

Chapter XV

Comment: The Existing Legal Framework, Protecting the Environment During International Armed Conflict

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I will now briefly and schematically present my understanding of the existing state of the relevant law, then quickly summarize the developments since the Gulf War — the immediate trigger of most of the current interest in this subject — and finally indicate where, on the basis of the foregoing, the present law appears to be in need of strengthening or other improvement.

First, a schematic summary of the current state of the law — which, incidentally, has not changed significantly since the Gulf War.

A. Norms governing armed conflict:

(1) Those prohibiting wanton destruction, which go back to the 1899 and 1907 Hague Peace Conferences, are embodied in treaties that have been widely accepted¹ and have been held to be solidly part of customary law that binds even those States that are not parties to these agreements. They do not specifically refer to the environment but, when observed, largely do protect it and actually proscribed most of the environmental abuses committed in the course of the Gulf War.²

(2) Other, more recent humanitarian treaties,³ and some others such as the ENMOD Convention,⁴ specifically require the protection of the environment. However, many significant States have not yet become parties to these treaties, and their recent vintage and the scarcity of relevant State practice makes it difficult to consider them part of customary international law.⁵

B. Environmental protection norms:

(1) Treaties relating to or containing general provisions for environmental protection, such as the 1982 U.N. Convention on the Law of the Sea,⁶ the many International Maritime Organization (IMO) conventions regulating the disposal of oil in the sea,⁷ or similar regional conventions such as those relating specifically to the Persian Gulf,⁸ which generally do not specify whether and to what extent they are meant to apply to or during military conflicts.⁹

(2) There are some environmental instruments that specifically refer to military operations, such as the following provisions of the 1982 World Charter for Nature:¹⁰

5. Nature shall be secured against degradation caused by warfare or other hostile activities.

....

20. Military activities damaging to nature shall be avoided.

and the Rio Declaration on Environment and Development:¹¹

Principle 24

Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing for protection of the environment in times of armed conflict and cooperate in its further development, as necessary.

The General Assembly also stressed, in a post-Gulf War resolution on "Protection of the environment in times of armed conflict", in which it referred to applicable provisions of the 1907 Hague and 1949 Geneva Conventions, the 1977 Additional Protocol I, the ENMOD Convention, and the Rio Declaration, that:

destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law. . . .¹²

Though these statements, which are merely declarations of leading representative international bodies, basically at best constitute international 'soft law,' their adoption by the votes or with the concurrence of representatives of a large majority of countries lend some weight to the suggestion that they represent, if not yet well-established customary law, at least the shape of *lege ferenda*.¹³

This quick summary suggests that the current shape of the international law protecting the environment during armed conflict is not really in very good shape, with principal reliance still placed on nearly century-old principles of humanitarian law evolved when environmental protection was not yet even a glimmer in the consciousness of the international community.

When legal stocktaking after the Gulf War¹⁴ revealed the somewhat tattered nature of this twig of international law, there was at first a good deal of scurrying around to see what should be done. Greenpeace and others suggested the formulation of a Fifth Geneva Convention on the Protection of the Environment in Time of Armed Conflict, and there were corresponding suggestions for the establishment of an International Green Cross.¹⁵ Fairly soon the matter was taken up by both the International Committee of the Red Cross (ICRC) — presumably concerned to protect its position as the world's primary humanitarian law

organization — and the U.N. General Assembly, which was pleased to defer in this complicated and ticklish field to the ICRC.¹⁶

The Red Cross thereupon held a number of expert meetings, and after submitting an interim report to the United Nations in 1992¹⁷ superseded the latter by an excellent definitive one the following year.¹⁸ In it, the ICRC in effect rejected the formulation of any comprehensive new international instrument and suggested instead a number of more modest measures, such as: clarifying the relationship between the somewhat similar terminology in the ENMOD Convention and in Article 35(3) of the 1977 Additional Protocol I to the 1949 Geneva Conventions; review of the applicability in armed conflict of international environmental law; restriction on the use of mines; protection of cultural sites and nature reserves and parks; institutional means of implementing provisions on the protection of the environment in times of armed conflict; dissemination of the relevant international legal provisions; and the drafting of Guidelines for military manuals and instruction — for which purpose it attached a detailed text.¹⁹ The General Assembly generally endorsed this approach and in particular the proposed Guidelines.²⁰

