

Chapter III

Framing the Issues

Rear Admiral Carlson M. LeGrand, JAGC, U.S. Navy

Professor Grunawalt's Introduction of Rear Admiral LeGrand

Professor Grunawalt: I'm very pleased to introduce an old friend, Rear Admiral Biff LeGrand, the Deputy Judge Advocate General of the Navy. Admiral Le Grand has the task this morning of framing the issues that we are to address during this Symposium. I gather from the questions and answers and the spirited discussion following Mr. Harper's remarks that what you have to tell us will fall on very, very eager ears.

But let me introduce our speaker. Admiral LeGrand is a native Californian, from Hollywood, and a graduate of the University of Southern California. He came to the Navy via the Officer Candidate Program. As an unrestricted line officer, he served on the USS *Hassiampa*, a fleet oiler, in the Gulf of Tonkin off Vietnam. He left active service to attend law school at the University of California Western. Following graduation, he was admitted to the practice of law in California. He was recalled to active duty in 1971, but this time as a judge advocate. He served in a variety of billets including Naval Legal Service Office, Guam, and Naval Air Test Center in Patuxent, Maryland. Then it was back to school again to get his Master of Laws degree at Georgetown University. Thereafter, he served as Special Assistant to the Assistant Secretary of the Navy for Manpower and Reserve Affairs. Following a tour of duty as the Force Judge Advocate for Submarine Forces, Pacific, he returned to Washington, this time for duty in the Office of the Chief of Naval Personnel. In 1992, he assumed command of the Navy Legal Service Office, Southwest, in San Diego. Selected for promotion to flag rank in April 1994, Admiral LeGrand assumed his duties as the Deputy Judge Advocate General of the Navy the following month. Admiral LeGrand is also the representative for Ocean Policy Affairs within the Department of Defense and in that capacity works very closely with Jack McNeill. Without further ado, ladies and gentlemen, it is my great pleasure to introduce the Deputy Judge Advocate General of the Navy, Rear Admiral LeGrand.

Rear Admiral LeGrand: Thanks Jack for that introduction. I've also got to say that for a grandfather, you are looking pretty chipper. For those of you who don't know, Jack became a grandfather about two weeks ago. His son Kurt is one of our

24 Protection of the Environment During Armed Conflict

young judge advocates in the Naval Legal Service Office, Mid-Atlantic, in Norfolk. Kurt's wife, Robin, gave birth to Jordan Kate. Congratulations! Jack mentioned that I was from Hollywood and he also was telling me before the meeting, that if I had time on Saturday night to tune my television to NBC at 8:00 and I would see "JAG", the series. The young hero, a good looking guy, is the spitting image of Kurt. I've seen the pilot, and Jack may be right about Kurt, but if you want to see who the JAG flag officer is; to know who this obsequious, toadying, politically oriented animal is.... Well, you know that little box at the end of the credits that says the program does not depict any real person, living or dead? That one applies.

Let me welcome all of you to the Symposium. As I look over this audience, and as I was overwhelmed by the questions and comments following Mr. Harper's opening address, it's obvious we have an incredibly talented group of people here. People who are leaders in their respective fields of expertise, including some great folks from each of our five Services, from State and from academia. And, we're particularly pleased to have representatives of foreign nations here. This Symposium certainly offers a great opportunity for us to actively engage over the next couple of days in a discussion of a discipline that has emerged as one that cannot be ignored; one that must be considered in our operations and planning. My assigned mission, as Jack put it at the podium this morning, is to help frame some of the issues that will likely be a part of that discussion. And believe me, for an old personnel lawyer, that's a daunting mission. Thank you very much Jack.

I think it certainly comes as no surprise to you in this audience that war is often regarded as being unkind to the environment. As my old friend Col. Jim Terry, former Legal Advisor to the Chairman, Joint Chiefs of Staff, said:

Inherent within the laws of armed conflict is the understanding that even the most sophisticated and precise weapons systems will exact a price upon the environment. While some collateral damage may be inevitable, there's a growing understanding that the international community's common interest is to minimize environmental destruction consistent with the exercise of legitimate measures of armed conflict.

There's a growing recognition that environmental devastation produces additional security concerns by depleting natural resources, by causing competition for scarce resources, and by displacing entire populations from devastated areas.

Over the next couple of days we are going to be discussing numerous ways in which the law of armed conflict operates to protect the environment. Further, we'll examine perceived benefits and deficiencies of the current international legal regime and debate whether new international legal protections are necessary. Hopefully, the insights gained from our discussions during this Symposium will help us to understand how to maximize both environmental protection and national security.

