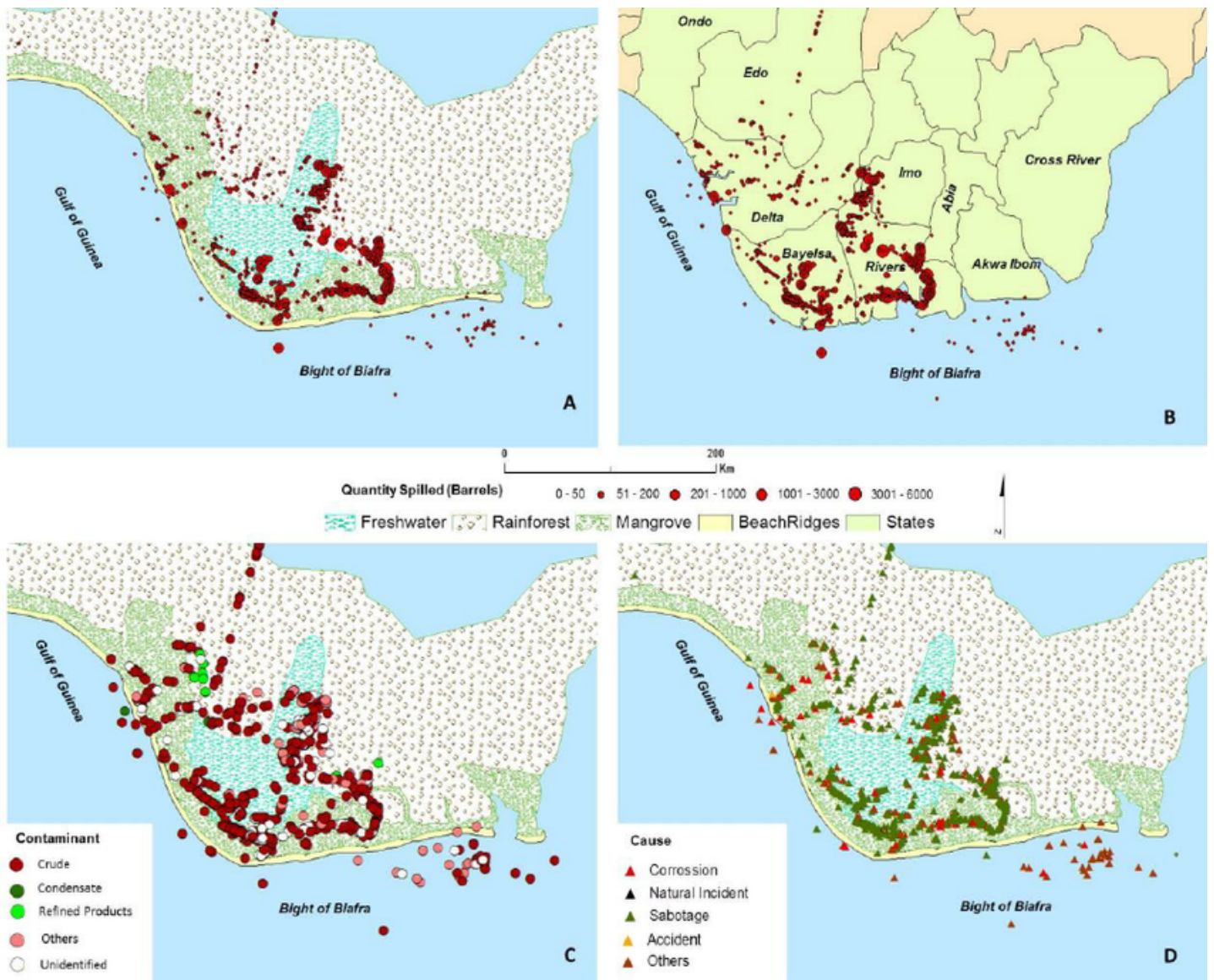


Figure 2. Four maps adapted from Anejionu et al. (2015) depicting the distribution of oil spill incidents in the Niger Delta between January 2013 and November 2014. (A) Distribution of spills in the major ecosystems. (B) Distribution spills across the Niger Delta states. (C) Distribution of the different contaminants. (D) Causes of the spills.