Having personally been among those who initially considered that it might be best to recodify and expand the existing international law,²¹ I must confess that I now concede the force of the arguments against such a project. My principal reason is that stated yesterday by Mr. Conrad Harper, that because of the need to achieve widespread consensus on any new treaty, “the resulting agreement might likely resemble a lowest common denominator, decidedly unhelpful in dealing with hard cases” and that it might “be a model of ambiguity.” It would appear that governments are not at present ready to accept significant new obligations in this field, and any attempt to press them to do so might indeed be counter-productive.

In this connection, I would like to recall my experience as the Legal Adviser to the 1979-1980 U.N. Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, which produced the 1980 Convention of the same name and the three initial Protocols thereto.²² There I observed to what extent the military members of, or advisers to, national delegations almost uniformly took the most conservative stance, opposing any restrictions that could conceivably in the future inhibit their own countries’ actions, even if the proposed restrictions — if observed — would be of great protective value to their own troops, and the grounds for wishing to remain unrestrained were at best speculative. There is no reason to expect that the situation would be different at any conference convened to draft environmental restrictions on warfare.

This having been said, I would now like to list a number of proposals—some, but not all, already mentioned in the 1993 ICRC report—for improving the current state of the relevant law. I will divide these suggestions into those pertaining to

the actual conflict (on which most of our discussions so far appear to have focused), those relating to the pre-conflict and those to the post-conflict phases — while recognizing that, of course, no strict division is possible.

1. With respect to the conflict or combat phase:

(a) Encouragement of universal adherence to existing treaties, in particular, the 1977 Additional Protocol I to the 1949 Geneva Conventions.

(b) Attempts to clarify existing norms, and in particular the terms “wide-spread,” “long-lasting/long-term” and “severe,” which appear disjunctively in the ENMOD Convention and conjunctively in Additional Protocol I and which are discussed in the *travaux préparatoires* of the respective instruments²³ — from which it appears that no reconciliation of the unfortunately similar terminology of these two instruments is possible.

(c) Clarification of the status of environmental treaties during armed conflict: (i) between the parties to such conflict; and (ii) between such parties and neutrals. In this connection, it is necessary to examine both the question of the persistence of treaty obligations during a state of war between parties thereto,²⁴ and the perhaps more fundamental question of whether such treaties are meant to apply, fully or partially, during a state of warfare.²⁵ In this connection, it may be apposite to note that multilateral environmental treaties generally establish *erga omnes* obligations, which two or more parties cannot suspend (except with effect purely between themselves) even by agreement — so why should they be able to do so by engaging in armed conflict with each other.

(d) Effective dissemination of the applicable rules to all whose actions or decisions might violate them, which can probably be best done by means of military manuals such as foreseen in the Guidelines proposed by the ICRC.

(e) The establishment of an international monitoring organ to function during periods of armed conflict, to note, if possible to investigate, and to remind the parties concerned of their obligations in respect of environmental protection; such functions might, but need not necessarily, be assigned to the International Fact-Finding Commission established pursuant to Article 90 of the 1977 Additional Protocol I.²⁶

2. With respect to the pre-conflict phase:

(a) Attention should be paid to the U.N. General Assembly’s 1980 resolution on the “Historical responsibility of States for the preservation of nature for present and future generations,” in which the Assembly, *inter alia*:

282 Protection of the Environment During Armed Conflict

2. [Drew] the attention of States to the fact that the continuing arms race has pernicious effects on the environment

There is little doubt that military exercises, in particular extensive target practice, are destructive of the environment where they take place. Moreover, weapons production facilities, such as nuclear facilities in the United States, may for various reasons not be subject to as strict environmental controls as other industrial enterprises. Much could probably be done to alleviate these situations — though obviously a reduction of war preparations would be most beneficial.