While reducing collateral damage will be one focus of the discussion, we will also have to recognize that, historically, the environment at times has been both an intentional target of warfare and subject to manipulation as a means of warfare. Fire and breach of dams to cause flooding to gain military advantage have been the most common methods of intentional environmental destruction. We should also note that we stand on the threshold of further technological innovation which may well result in the development of other, more terrible forms of environmental destruction. There are, if my figures are right, currently 72 major dams and 297 nuclear powered electrical generating stations around the globe which provide potential environmental targets that could cause unprecedented devastation. Finally, as we all know, nuclear, chemical and biological warfare has the potential to rain havoc on the environment. Environmental manipulation has also been used on occasion as a method of warfare. During the Franco-Dutch War in 1672, the Dutch were successful in stopping French advances by cutting a series of dikes to create the Holland Water Line. Likewise in June 1938, the Chinese dynamited a dike on the Yellow River to stop the advance of Japanese troops during the 2nd Sino-Japanese War. However, this action not only drowned several thousand advancing Japanese troops, it destroyed 11 Chinese cities, 4,000 villages and killed several hundred thousand Chinese. It also destroyed millions of acres of farmland and left several million Chinese homeless.

During WW II, the British destroyed two major dams in the Ruhr Valley, causing extensive damage and resulting in the death of approximately 1200 German civilians. The United States has been criticized for the use of defoliating agents during the Vietnam War, and for unsuccessful attempts to create rainstorms, to gain tactical advantage. On the other hand, it should be noted that at the end of the Vietnam War, the United States removed its naval mines from North Vietnamese waters and took other steps to safeguard the post-war environment. In contrast, the pictures of the devastation caused by Iraq in releasing an estimated 4-6 million gallons of oil in Kuwait and setting fire to some 732 oil wells are certainly etched into all of our minds.

The first session of the Symposium is going to focus on the strategic imperative. What impact on the environment must the military be allowed in order to win across the spectrum of conflict? Issues of readiness, training and actual operations will need to be addressed. The flip side to that, which is an examination of the threat posed to the environment by these operations, will also be addressed. These issues will then be analyzed under the existing legal framework; first as to protecting the environment during international armed conflict, and then as to protecting the environment during non-international armed conflict operations involving the use of force in military operations other than war.

The law of armed conflict is perhaps the starting point here. Historically, the law of armed conflict has developed as the result of the experience of war, which

26 Protection of the Environment During Armed Conflict

has led to two series of conventions; the Hague Conventions, containing the rules governing the means and methods of warfare; and the Geneva Conventions, containing the rules governing the treatment of victims of armed conflict. While not containing detailed provisions directed specifically toward protecting the environment, the Hague and Geneva Conventions do prohibit unnecessary destruction, including destruction or damage to property. These basic provisions are now considered customary international law that is universally binding. Specifically, the Fourth Hague Convention of 1907 includes principles of limitation which prohibit unnecessary destruction not required by military necessity. Article 22 of the Regulations annexed to the 1907 Hague Convention, provides that the right of belligerents to adopt means of injuring the enemy is not unlimited. Article 23 prohibits both the use of arms, projectiles or material calculated to cause unnecessary suffering and the destruction or seizure of the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war.

The doctrine of military necessity, requiring subjective judgment and interpretation, is said by some to create a loophole or an excuse for every conceivable situation, so that the laws of armed conflict impose no real limitation and, therefore, no protection for the environment. Others maintain that the doctrine of military necessity invests too much discretion in the military commander. According to that view, in the heat of battle, the on-scene commander would always choose military advantage over environmental protection, justifying decisions based on military necessity after the fact. Additionally, there are folks who view powerful, technologically advanced nations, such as the United States, as inherently resistant to limitations on their military might, unwilling to accept restraints imposed by the law of armed conflict limiting their power. The counterclaim to these views is the current U.S. Department of Defense position that the existing international legal regime is sufficient to protect the environment during international armed conflict or military operations other than war.

The Department of Defense position is that while armed conflict may acutely impact the environment, prohibitions against unnecessary destruction are pervasive and provide a basis for the imposition of sanctions whether criminal or civil. For example, Iraq has been universally condemned for the wanton devastation inflicted on Kuwait. After the Gulf War, the Department of Defense issued a report detailing the extent to which law of armed conflict concerns permeated strategic decisions at every stage. For instance, during the conflict, bombing targets were carefully selected to avoid civilian population centers, cultural and religious structures and environmentally sensitive areas, even when it became apparent that Iraq was conducting military activities from such sites. In the view of those who believe the current law of armed conflict protects the environment effectively, the Allied restraint shown in the Gulf War is supporting

evidence that militarily powerful nations, such as the United States, are able to accept, implement and effectively enforce limitations on the conduct of armed conflict.