## 6. Sources

### International Treaties

Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 429 (Hague Convention IV)

Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter)

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT)

Convention on Wetlands of International Importance Especially as Waterfowl Habitat (adopted 2 February 1971, entered into force 21 December 1975) 996 UNTS 245 (Ramsar Convention)

Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (adopted 16 February 1976, entered into force 12 February 1978, amended 10 June 1995, amended version entered into force 9 July 2004) 1102 UNTS 27 (Barcelona Convention)

Convention for the Prohibition of Military or Other Hostile Use of Environmental Modification Techniques (adopted 10 December 1976, entered into force 5 October 1978) 1108 UNTS 151 (ENMOD Convention)

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of War Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I)

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of War Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II)

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 (and Protocols) (adopted 10 October 1980, entered into force 2 December 1983, amended 21 December 2001) 1342 UNTS 137 (Conventional Weapons Convention)

The Convention for Cooperation in the Protection, Management and Development of the Marine and Coastal Environment of the Atlantic Coast of the West, Central and Southern Africa Region (adopted 23 March 1981, entered into force 5 August 1984) 20 ILM 729 (Abidjan Convention)

African Charter of Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (African Charter)

ASEAN Agreement on the Conservation of Nature and Natural Resources (adopted 9 July 1985)

Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Adopted 17

- November 1988, entered into force 16 November 1999) OAST No. 69, 28 ILM 161 (ESC Protocol)
- International Convention on Oil Pollution Preparedness, Response and Co-operation (adopted 30 November 1990, entered into force 13 May 1995) 1891 UNTS 51 (OPRC Convention)
- Convention on the Protection of the Alps (adopted 7 November 1991, entered into force 6 March 1995) 1917 UNTS 135 (Alpine Convention)
- ECE (adopted under the Council of Europe) Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 March 1992, entered into force 6 October 1996), 1936 UNTS 269 (Transboundary Watercourses and International Lakes Convention)
- Convention on the Protection of the Marine Environment of the Baltic Sea Area (adopted 9 April 1992, entered into force 17 January 2000) 2099 UNTS 197 (Helsinki Convention)
- ECE (adopted under Council of Europe) Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (adopted 21 June 1993) ILM 32, 1228 (Lugano Convention)
- Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90 (Rome Statute)
- Protocol on Preparedness, Response and Co-Operation to Pollution Incidents by Hazardous and Noxious Substances (adopted 15 March 2000, entered into force 14 June 2007) (OPRC Convention HNS Protocol)

## **National Legislation**

- Federal Environmental Protection Agency Act of 1988, Volume VIII Chapter 131, Laws of the Federation of Nigeria (1990)
- Oil Pipeline Act of 1990, Volume XIX Chapter 338, Laws of the Federation of Nigeria (1990)

## **Case Law**

- Chorzów Factory Case*, Judgment of 14 September 1928, PCIJ Series A, No. 17
- Trail Smelter Case United States/Canada*, Award of 11 March 1941, Reports of International Arbitral Awards, Volume III (1941) pp. 1905–1982
- Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment of 27 June 1986. I.C.J Reports 1986, p. 14
- Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J Reports 1996, p. 226
- Tadić* case, Decision on the Defense Motion for Interlocutory Appeal on jurisdiction, 2 October 1995, IT-94-I-AR72 (Appeals Chamber, ICTY)

*Social and Economic Rights Centre (SERAC) v. Nigeria*, Decision, Case No. 155/96, African Commission on Human Rights, 27 October 2001

*Akpan v. Royal Dutch Shell plc/SPDC (Nigeria)*, Judgment of 30 January 2013, LJN: BY9854, Rechtbank's-Gravenhage, C/09/337050/HA ZA 09-1580. An unofficial English translation is available at: <https://milieudedefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-akpan-vs-shell-oil-spill-ikot-ada-udo/view>, last accessed 9 May 2017