(b) Attention should also be paid to Article 36 of Additional Protocol I, which reads as follows:

Article 36 — New weapons

In the study, development, acquisition or adoption of new weapons, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or in all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

First of all, it should be noted that this obligation thus encompasses the environmentally protective provisions of Articles 35(3), 55 and 56 of the Protocol, but also refers to all other such provisions of conventional or customary law, whatever their source.²⁷ Second, the methods of determining whether a particular new weapon might be unduly offensive to the environment include the by now well-established practices of environmental impact assessments²⁸ and the use of the precautionary principle²⁹ — which evidently can not easily be applied in combat situations but which should be fully applicable in pre-conflict ones.

(c) The setting of targeting rules and the selection of targets or types of targets should, as far as possible, be carried out in advance of a particular armed conflict and, in any event, of a particular combat situation, at a level of leadership — whether military or civilian — where account can appropriately be taken of any relevant environmental considerations. Thus, it should not be left to commanders of ships to decide whether or not, under certain circumstances (*e.g.*, the maintenance of an embargo), tankers may be targeted.

3. With respect to the post-conflict phase:

(a) Some type of international, impartial fact-finding procedure should be established to determine to what extent and how the environment has been harmed during an armed conflict, and all parties to the conflict should be required to co-operate in such an exercise.

(b) Procedures should be established for the determination and assessment of civil liability on States for the infliction, during a conflict, of undue damage to the environment, which damages should be payable to the States damaged or to the international community if the damage extends to a *res communis*. Such liability need not necessarily be restricted to the aggressor State, though such a State might be required to bear the ultimate burden of any environmental harm caused, as the Security Council required of Iraq in the Gulf War.³⁰ But as between a neutral in a conflict (or the international community) and a participant in a conflict who caused improper environmental harm (*i.e.*, harm inconsistent with a legal obligation of such State), it would seem proper that the latter rather than the former bear the burden — though that is not the current view of the International Law Commission.³¹

(c) Procedures should be established for the determination of criminal liability for individuals and possibly even for States. For the former, the necessary institutions could be based on the examples of the *ad hoc* tribunals that the Security Council has established in respect of former-Yugoslavia³² and Rwanda,³³ but a more sound foundation would probably be the International Criminal Court now under consideration by the General Assembly.³⁴

As to what constitutes environmental crimes, it should first of all be noted that Article 85(5) of the 1977 Additional Protocol I specifies that grave breaches of that instrument or of the 1949 Conventions constitute war crimes; however, it does not identify breaches of its environmental provisions (Articles 35(3) and 55) as grave breaches— although “extensive destruction . . . of property, not justified by military necessity and carried out unlawfully and wantonly” is so classified by Article 147 of Geneva Convention IV and is thus a war crime for parties to the Protocol. In addition, the I.L.C. had included in its first reading of the Draft Code of Crimes against the Peace and Security of Mankind, the “employing of methods and means of warfare which are intended or may be expected to cause wide-spread, long-term and severe damage to the natural environment” as an “exceptionally serious war crime.”³⁵

Furthermore, under its work on “State Responsibility,” the I.L.C. has tentatively classified as a State crime “massive pollution of the atmosphere or of the seas”³⁶ — though the very notion of the criminal responsibility of States has recently been seriously questioned in the Commission.³⁷

(d) Finally, one of the most useful post-conflict environmental measures that could be taken would be to make effective provisions for the removal of the remnants of war, and especially mines, from erstwhile battlefields. In this connection, one might recall a 1982 U.N. General Assembly resolution on “Remnants of War”³⁸ that stated, *inter alia*:

284 Protection of the Environment During Armed Conflict

Convinced that the responsibility for the removal of the remnants of war should be borne by the countries that planted them,

....

3. *Reiterates* its support of the just demands of the States affected by the implantation of mines and the presence of the remnants of war on their lands for compensation from the States responsible for those remnants. . . .