Returning for a moment to the 1907 Hague Conventions, Article 55 of the Regulations annexed to Convention IV imposes the obligation on an occupying State to protect natural resources during periods of occupation. Article 3 of that Convention provides that a belligerent party violating that provision of the Convention may be liable to pay compensation. Taken together, these provisions of the 1907 Hague Convention require a balancing of potential destruction with military requirements. Have they proven enduring and broad enough to cover ever-evolving technology? The adequacy of such provisions addressing State responsibility and civil reparations will be assessed during this Symposium. Like the Hague Conventions regulating the conduct of war, the Geneva Conventions protecting the victims of war can be construed as including protection for the environment. Specifically, Article 53 of the Fourth Geneva Convention of 1949 prohibits any destruction of property, whether public or private, by an occupying power unless such destruction is rendered absolutely necessary by military operations. Article 147 of the Fourth Geneva Convention, provides that extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly, is a grave breach of the convention.

Criminal and civil responsibility for environmental damage are to be reviewed as a part of this Symposium. Discussion concerning the application of the Fourth Geneva Convention in this context is also important. The Fourth Geneva Convention provides for individual criminal liability for any breach, and State civil liability for grave breaches of the Convention. While reparations were ultimately imposed by the U.N. Security Council against Iraq for environmental destruction in Kuwait, many scholars argued that the Fourth Geneva Convention provided a sufficient legal basis for convening a Nuremberg-type war crimes tribunal to prosecute individual Iraqis after the Gulf War.

The 1977 Environmental Modification Convention, to which the United States is a party, limits military or other hostile use of environmental modification techniques as a method of armed conflict. Concerned by the use of defoliating agents and weather manipulation techniques used by the United States during the Vietnam War, the United States Senate passed a resolution in 1973 encouraging the Executive Branch to pursue a treaty prohibiting the manipulation of the environment as a weapon of war. The resulting Environmental Modification Convention prohibits a State from using any environmental manipulation that has widespread, long-lasting or severe effects on the environment for military or any other hostile use. Like the Hague Conventions, the Environmental Modification Convention governs means and methods of warfare. It applies regardless of the existence of military necessity, establishing an outer limit that

28 Protection of the Environment During Armed Conflict

cannot be overcome, notwithstanding the presence of military exigency. Unlike the Hague or Geneva Conventions, the Environmental Modification Convention does not establish individual criminal or State civil liability, rather it provides for U.N. Security Council investigation and assistance by the other parties upon verification of a complaint.

Now whether the threshold that triggers the application of this treaty is too high or too low, is likely to be a subject addressed by our last panel, which will assess the need for new international accords. Nevertheless, the Environmental Modification Convention provides some further protection against the most serious forms of environmental devastation. So far, I've been talking about conventions that have been widely ratified, including those ratified by the United States. Another issue that this Symposium will address, is whether the United States and other nations that have not yet ratified Additional Protocol I of the Geneva Conventions, should be encouraged to do so as a means to further protect the natural environment during armed conflict. Opinion on this issue certainly appears divided. Articles 35 and 55 of Additional Protocol I contain parallel provisions protecting the environment from widespread, long-term and severe damage. Article 35 states that it is prohibited to employ methods or means of warfare which are intended or may be expected to cause widespread, long-term or severe damage to the natural environment. Article 55 provides that care should 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 widespread, long-term and severe damage to the natural environment, and thereby to prejudice the health or survival of the population. Attacks against the natural environment by way of reprisals are also prohibited.

To see the environment as one of the four interrelated categories of civilian objects afforded special protection by Additional Protocol I is an evolving concept. The other categories are cultural objects, places of worship, objects indispensable to the survival of the civilian population, and works and installations containing dangerous forces such as dams, dikes and nuclear electricity generating stations. Obviously, there are many situations in which two or more prohibitions could be violated simultaneously.

Supporters of ratification of Additional Protocol I, argue that Articles 35 and 55 represent an important stage in the development of humanitarian law by explicitly codifying protection of the environment. They note that the Environmental Modification Convention prohibits environmental manipulation as a means of warfare but does not prohibit targeting of the environment. In contrast, opponents of ratification have argued that the three-part threshold for triggering Additional Protocol I, which requires environmental destruction be widespread, long-term and severe, is too high to provide real protection. The

understanding of the drafters of the Protocol that long-term means decades, is much higher than the threshold established in the Environmental Modification Convention whose drafters defined long-term to be more than one season. In addition, some countries have argued that Articles 35 and 55 of the Protocol include limitations upon nuclear weapons which would, of course, upset the balance established in nuclear weapons conventions.