*Kiobel v. Royal Dutch Petroleum Co.*, Decision of 17 April 2013, 133 US Supreme Court. 1659

*The Bodo Community v. Shell Petroleum Development Company of Nigeria Ltd*, Judgment of 20 June 2014, [2014] EWHC 1973 (TCC)

## Literature

Adekola, O., S. Whanda and F. Ogwu, "Assessment of Policies and Legislation that Affect Management of Wetlands in Nigeria", 32 *Wetlands* (2012), pp. 665–677

Allen, F., *Implementation of Oil-Related Environmental Policy in Nigeria: Government Inertia and Conflict in the Niger Delta* (Diss. University of Kwazulu-Natal, 2010)

Anejionu, O., P-A., Ahiamammunnah and C. J. Nri-ezedi, "Hydrocarbon Pollution in the Niger Delta: Geographies of Impacts and Appraisal of Lapses in Extant Legal Framework", 45 *Resources Policy* (2015), pp. 65–77

Banfield, J., "From Fuelling Conflict to Oiling the Peace: Harnessing the Peace-Building Potential of Extractive-Sector Companies Operating in Conflict Zones" in R. Sullivan (ed.), *Business and Human rights: Dilemmas and Solutions* (Greenleaf, 2003) pp. 220–231

Benedict, A. O., "Tragedy of Commons: Analysis of Oil Spillage, Gas Flaring and Sustainable Development of the Niger Delta of Nigeria", 4:2 *Journal of Sustainable Development* (2011), pp. 200–210

Beyerlin, U., "Different Types of Norms in International Environmental Law: Policies, Principles and Rules" in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law*, electronic ed. (Oxford University Press, 2012) pp. 425–448

Bothe, M. "Customary International Humanitarian Law: Some Reflections on the ICRC Study", 8 *Yearbook of International Humanitarian Law* (2005), pp. 143–178

Boyle, A., Introductory Remarks at Panel on "International Law and the Liability for Catastrophic Environmental Damage", 105 *American Society of International Law Proceedings* (2011), pp. 423–427

Bugge, H.C., "The Polluter Pays Principle: Dilemmas of Justice in National and International Contexts" in J. Ebbesson and P. Okowa (eds.), *Environmental Law and Justice in Context* (Cambridge University Press, 2009), pp. 411–428

Bunker, A-L., "Protection of the Environment During Armed Conflict: One Gulf, Two Wars", 13:2 *Review of European Community & International Environmental Law* (2004), pp. 201–213