Though there has been no direct follow-up of that somewhat isolated declaration, it should be noted that immediately after the Gulf War cease-fire the Security Council demanded that Iraq:

Provide all information and assistance in identifying Iraqi mines, booby traps and other explosives as well as any chemical and biological weapons and material in Kuwait, in areas of Iraq where forces of Member States cooperating with Kuwait pursuant to Resolution 678 (1990) are present temporarily, and in adjacent waters. . . .³⁹

Such an obligation, of course, is set out in Protocol II (which deals with land mines) of the Inhumane Conventional Weapons Convention.⁴⁰

Of greater general and long-term significance is the conference that the United Nations organized this July on the Removal of Land Mines, recognizing that this may be the most important post-war environmental restoration that can be taken. On the other hand, the first Review Conference of the Inhumane Weapons Convention, which is *inter alia* scheduled to consider an extension of Protocol II to that instrument, is unlikely to make much progress over the existing provisions — for the majority of poorer countries consider simple contact mines to be a weapon of choice for those that cannot afford more complex and expensive defensive devices, such as the self-destructing mines that would meet the requirements of the existing Protocol.

Arguably, the present Symposium has—true to a narrow construction of its title—so far focused too extensively on the protection of the environment during actual combat, *i.e.*, in situations where these concerns can least readily be accommodated, and thus arouse the greatest anxiety of the military. By contrast, the measures that can be taken before a particular conflict arises, and in any event before an actual combat operation has begun, and especially those that can be taken after the end of the conflict, appear to have been somewhat neglected even though they may well be less controversial and more effective.

Notes

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1. *See*, in particular, the "Martens Clause" set out in the Preamble to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, 36 Stat. 2227; T.S. 539; Bevans 631, Articles 22, 23(g) and 55 of the Hague Regulations attached thereto, as well as Article 53 of 1949 Geneva Convention IV on Protection of Civilian Persons in Time of War, 6 U.S.T. 3516; T.I.A.S. 3365; 75 U.N.T.S. 287.

2. It is evidently these rules that are referred to in para. 3 of the "Chairman's Conclusions" of the July 1991 Ottawa Conference of Experts on the Use of the Environment as a Tool of Conventional Warfare [hereinafter the Ottawa Conference Conclusions], which declares that: "There was a shared view that important provisions of customary and conventional law had been seriously violated."

3. In particular, 1977 Additional Protocol I to the 1949 Geneva Conventions, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 (1977), Articles 35(3) and 55 of which are directly relevant.

4. Convention on the Prohibition of Military or Any Other Hostile Uses of Environmental Modification Techniques, 18 May 1977, 1108 U.N.T.S. 151; 31 U.S.T. 333; T.I.A.S. 9614; 16 I.L.M. 88 (1977).

5. It is therefore less clear on what evidence the Chairman of the Ottawa Conference (*see supra* n. 2) based his conclusions in paragraphs 5 and 9, respectively that: "There was a shared view that wanton destruction of the environment with no legitimate military objective is clearly contrary to existing international law" and "The customary laws of war, in reflecting the dictates of public conscience, now include a requirement to avoid unnecessary damage to the environment." *See also* the texts preceding n. 13 *infra*.

6. 21 I.L.M. 1261 (1982), in particular Part XII (Articles 192-237), Protection and Preservation of the Marine Environment.

7. In particular: the International Convention for the Prevention of the Pollution of the Sea by Oil, 12 May 1954, 327 U.N.T.S. 3; 12 U.S.T. 2989; T.I.A.S. 4900; Brussels International Convention on Civil Liability for Oil Pollution Damage, 29 November 1969, 973 U.N.T.S. 3, 9 I.L.M. 45 (1970); London Convention on Civil Liability for Oil Pollution Damage from Offshore Operations, 1 May 1977, 16 I.L.M. 1450 (1977).

8. Kuwait Protocol [to the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, 24 April 1978] concerning Regional Co-operation in Combatting Pollution by Oil and Other Harmful Substances in Cases of Emergency, 24 April 1978, 17 I.L.M. 526 (1978).

