

Chapter XIX

Comment: The Existing Legal Framework: Protecting the Environment During Non-international Armed Conflict Operations Involving the Use of Force (*i.e.*, Military Operations Other Than War (MOOTW))

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In the context of non-international armed conflict operations there are different situations that I think are most important to consider in order to identify the applicable law concerning environmental protection.

First of all, we must distinguish between non-international armed conflict operations taking place with or without external intervention.

A traditional internal armed conflict, as defined by Article 1 of Additional Protocol II to the Geneva Conventions of 1949,¹ is one in which there is no participation of external armed forces. An internal armed conflict, to be classified as such, must involve a confrontation, with a certain level of intensity, of regular armed forces against insurgents or belligerents of that same country. If a certain level of intensity in the use of force is not present, Protocol II would not apply. In that case, Article 3 common to the four 1949 Geneva Conventions² would be operative.

In all those particular situations, the applicable law for the protection of the environment during an internal armed conflict will, in principle, be no other than domestic law.

In that context, it might be possible to assume that in a certain country there are no specific developments of internal law to regulate the protection of the environment during armed conflicts or, that the applicable law contains lacunae on that particular issue. It could also be assumed that basic principles of environmental law have not been enforced within that particular country or even made to be applicable during time of peace.

In those extreme situations, and on a residual basis, we could assume that an international customary rule expressing the duty of every State not to damage other States and/or areas beyond national jurisdiction, should apply.

In his paper, Rear Admiral Harlow clearly stated the present status of environmental law principles applicable to relations among States in time of peace. We do agree that the scope and reach of that set of principles determine the basic rules which regulate and restrict the use of force by a State within an internal armed conflict vis-à-vis third States.

After all, the relations between a State in which an internal armed conflict is taking place, and any other State, are governed by international law applicable during time of peace.

On the same line of thought, we also consider that insurgents or belligerents, that fight against regular armed forces of a State, are also obliged to observe that basic duty not to damage other States or areas beyond national jurisdiction.

Although Article 1 of Additional Protocol II establishes for all parties to the internal conflict the obligation to observe the laws prescribed by it, we should admit that this obligation not to damage the environment of other States is a customary obligation addressed to States, not to insurgents or belligerents in a non-international armed conflict.

The problem will remain; whose responsibility has been affected in cases where insurgent forces, having produced environmental damage to a third State or to an area beyond the national jurisdiction, are finally defeated?

In general terms, it could be accepted that the State in which territory an internal armed conflict has taken place would have a double obligation. First, not to use its forces in such a way that could affect third States' environmental interests, and, second, to impede such effects being produced by insurgents or belligerents engaged in an internal armed conflict.

A second situation that needs to be distinguished within internal armed conflicts is one in which there is an intervention, whether by direct or indirect involvement, of a third State. If such intervention, in one way or another, involves the use of force by third States, that will constitute the necessary condition for the internationalization of the conflict.

The environmental protection rules applicable in such a situation would be no other than the ones derived from international humanitarian law enforced during international or internationalized armed conflicts.

A second alternative related to non-international armed conflict operations where there is third party intervention, is related to peace-keeping operations authorized by international or regional organizations. In cases of peace-keeping operations performed within an internal armed conflict, there is a peculiar relationship of third parties to the conflict in which they intervene.

First of all, peace-keeping operations would not constitute a use of force that would cause the internationalization of the conflict *per se*. Peace-keepers are not intended to be involved in combat and it is supposed that they will not be. In that sense, there would be very few and extreme cases in which damage to the

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environment could be justified on the basis of military necessity by peace-keeping forces.

The main issue here is that peace-keeping operations will qualify as operations other than war within an internal armed conflict in which both sides of the conflict will be performing acts of war. That particular situation leads us to consider the possibility of a mixed situation in which the applicable law will differ depending upon who is undertaking actions amounting to the use of force.

One general consideration about the applicable law in this particular situation might be that peace-keeping operations that are authorized by international organizations will internationalize the conflict. That would be to say that the mere intervention of peace-keepers within an internal armed conflict will generate new obligations on internal belligerents.