- Burdin Asuni, J., “Working Paper: Understanding the Armed Groups of the Niger Delta” (The Council on Foreign Relations, 2009)
- Cardesa-Salzman, A., “Constitutionalising Secondary Rules in Global Environmental Regimes: Non-Compliance Procedures and the Enforcement of Multilateral Environmental Agreements”, 24:1 *Journal of Environmental Law* (2011), pp. 103–132
- Caron, D. D., “The Profound Significance of the UNCC for the Environment” in C. Payne and P.H Sand (eds.), *Gulf War Reparations and the UN Compensation Commission: Environmental Liability*, electronic ed. (Oxford University Press, 2011), pp. 265–276
- Costanza, R., “Liability for Environmental Damages: Toward Principles of Sustainable Governance” in C. Payne and P. H. Sand (eds.), *Gulf War Reparations and the UN Compensation Commission: Environmental Liability*, electronic ed. (Oxford University Press, 2011), pp. 258–264
- Courson, E. E., *Spaces of Insurgency: Petro-Violence and the Geography of Conflict in Nigeria’s Niger Delta* (Diss. University of California, Berkeley, 2016)
- De Sadeleer, N., *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press, 2002)
- Dworkin, R., *Taking Rights Seriously* (Duckworth, 1977)
- Ebbesson, J., “Introduction: Dimension of Justice in Environmental Law” in J. Ebbesson and P. Okowa (eds.), *Environmental Law and Justice in Context* (Cambridge University Press, 2009), pp. 1–36
- Ebbesson, J., “Piercing the State Veil in Pursuit of Environmental Justice” in J. Ebbesson and P. Okowa (eds.), *Environmental Law and Justice in Context* (Cambridge University Press, 2009), pp. 270–293
- Ebbesson, J., *Miljörätt*, 3<sup>rd</sup> ed. (Iustus, 2015)
- Eke, S. J., “Running to Fight Another Day: Commodification of Peace and the Resurgence of Violence in Post-Amnesty Niger Delta”, 9:2 *African Security* (2016), pp. 136–159
- Falk, R., “The Inadequacy of the Existing Legal Approach to Environmental Protection in Wartime” in J.E. Austin and C.E. Bruch (eds.), *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, digitally printed version (Cambridge University Press, 2007), pp. 137–155
- Falk, R., “The Second Cycle of Ecological Urgency: An Environmental Justice Perspective” in J. Ebbesson and P. Okowa (eds.), *Environmental Law and Justice in Context* (Cambridge University Press, 2009), pp. 39–54
- Falk, R. and A. Ü. Bâli, “International Law at the Vanishing Point” 241 *Middle East Report* (2006), pp. 34–41, 48
- Flyvbjerg, B., “Five Misunderstandings About Case-Study Research”, 12:2 *Qualitative Inquiry* (2006), pp. 219–245
- Goodwin, E.J., “The Consequences of Deleting World Heritage Sites”, 21:2 *King’s Law Journal* (2010), pp. 283–309



- Gracia J. N. and H.K. Koh, “Promoting Environmental Justice”, 101:S1 *American Journal of Public Health* (2011), pp. 14–16
- Henckaerts, J-M. and E. Debuf, “ICRC & Clarification of Customary International Humanitarian Law” in B.D. Leppard (ed.), *Reexamining Customary International Law* (Cambridge University Press, 2017), pp. 161–188
- Henckaerts, J-M. and L. Doswald-Beck (eds.), *Customary International Humanitarian Law Vol I–II* (Cambridge University Press, 2005)
- Hulme, K., “Taking Care to Protect the Environment Against Damage: A Meaningless Obligation?”, 92:879 *International Review of the Red Cross* (2010), pp. 675–691
- Ibaba, I. S., “Violent Conflicts and Sustainable Development in Bayelsa State”, 36:122 *Review of African Political Economy* (2009), pp. 555–573
- Jabbari-Gharabagh, M., “Type of State Responsibility for Environmental Matters in International Law”, 33:1 *Revue Juridique Thémis de l’Université de Montréal* (1999), pp. 59–121
- Klee, J., “The Process” in C. Payne and P. H. Sand (eds.), *Gulf War Reparations and the UN Compensation Commission: Environmental Liability*, electronic ed. (Oxford University Press, 2011), pp. 29–66
- Koppe, E. V., *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict* (Gildeprint, 2006)
- Koppe, E. V., “Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict” in G. Nystuen, S. Casey-Maslen and A. Golden Bersagel (eds.), *Nuclear Weapons under International Law* (Cambridge University Press, 2014), pp. 247–268
- Leibler, A., “Deliberate Wartime Environmental Damage: New Challenges for International Law”, 23 *California Western International Law Journal* (1992), pp. 67–137
- Low, L. and D. Hodgkinson, “Compensation for Wartime Environmental Damage: Challenges to International Law After the Gulf War”, 35 *Virginia Journal of International Law* (1995)
- Merriam, S. B., *Fallstudien som forskningsmetod* (Studentlitteratur, 1994)
- Nollkaemper A., “Sovereignty and Environmental Justice in International Law” in J. Ebbesson and P. Okowa (eds.), *Environmental Law and Justice in Context* (Cambridge University Press, 2009), pp. 253–269
- Ojakorotu V. and U. Okeke-Uzodike, “Oil, Arms Proliferation and Conflict in the Niger Delta of Nigeria”, 6:2 *African Journal on Conflict Resolution* (2006), pp. 85–106
- Okonkwo, C. N. P., L. Kumar and S. Taylor, “The Niger Delta Wetland Ecosystem: What Threatens It and Why Should We Protect It?”, 9:5 *African Journal of Environmental Science and Technology* (2015), pp. 451–463
- Okonofua, B. A., “The Niger Delta Amnesty Program: The Challenges of Transitioning from Peace Settlements to Long-Term Peace”, 6:2 *SAGE Open* (2016), pp. 1–16
- Okowa, P., “Environmental Justice in Situations of Armed Conflict” in J. Ebbesson and P. Okowa (eds.), *Environmental Law and Justice in Context* (Cambridge University Press, 2009), pp. 231–252