9. Article 236 of the 1982 U.N. Convention on the Law of the Sea (*supra* n. 6), misleadingly titled "Sovereign immunity," makes Chapter XII of the Convention inapplicable to any naval or other governmental ships, which suggests that at least these provisions do not apply in armed conflict

10. U.N. General Assembly Res. 37/7 of 28 Oct. 1982, 22 I.L.M. 455 (1982), adopted by a vote of 111: 1 (United States): 18.

11. U.N. Doc. A/CONF.151/26 (Vol. I), part I.1.I; 31 I.L.M. 876 (1992).

12. U.N. General Assembly Res. 47/37 of 25 Nov. 1992, 5th preambular paragraph, U.N. Doc. A/RES/47/37 (1993).

13. It is presumably on declarations of this type that the Ottawa Conference Conclusions referred to in n. 5 *supra* were based—though it should be noted that the latter two were subsequent to both the Gulf War and the Ottawa Conference.

14. Aside from the July 1991 Ottawa Conference of Experts referred to in n. 2 *supra*, the International Council of Environmental Law held consultations in December 1991 in Munich that issued a Final Report; these and other meetings, some that merely surveyed the terrain and others that considered specific further action, are listed in the ICRC report cited in n. 20 *infra*, endnote 4, p. 22. In addition, there were two reports to the U.S. Congress, respectively by the Senate Committee on Environment and Public Works, Gulf Pollution Task Force, on "The Environmental Aftermath of the Gulf War", March 4 and 5, 1992, the Executive Summary and Recommendations of which contains a section on "International Legal Issues", and by the Department of Defense on the Conduct of the Persian Gulf War, Appendix O of which addressed "The Role of the Law of War" and includes a brief section on "Environmental Terrorism" (31 I.L.M. 612, at 636-37 (1992)).

15. *See*, The Globe and Mail, 6 and 11 March 1991, respectively reporting on and presenting the proposals of Patrick Boyer, a Canadian Member of Parliament.

16. *See*, U.N. General Assembly Decision 46/417 of 9 December 1991, on the agenda item: "Exploitation of the environment as a weapon in times of armed conflict and the taking of practical measures to prevent such exploitation".

17. U.N. Doc. A/47/328, 31 July 1992.

18. U.N. Doc. A/48/269, 29 July 1993, part II.

19. *Id.*, section II.G (paras. 109-13) and Annex. It might be noted that these conclusions, including the one concerning military manuals, were foreshadowed by the Ottawa Conference Conclusions two years earlier.

20. U.N. General Assembly Res. 48/30 of 9 December 1993, paras. 11-14; *see also* Resolution 49/50 of 9 December 1994, paras. 11-12.

21. *See Szasz, Environmental Destruction as a Method of Warfare: International Law Applicable to the Gulf War*, 15:2 *Disarmament* 128 (1992), "Some Proposals" at 151, as well as the other earlier studies referred to in n. 6 to that article.

22. 1342 U.N.T.S. 7; 19 I.L.M. 1529 (1980).

23. Understandings concerning the terms used in ENMOD were recorded by the U.N.'s Conference of the Committee on Disarmament, A/31/27, Annex I, reproduced in the article in *Disarmament* (*supra* n. 24), in endnote 11 at 155-56. With respect to Additional Protocol I, the terms in question and their comparison with those in ENMOD are discussed in the Rapporteur's Report, O.R. XV, p. 268, CDDH/215/Rev.1, para. 27, reproduced with extensive

286 Protection of the Environment During Armed Conflict

comments in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Sandoz, Swinarski, & Zimmermann eds. 1987) paras. 1454-58, at 416-19.

24. This question is so difficult that it was explicitly evaded by Article 73 of the 1969 Vienna Convention on the Law of Treaties (1155 U.N.T.S. 331); however, it is interesting to note that Article 75 suggests that there may be special obligations in respect of a treaty for an “aggressor State.”

25. It should be noted that the International Council of Environmental Law, in its 1991 Final Report (*see supra* n. 14) “6. ... drew attention to the fact that the rules of international environmental law continue to apply between parties to an armed conflict and third parties [and] recommended clarification of the extent to which these rules also continue to apply between parties to an armed conflict.”