Finally, others have noted problems with Article 51 of Additional Protocol I, which requires parties to seek to minimize injury to the civilian population even when civilians are being used as so-called "human shields" for military operations. Even though the other party may have violated the law of armed conflict by locating *bona fide* military targets in population centers, the injunction against collateral injury to the civilian population remains. While the Protocol may contain some advantageous developments in the law of armed conflict, the disadvantages are such that no United States Administration has yet submitted the treaty to the Senate for its advice and consent for ratification.

From considerations of existing conventions, we will then necessarily turn to the question of whether new treaties should be developed to protect the environment in times of armed conflict. Now this topic has received a great deal of attention in the aftermath of the Gulf War and the destruction inflicted on Kuwait by Iraq. On the one hand, a number of leading scholars have argued that ecocide, if we may use that term, was a failure of deterrence, not law. Proponents of this view note that Iraq wantonly breached the Hague and Geneva Conventions and that blatant violations of the law cannot be remedied simply by establishing new laws. Further, some commentators have noted that while the international community has become proficient at drafting and negotiating environmental treaties, there is little evidence that the international community is equally adept at implementing and enforcing them. There were fewer than three dozen, multilateral environmental treaties in 1972. Today, there are nearly 900 international agreements that contain important environmental protections. Edith Brown Weiss has termed this situation the "treaty congestion" problem in emphasizing the need to shift resources from drafting and negotiating to supporting the implementation and enforcement of environmental treaties. Those who seek increased protection for the environment in times of armed conflict were certainly mobilized by Iraq's conduct during the Gulf War. Their proposals have largely focused on either restricting the methods of armed conflict or the location of that conflict. For example, on March 11, 1991, French representatives to the Governing Council of the United Nations Environmental Program proposed two new conventions, one protecting world heritage monuments in time of war and one prohibiting the targeting of ecological areas. That same day, Japan urged the adoption of a Declaration of Principles which would prohibit destruction such as that inflicted by Iraq as a method of warfare. These proposals were later discussed

30 Protection of the Environment During Armed Conflict

at a Governing Council meeting on May 20, 1991, in Nairobi, Kenya. Others have urged that protected geographical sanctuaries be established through the Cultural and Natural Heritage Convention of 1972. And still others have urged that demilitarized areas be established by adoption of conventions similar to the Antarctic Treaty of 1959.

Two international conferences were convened in 1991 to address the need for additional law in times of armed conflict. First, Greenpeace International sponsored a conference in London at which it proposed a Fifth Geneva Convention. The Greenpeace proposal would prohibit the use of the environment as a weapon, would ban weapons aimed at the environment, and would prohibit indirect damage to the environment of a third State, irrespective of a claim of military necessity. This Fifth Geneva Convention would apply in all armed conflicts, not just to international armed conflict as do existing Geneva Conventions. And finally, the proposal would establish a responsibility to pay compensation for violation of the Convention. At present, this proposal does not appear to be moving forward. Second, in July 1991, a conference was held in Ottawa. United States' participants in Ottawa emphasized the importance of not unduly restricting otherwise lawful military operations. In general, the participants recommended further efforts be focused on enforcement mechanisms rather than additional international agreements.

Finding ways in which the laws of armed conflict could be better enforced will also be discussed at this Symposium. While some also argue that new laws of armed conflict are necessary, there seems to be greater consensus for examining ways to improve enforcement of existing laws of armed conflict. As Professor Bob Turner has said about the Gulf War, "The real reason was not that the law was ineffective but rather, unenforced law is ineffective."

Now, aside from use of military force, there are three ways in which the international community has sought to enforce the laws of armed conflict. The first method of enforcement has been to hold individuals criminally liable. The most frequently suggested model has been the use of a Nuremberg-type war crimes tribunal. Though many commentators urged the establishment of a tribunal to prosecute Iraqi war crimes, one was not established. However, the current tribunal established at the Hague by the U.N. Security Council pursuant to Articles 29, 39 and 41 of the U.N. Charter to prosecute war crimes in the former Republic of Yugoslavia, and in Rwanda, should give us a great deal of information, hopefully, about the effectiveness and practicability of such a forum in today's contemporary world. Now, in addition to an *ad hoc* tribunal, the Security Council also has the authority, pursuant to Article 43 of the U.N. Charter, to authorize a regional arrangement or group to conduct war crimes trials. However, many favor the degree of impartiality gained by use of an international, rather than a regional forum. Furthermore, there is growing sentiment to prosecute war criminals in

national courts. Both Austria and Denmark have recently prosecuted individuals accused of committing war crimes in the former Republic of Yugoslavia. While States have on occasion prosecuted their own nationals for war crimes violations, as Austria and Denmark have recently done, for the most part, they have resisted prosecuting enemy personnel since WW II. Nevertheless, that option may warrant greater attention.