- Ong, D. M., “Regulating Environmental Responsibility for the Multinational Oil Industry: Continuing Challenges for International Law”, 11:2 *International Journal of Law in Context* (2015), pp. 153–173
- Sand, P. H., “Catastrophic Environmental Damage and the Gulf War Reparation Awards: The Experience of the UN Compensation Commission”, 105 *American Society of International Law Proceedings* (2011), pp. 430–433
- Sandoz Y., C. Swinarski and B. Zimmermann (eds.) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, 1987)
- Sands, P., “International Law in the Field of Sustainable Development: Emerging Legal Principles” in W. Lang (ed.), *Sustainable Development and International Law* (Graham & Trotman, 1995), pp. 53–66
- Sands, P., J. Peel, A. Fabra and R. MacKenzie, *Principles of International Environmental Law*, 3<sup>rd</sup> edition (Cambridge University Press, 2012)
- Schlosberg, D., *Defining Environmental Justice: Theories, Movements, and Nature*, electronic ed. (Oxford University Press, 2007)
- Schmitt, M., “War and the Environment: Fault Lines in the Prescriptive Landscape” in J.E. Austin and C.E. Bruch (eds.), *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, digitally printed version (Cambridge University Press, 2007), pp. 87–136
- Scotford, E., *Environmental Principles and the Evolution of Environmental Law* (Hart, 2017)
- Shaw, M. N., *International Law*, 7<sup>th</sup> ed. (Cambridge University Press, 2014)
- Shelton, D., “Equity” in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law*, electronic ed. (Oxford University Press, 2012), pp. 639–662
- Shelton D., and I. Cutting, “If You Break It, Do You Own It? Legal Consequences of Environmental Harm from Military Activities”, 6 *Journal of International Humanitarian Legal Studies* (2015), pp. 201–246
- Sjöstedt, B., “The Role of Multilateral Environmental Agreements in Armed Conflict: 'Green-keeping' in Virunga Park. Applying the UNESCO World Heritage Convention in the Armed Conflict of the Democratic Republic of the Congo” 82 *Nordic Journal of International Law* (2013), pp. 129–153
- Sjöstedt, B., *Protecting the Environment in Relation to Armed Conflict: The Role of Multilateral Environmental Agreements* (Diss. Lund University, 2016)
- Takshe, A. A., I. Van der Molen and J. C. Lovett, “Examining the Lack of Legal Remedies for Environmental Damage in the 2006 Lebanon–Israel War” 22 *Environmental Policy and Governance* (2012), pp. 27–41
- Tucker, M.L., “Mitigating Collateral Damage to the Environment in Naval Warfare: An Examination of the Israeli Naval Blockade of 2006” 57 *Naval Law Review* (2013), pp. 161–202
- Vöneky, S., “Peacetime Environmental Law as a Basis of State Responsibility for Environmental Damage Caused by War” in J.E. Austin and C.E. Bruch (eds.), *The*

*Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, digitally printed version (Cambridge University Press, 2007), pp. 190–225

Weinrib, E.J. “Corrective Justice in a Nutshell”, 52 *University of Toronto Law Review* (2002), pp. 349–356

## UN Documents and Resolutions

UN Security Council Resolution 687, UN Doc. S/RES/687, 3 April 1991

UN Compensation Commission, Governing Council Decision 7, UN Doc. S/AC.26/1991/7/Rev.1, 28 November 1991 (as revised 17 March 1992)