26. The Commission was established only a few years ago, when 20 parties to the Protocol had made the declaration required by Article 90(2); it has not as yet had any business. It should be noted that it is likely that the Commission will consist mostly of experts in conventional humanitarian law, and that in any event its competence is limited, in respect of environmental protection *strictu sensu*, to the relevant provisions of Additional Protocol I.

27. *See* ICRC report, *supra* n. 18, para. 36.

28. *See* Principle 17 of the Rio Declaration, *supra* n. 11. More importantly, the requirement to make environmental impact assessments (originally a U.S. domestic innovation) has been enshrined in numerous international instruments, including treaties (*see, e.g.*, those listed in Weiss, Szasz & Magraw, INTERNATIONAL ENVIRONMENTAL LAW: BASIC INSTRUMENTS AND REFERENCES (1992) at 120-21).

29. Rio Principle 15 (*id.*) and the instruments set out in INTERNATIONAL ENVIRONMENTAL LAW (*id.*) at 121.

30. Security Council Res. 687 (1991) of 3 March 1991, para. 16. *See also* Article 75 of the Vienna Convention on the Law of Treaties *supra* n. 24.

31. Under the heading “International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law” the I.L.C. Rapporteur has suggested the adoption of the following draft Articles:

Article 24

Harm to the environment and resulting harm to persons or property

If the transboundary harm proves detrimental to the environment of the affected State:

(a) The State of origin shall bear the costs of any reasonable operation to restore, as far as possible, the conditions that existed prior to the occurrence of the harm. If it is impossible to restore these conditions in full, agreement may be reached on compensation, monetary or otherwise, by the State of origin for the deterioration suffered. . . .

Article 26

Exceptions

1. There shall be no liability on the part of the State of origin or the operator, as the case may be:

(a) If the harm was directly due to an act of war, hostilities, civil war, insurrection ...

(Report of the I.L.C. on its 42nd session, 45 GAOR Suppl. No. 10 (A/45/10), ch. VII, paras. 515-16, at 274-77. In his report to the 43rd (1991) session of the Commission, the Rapporteur proposed some restructuring of the provisions quoted below, but without any substantive changes (A/CN.4/437, paras. 59 and 61).)

However, under the heading of “State Responsibility”, the Commission is considering the inclusion—apparently without a military exception—of:

... a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

(Report of the I.L.C. on its 28th session, 31 GAOR Suppl. No. 10 (A/31/10), ch. III.B.1, para. 78, at 175, reproduced in 1976:II I.L.C.Y.B. 95-96).

32. U.N. Security Council Res. 827 (1993) of 25 May 1993.

33. U.N. Security Council Res. 955 (1994) of 11 Aug. 1994.

34. U.N. General Assembly Res. 49/53 of 9 Dec. 1994. For the latest text of the Draft Statute of such a tribunal, see the I.L.C. report set out in U.N. Document A/49/10.

35. Report of the I.L.C. on its 43rd session, 46 GAOR Suppl. No. 10 (A/46/10), Ch. IV.D.1, reproduced in 30 I.L.M. 1584 (1991), draft Articles 22(2)(d) and 26. It should be noted that the latter Article has aroused sufficient opposition

among governments that the I.L.C. Rapporteur in his latest report (A/CN.4/466 and /Corr.1) suggested the deletion of this provision—a matter that the Commission considered at its 47th session and which it then referred to a special working group. *See* 50 GAOR Suppl. No. 10 (A/50/10), ch. II, paras. 38, 119-21, 140-41.

36. Report of the I.L.C. on its 28th session, 31 GAOR Suppl. No. 10 (A/31/10), Ch. III.B.1, para. 78, at 175, *reproduced in* 1976:II I.L.C.Y.B. 95-96.

37. *See* 50 GAOR Suppl. No. 10 (A/50/10), ch. IV.B.3, paras. 323-36.

38. U.N. General Assembly Res. 37/215 of 20 December 1982.

39. U.N. Security Council Res. 686 of 2 March 1991.

40. *See supra* n. 22..