A second widely used sanction has been the requirement that the responsible nation make reparations, usually of monetary damages, for environmental degradation or destruction. During active hostilities, seizure of assets has been accomplished both to deter aggression and to provide a source of potential reparations at the conclusion of hostilities. Claims commissions may be established by the agreement ending hostilities or by the U.N. Security Council pursuant to Articles 39 and 41 of the Charter. By Security Council Resolution 687, the U.N. Compensation Fund was created, and a commission was established and charged with evaluating crimes arising out of "direct losses, (and) damage, including environmental damage, as a result of Iraq's unlawful invasion and occupation of Kuwait." While injured parties may eventually obtain reparations, the possibility of future compensation provides little comfort to individuals and communities that experience loss and require immediate relief.

A third enforcement method could be described as condemnation in the court of public opinion. Professor John Norton Moore has long been an advocate of disseminating the facts of international law violations through the media. Moreover, Article 149 of the Fourth Geneva Convention authorizes an inquiry at the request of a party to the conflict concerning any alleged violation of the Convention. Evidence from such an inquiry may later form the basis for criminal prosecution. Finally, for those countries that are parties, Article 90 of Additional Protocol I authorizes the establishment of an international fact-finding commission to conduct investigations.

So, in summary, this Symposium will hopefully stimulate a broad discussion of the viability of the existing law and the need for new accords. In our opening panel, which will take place after lunch, we will begin with the first of our topics, "The Strategic Imperative." Ultimately, we will address each of the issues I have attempted to outline this morning, including whether the existing legal regime effectively protects the environment in times of armed conflict, whether the legal regime has been or is capable of being effectively enforced, and whether new developments in the enforcement of the law would better protect the environment. Because our national security interests, as well as the potential risks to the environment are enormous, the stakes regarding these issues are quite high. And, with the exceptional talent we have gathered here, we are looking forward to a productive and lively exchange of opinions. I would like to thank you all for being here and I hope you enjoy the Symposium. Thank you very much.

32 Protection of the Environment During Armed Conflict

Professor Grunawalt: Thank you Admiral. Before we break for lunch, a couple of thoughts occurred to me as I listened to Mr. Harper's address, Admiral LeGrand's "Framing The Issues" presentation, as well as the intercessions from the floor. One thing I thought I would ask you to contemplate over lunch and when we get together after lunch, is the military dimension of the equation, the strategic imperative, that is, what one must do to win across the spectrum of conflict. Admiral LeGrand noted that it is our assessment that during the Gulf Conflict, the United States Armed Forces indeed were prepared to accept, implement, and effectively enforce international norms with respect to the protection of the environment. Mr. Harper pointed out, as did Admiral LeGrand, that the issue appears to be enforcement of that law which already exists, as much, if not more, than the necessity to develop further law. I am reminded of an article written by Professor Michael Reisman that appeared in Admiral Robertson's Volume 64 of the Naval War College's "Bluebook" series. Professor Reisman wrote very persuasively of the very positive role of military manuals in the general process of behavior of military forces. The whole theme here, and one again I would like you to carry with you and put into context when we hear from our military people this afternoon, is that ultimately it is not what kind of treaty one signs, it is the behavior of forces in the field that is going to determine whether or not military operations bring unacceptable destruction to the environment. You have to understand the critical role, the inescapable role, that comes from the subjective judgment of the operational commander on the scene. We are talking about a decision that must be taken in the crucible of conflict, in von Clausewitz's "fog of war." How do we do that? How do we prepare our operational commanders to do that which is right when these subjective judgments must be made? I believe very strongly in the efficacy of the military manuals approach and I recommend Michael Reisman's article to you if you have not seen it. Also, we are now in the process of promulgating the next iteration of the Commander's Handbook on the Law of Naval Operations, what was until recently called NWP 9. It, unfortunately, now has a new number, NWP1-14M. Finally, among us this morning are folks like Chris Greenwood, Dieter Fleck and Ivan Shearer, who have been working diligently in this military manual arena, to provide guidance to our military commanders who must make those substantive judgments so that they do so on the basis of that which we expect of them.

We had anticipated that Senator John Chaffee would be our guest speaker for the luncheon today. If you have been following the news these past few days you will have noted that it is very unlikely that any United States Senator is going to get out of Washington for the next several days and, unfortunately, Senator Chaffee has had to send his regrets. Nonetheless, we will now recess and reassemble at the Officer's Club for lunch.