Declaration of the United Nations Conference on Environment and Development (14 June 1992) UN Doc. A/CONF.151/26 (Vol. I), 31 ILM 874 (Rio Declaration)

International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Report on its Fifty-Third Session (23 April to 1 June and 2 July to 10 August 2001), UN Doc. A/65/20, *Yearbook of the International Law Commission*, 2001, Volume II, Part Two (ILCDA)

UN General Assembly Resolution 56/83 of 12 December 2001 “Responsibility of States for Internationally Wrongful Acts”, UN Doc. A/RES/56/83, 28 January 2002

Report of the International Commission of Inquiry On Darfur to the United Nations Secretary-General, UN Doc. S/2005/60, 1 February 2005

UN General Assembly Resolution 61/194 of 20 December 2006 “Oil Slick on Lebanese Shores”, UN Doc. A/RES/61/194, 6 February 2007

Report of the UN Secretary-General “Oil Slick on Lebanese Shores” UN Doc. A/62/343, 24 October 2007

International Law Commission, Draft Articles on the Effect of Armed Conflicts on Treaties, Report on its Sixty-Third Session (26 April to 3 June and 4 July to 12 August 2011), UN Doc. A/66/10/Add.1, *Yearbook of the International Law Commission*, 2011, Volume II, Part Two

International Law Commission, Report on its Sixty-Fifth Session (6 May to 7 June and 8 July to 9 August 2013), UN Doc. A/68/10, *Yearbook of the International Law Commission*, 2013, Volume II, Part Two

Report of the UN Secretary-General “Oil Slick on Lebanese Shores” UN Doc. A/69/313, 14 August 2014

UN General Assembly Resolution 69/212 of 19 December 2014 “Oil Slick on Lebanese Shores”, UN Doc. A/RES/69/212, 28 January 2015

Special Rapporteur M.G. Jacobsson, Third Report on the Protection of the Environment in Relation to Armed Conflicts, UN Doc. A/CN.4/700, 3 June 2016

UN Environment Assembly of the UN Environment Programme Resolution 2/15 of 27 May 2016, “Protection of the Environment in Areas Affected by Armed Conflict”, UN Doc. UNEP/EA.2/Res.15, 4 August 2016

- International Law Commission, Report on its Sixty-Eighth Session (2 May to 10 June and 4 July to 12 August 2016), UN Doc. A/71/10, *Yearbook of the International Law Commission*, 2016, Volume II, Part Two
- Sixth Committee, Summary Record of the 28<sup>th</sup> Meeting on its Seventy-First Session (1 November 2016), UN Doc. A.C/6/71/SR.28, 7 December 2016
- Sixth Committee, Summary Record of the 29<sup>th</sup> Meeting on its Seventy-First Session (2 November 2016), UN Doc. A.C.6/71/SR.29, 2 December 2016
- UN General Assembly Resolution 71/218 of 21 December 2016 “Oil slick on Lebanese Shores”, UN Doc. A/Res/71/218, 3 February 2017
- Twelfth meeting of the Contracting Parties to the Abidjan Convention (27 March to 31 March 2017), Draft Additional Protocol to the Abidjan Convention on Sustainable Mangrove Management, UN Environment (Ecosystems Division)/ABC-WACAF/COP.12/9, 27 March 2017
- Twelfth meeting of the Contracting Parties to the Abidjan Convention (27 March to 31 March 2017), Draft Decisions, UN Environment (Ecosystems Division)/ABC-WACAF/COP.12/6, 27 March 2017