Although peace-keeping operations are a form of lawful international intervention, it does not follow from that presumption that international humanitarian law applicable to international or internationalized armed conflicts should apply.

It is clear that peace-keeping operations infringe on the principle of absolute sovereignty of States and, most obviously, its corollary, non-intervention in domestic affairs.

It is also clear that the obligations of peace-keepers, in performing operations other than war in relation to an internal armed conflict, are stricter than obligations of domestic or internal belligerents. In principle, both sides to the conflict are acting within the territory of one single State. They are in a certain way within "their own territory."

Colonel Burger, in his paper, clearly expressed the obligations of peace-keepers involved in an internal armed conflict that are derived either from conventional arrangements or from their own rules of engagement. It is important to realize that whether through treaty obligations or through internal imposition, armed forces participating in peace-keeping operations are bound to respect certain environmental premises in conducting their actions.

As suggested above, the question remains whether the mere presence of peace-keeping forces in an internal armed conflict will generate new obligations on belligerent parties to that internal conflict.

Those problems lead us to propose that, in protecting the environment during non-international armed conflict operations, we differentiate between those circumstances involving the use of force in military operations other than war (MOOTW) and those that do not.

Military operations other than war could be performed during non-international armed conflicts by peace-keeping forces, but that specific category of operations also has application outside non-international armed conflicts.

Military operations other than war will then include, a) peace-keeping operations and b) operations involving the use of force performed in compliance with international law in time of peace.

The situation in the former-Yugoslavia, commented on in Colonel Burger's paper, is not a clear example of non-international armed conflict operations, due to the actual and non-disputed international character of that conflict. But at the same time, peace-keeping operations in the former-Yugoslavia qualify as military operations other than war. This is one of the main reasons why we propose the formulation of a clear distinction between internal armed conflict and MOOTW situations as a basic prerequisite for the definition of the applicable law concerning environmental protection.

Governmental arrangements, as well as specific rules of engagement, would determine the proper framework within which to use force in compliance with environmental protection standards in or outside non-international armed conflicts. The main problem here is the unilateral character of the rules of engagement adopted by States in observance of domestic policies.

In reference to MOOTW performed in strict compliance with international law in time of peace, we should include, as another example, the force that an individual State is authorized to use in observing fisheries stocks conservation measures within its exclusive economic zone and beyond that zone on the adjacent high seas, in conformity with the 1982 United Nations Convention on the Law of the Sea³ and the latest developments of the law incorporated into the U.N. Draft Convention on the conservation and management of straddling fish stocks and highly migratory fish stocks and other protected species.⁴

For all those situations involving MOOTW, the applicable law concerning the protection of the environment would be no other than international law standards. There is no doubt that international law will specifically be applied in areas beyond the national jurisdiction of the State performing MOOTW. But we also could argue that general principles of environmental protection law, as described in Rear Admiral Harlow's paper, also limit individual States in the conduct of MOOTW taking place within their own territory.

For all the above considerations, we are prompted to conclude that: MOOTW performed by a State within its own territory are governed, in respect to environmental protection, by its own domestic law, whatever the degree of development of that law might be. Obviously, there are two basic international limitations in performing those military operations. The first limitation, as we have already stated above, is derived from the duty not to damage other States and areas beyond national jurisdiction. The second limitation specifically relates to non-international armed conflicts of certain intensity.

For the latter situations, Additional Protocol II to the Geneva Conventions of 1949⁵ should be applied. Parties involved in the use of force during

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non-international armed conflicts are obliged to protect the environment as a collateral obligation to protect civilian resources necessary for the survival of the civilian population. (As mentioned in Rear Admiral Harlow's paper, Articles 14 and 15 of Additional Protocol II would apply here.)

Along the same line, MOOTW performed in third States' territories or in areas beyond national jurisdiction, will be governed, in relation to environmental protection issues, by international law standards.

I think that it would go too far to suggest, at the present time, that the law has created an environmental legal protection scheme binding upon all States during non-international armed conflict, when in peace time the same environment is subject to no protection or control.