## Reports, Assessments and Recommendations

- ICRC, Draft Rules for the Limitation of Dangers incurred by the Civilian Population in Time of War (International Committee of the Red Cross, Geneva, 1956)
- Katsouris, C. and A. Sayne, “Nigeria’s Criminal Crude: International Options to Combat the Export of Stolen Oil” (Chatham House, 2013)
- Nigeria National Report on the Implementation of the Ramsar Convention on Wetlands submitted to the 12<sup>th</sup> Meeting of the Conference of the Contracting Parties, Uruguay, 2015. Available at [http://www.ramsar.org/sites/default/files/documents/2014/national-reports/COP12/cop12\\_nr\\_nigeria.pdf](http://www.ramsar.org/sites/default/files/documents/2014/national-reports/COP12/cop12_nr_nigeria.pdf), accessed 30 April 2017
- OECD, Guidelines for Multinational Enterprises 2008, available at [www.oecd.org](http://www.oecd.org).
- Organisation for Economic Co-operation and Development, Recommendation of the Council on Guiding Principles Concerning International Economic Aspects of Environmental Policies and Annex, 26 May 1972, C(72)128
- Sarraf M., L. Croitoru, M. El Fadel, K. El-Jisr, E. Ikäheimo, E. Grundlach and S. Al-Duaij, “Oil Spill and Waste due to Conflict: The Case of Lebanon” in L. Croitoru L. and M. Sarraf (eds.) *The Cost of Environmental Degradation – Case Studies from the Middle East and North Africa* (World Bank, 2010), pp. 89–145
- Shell in Nigeria, “Security, Theft, Sabotage and Spills” (Shell, 2015), available at <http://s04.static-shell.com/content/dam/shell-new/local/country/nga/downloads/pdf/security-theft-em.pdf>, accessed 4 April 2017
- The Office of the Prosecutor, “Situation in Nigeria: Article 5 Report” (International Criminal Court, 2013)
- UNDP, “Niger Delta Human Development Report” (UNDP, Nigeria, 2006)

- UNDP, “Lebanon Rapid Environmental Assessment for Greening Recovery Reconstruction and Reform” (UNDP, Lebanon, 2007)
- UNDP, “Report on the Measurement & Quantification of the Environmental Damage of the Oil Spill on Lebanon” (UNDP, Lebanon, 2014)
- UNEP, “Lebanon Post-Conflict Environmental Impact Assessment” (UNEP, Kenya, 2007)
- UNEP, “Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law” (UNEP, Switzerland, 2009)
- UNEP, “Environmental Assessment of Ogoniland” (UNEP, Kenya, 2011)
- US Department of Defense, Conduct of the Persian Gulf War: Final Report to Congress, (1992)
- World Bank, “Republic of Lebanon Economic Assessment of Environmental Degradation Due to July 2006 Hostilities”, Report No. 39787-LB (World Bank Sustainable Development Department, Middle East and North Africa Region, 2007)

## News Media and Other Sources

- DiChristopher, T., “The ‘Niger Delta Avengers’ Have a Message for Big Oil”, *CNBC* (3 November 2016), <http://www.cnn.com/2016/11/03/niger-delta-avengers-and-insurgents-turn-up-the-pressure-on-nigerias-buhari-and-big-oil.html>, accessed 8 May 2017
- ICRC Customary International Humanitarian Law Database, available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>, last updated in December 2016, accessed 5 May 2017
- Israel Ministry of Foreign Affairs, “Responding to Hizbullah attacks from Lebanon: Issues of proportionality”, (26 July 2006), available at: <http://mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/Responding%20to%20Hizbullah%20attacks%20from%20Lebanon-%20Issues%20of%20proportionality%20July%202006.aspx>, accessed 30 April 2017
- Jewish National Fund, “More Press for JNF’s Work in the North” (9 August 2006), available at [https://web.archive.org/web/20081120221045/http://www.jnf.net/blogs/securityblanket/2006/08/more\\_press\\_for\\_jnfs\\_work\\_in\\_th/](https://web.archive.org/web/20081120221045/http://www.jnf.net/blogs/securityblanket/2006/08/more_press_for_jnfs_work_in_th/), accessed 5 May 2017
- Monnet, B. (filmmaker), *Pirates: Threatening Global Trade* (2016)
- Myre G. and S. Erlanger, “Clashes Spread to Lebanon as Hezbollah raids Israel”, *International Herald Tribune* (12 September 2006), <https://web.archive.org/web/20090129193940/http://iht.com/articles/2006/07/13/africa/web.0712mideast.php>, accessed 7 April 2017
- NBC News, “Lebanon still digging out from oil spill” (21 September 2006) [http://www.nbcnews.com/id/14937105/ns/world\\_news-world\\_environment/t/lebanon-still-digging-out-oil-spill/#.WQSzKIRDzq0](http://www.nbcnews.com/id/14937105/ns/world_news-world_environment/t/lebanon-still-digging-out-oil-spill/#.WQSzKIRDzq0), accessed 6 May 2017

- OPEC, Nigeria Facts and Figures, available at [http://www.opec.org/opec\\_web/en/about\\_us/167.htm](http://www.opec.org/opec_web/en/about_us/167.htm), accessed 6 May 2017
- REMPEC, Information on Preparedness, available at [http://www.rempec.org/rempec.asp?theIDS=2\\_162&theName=RESPONSE&theID=9&daChk=1&pgType=1](http://www.rempec.org/rempec.asp?theIDS=2_162&theName=RESPONSE&theID=9&daChk=1&pgType=1), accessed 10 May 2017
- REMPEC, “Lessons Learnt from the Marine Pollution Incident in the Eastern Mediterranean During the Summer 2006”, REMPEC/WG.28/9/3, 8<sup>th</sup> Meeting of the Focal Points 7–11 May 2007
- Ramsar Convention, Annotated Ramsar List: Nigeria (2010) available at: <http://ramsar.org>, accessed 6 May 2017
- Ramsar Convention, Applications of the Ramsar Advisory Mission, available at: [http://archive.ramsar.org/cda/en/ramsar-documents-rams/main/ramsar/1-31-112\\_4000\\_0\\_\\_](http://archive.ramsar.org/cda/en/ramsar-documents-rams/main/ramsar/1-31-112_4000_0__), accessed 6 May 2017
- Ramsar Convention, Montreux Record of Ramsar sites, available at: [http://archive.ramsar.org/cda/en/ramsar-documents-montreux-montreux-record/main/ramsar/1-31-118^20972\\_4000\\_0\\_\\_](http://archive.ramsar.org/cda/en/ramsar-documents-montreux-montreux-record/main/ramsar/1-31-118^20972_4000_0__), accessed 6 May 2017
- Shehu, N., Information provided by national focal point Ndaman Shehu at the Department of Forestry in email to author on 19 April 2017
- Smith, D., “WikiLeaks Cables: Shell’s Grip on Nigerian State Revealed”, *The Guardian* (8 December 2010), <https://www.theguardian.com/business/2010/dec/08/wikileaks-cables-shell-nigeria-spying>, accessed 8 May 2017
- Transparency International, 2016 index, available at [http://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](http://www.transparency.org/news/feature/corruption_perceptions_index_2016), accessed 30 April 2017
- UNEP-MAP, Information on their partnerships, available at <http://www.unep.org/unepmap/what-we-do/partnerships>, accessed 10 May 2017
- UNEP News Centre, Press Releases August 2006, available at <http://new.unep.org/Documents.Multilingual/Default.asp?DocumentID=484&ArticleID=5328&l=en>, accessed 5 April 2017
- Urquhart, C., “Computerized Weaponry and High Morale”, *The Guardian* (11 August 2006), <https://www.theguardian.com/world/2006/aug/11/syria.israel>, accessed 7 April 2017
- Vanguard*, “Who are the Niger Delta Avengers?” (1 June 2016), <http://www.vanguardngr.com/2016/06/niger-delta-avengers-2/>, accessed 8 May 2017
- Zunes, S., “The Other Oil Spill”, *Huffington Post*, [http://www.huffingtonpost.com/stephen-zunes/the-other-oil-spill\\_b\\_709029.html](http://www.huffingtonpost.com/stephen-zunes/the-other-oil-spill_b_709029.html), accessed 6 May 2017

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