When a State is acting within its own territory, the principle of non-intervention in the domestic affairs of other States would be a legal barrier for environmental protection claims, except when there is entitlement to damage reparations or entitlement to stop or prevent future damages produced, or expected to be produced, in third States' territories or in areas beyond national jurisdiction. Additional Protocol II to the 1949 Geneva Conventions does not protect the environment *per se*, but as a collateral effect from the protection of natural resources necessary for the survival of the civilian population.

Concerning the development of the law applicable to the protection of the environment during MOOTW performed either during non-international armed conflicts or in time of peace, we consider that emerging rules have been inferred from general and basic principles of international humanitarian law.

The protection of civilian property, as well as the limitations on means and methods of war—principles adopted by the Hague Conventions of 1899 and 1907⁶—have been the starting point for future developments inspired on a growing international conscience that interrelates rules regarding the selection of targets and restrictions on the production of collateral damage, with the protection of the environment as a manifestation of individual rights to preserve a tolerable human habitat for future generations.

This human rights element has strengthened internal as well as international political interests in preserving adequate environmental conditions as a common obligation of all States.

At the international level, the existence of recognized principles establishing an affirmative duty for all States to protect and conserve the environment is beyond question. There is also a generalized consensus on the obligation of States to observe adequate legal protection against unnecessary environmental damage during armed conflicts. As referred to by Rear Admiral Harlow, that obligation has been expressed as a duty upon States to take necessary measures, to the extent practicable under the circumstances, to not cause significant damage to other States or areas beyond national jurisdiction.

There is a strong commitment among academicians and politicians in different parts of the world to extend these international commitments to foster adequate legal protection of the environment to situations not necessarily reached within the framework of international law. Although we agree with the aims of such a proposition, we have to recognize that, in reference to MOOTW, that is just a manifestation of *lege ferenda*.

Even considering that all those efforts have already produced certain positive effects, we must recognize that at the present time international law has no specific rules to protect the environment in relation to military operations other than war or with respect to the use of force during a non-international armed conflict.

As an exception, actual practices of U.N. peace-keeping forces have contemplated environmental protection standards in performing MOOTW. But we should also recognize that those commitments are the direct consequence of either special international agreements or of rules of engagement defined and imposed at the national level.

Taking into account the recent experiences of NATO, the U.N., and individual States in the former-Yugoslavia, referred to in Colonel Burger's paper, it is important to identify new trends in the law which hopefully will inspire national legislatures to adopt common domestic standards on environmental protection when defining rules of engagements for MOOTW.

That recent experience allows us to conclude that adoption at the national level of appropriate rules of engagement will be a most appropriate way to implement and enforce developing international standards concerning environmental protection during MOOTW, either in non-international armed conflicts or when MOOTW are performed by States in time of peace.

Although those international trends towards environmental protection, as extensively commented on in the papers of Rear Admiral Harlow and Colonel Burger, are for most countries still in a very primitive stage, we may at least have some hope that through the generation of domestic awareness, certain approximation of *lege ferenda* to *lege lata* will be accomplished in the near future.

Notes

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1. Protocol II Additional to the Geneva Conventions Relative to the Protection of Victims of Non-international Armed Conflicts, 12 Dec 1977, *reprinted* in 6 I.L.M. 1442 (1977).

2. *I.e.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug 1949, 6 U.S.T. 3114, T.I.A.S. 3362; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 Aug 1949, 6 U.S.T. 3251, T.I.A.S. 3363; Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug 1949, 6 U.S.T. 3316, T.I.A.S. 3364; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug 1949, 6 U.S.T. 3516, T.I.A.S. 3365.

3. 1982 United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122 (1982), *reprinted* in 21 I.L.M. 1261-1354 (1982).

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4. See Articles 21 and 22, United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, *Draft Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, A/CONF.164/33, 23 Aug. 1994.

5. *Supra*, n. 1.

6. *E.g.*, Hague Convention No. IV, Respecting the Laws and Customs of War on Land, 18 Oct. 1907, 36 Stat. 2227, T.5. 539.