Chapter XXI

Panel Discussion: Panel IV

The Existing Legal Framework, Part II

Protecting the Environment During Non-International Armed Conflict Involving the Use of Force

Rear Admiral Horace B. Robertson, Jr., JAGC, U.S. Navy (Ret.): Good Morning, I am Robbie Robertson, moderator for this panel. Having heard from the previous panel on the existing legal framework for protecting the environment during international armed conflict, we now turn to an examination of the existing legal framework for protecting the environment during non-international armed conflict operations involving the use of force. That is, “military operations other than war,” sometimes abbreviated as MOOTW.

Chairman, Joint Chiefs of Staff Instruction 3110.03 defines MOOTW as, “The use of military capabilities across the range of military operations short of war.” Protecting the environment in such operations could embrace a continuum of actions ranging from the most mundane, such as the proper disposal of garbage at sea, through oil spills created by attempts to enforce an oil embargo, all the way up to target selection for air strikes to enforce protected zones in Bosnia. Colonel Burger will address this latter conflict, or non-conflict, in detail. You may wish to challenge the assertion that I believe he will make that NATO considers this a MOOTW operation.

To discuss our topic, we have four eminent experts, two of whom will summarize their papers which are being distributed, and two of whom will comment. In order to allow time for discussion at the end, our two principal speakers have agreed to limit their remarks to 20 minutes and our commentators to 15 minutes. Rather than interrupt their flow, I will introduce all of them now in the order in which they will speak:

First, Rear Admiral Bruce Harlow, JAGC, U.S. Navy, Retired. Admiral Harlow had a distinguished 28-year career as a JAG Corps Officer, culminating in his service as Assistant Judge Advocate General of the Navy, and JCS and Department of Defense Representative for Ocean Policy Affairs. Additionally, he was Vice Chairman of the U.S. Delegation to the Third U.N. Conference on the Law of the Sea. He stays active in the international law field as a consultant to the Air Force and lecturer at the Naval War College.

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.
Colonel Jim Burger, JAGC, U.S. Army, has had a 26-year career in the Army JAG Corps with extensive tours of duty in international and operational law. He is currently Legal Adviser to the Commander of NATO, Allied Forces South in Naples, Italy, the commander of the forces engaged in the NATO air strikes in Bosnia.

Dr. Raul Vinuesa is a distinguished professor of international law and human rights at the University of Buenos Aires, the Institute of Foreign Service of the Ministry of Foreign Affairs and the Argentine Naval War College. He also serves in other advisory capacities in the Argentine Government and around the world.

Professor Ted Meron is a well-respected professor of international law at New York University School of Law specializing in human rights and international humanitarian law. Among his many other roles, he is Editor in Chief of the American Journal of International Law, the official publication of the American Society of International Law. I am sure that many of you have been amused, as well as enlightened, by his recent article which got widespread comment entitled, “Shakespeare’s Henry V, and the Law of War” at that time.

Without further ado I present Admiral Harlow.

Rear Admiral Bruce A. Harlow, JAGC, U.S. Navy (Ret.): Thank you very much. I do not know if it is an environmental issue, but I heard this morning that Saddam Hussein has seized 1,000 lawyers and threatens to release them 100 per week unless his demands are met. [Laughter.] At the outset, I would like to make a couple of general comments on the discussion that we heard yesterday and this morning. Yesterday, reference was made to documentation from an Iraqi official which clearly indicated the burning of the oil wells in Kuwait was vindictive. The inference that one could draw, I do not think it was intended but one could draw it, was that the confession of this intent along with the act would clearly indicate the illegality of the act itself. I would emphasize, however, that the admission of evil intent does not make an act illegal, in my judgment, any more than profession of pure intent makes an otherwise unlawful act legal. I think that although confession of error may bear some relevance in the examination of the legality of an act, one must look to the act itself, the consequences of the act, and the circumstances under which the act was undertaken to assess the legality or illegality of the act.

In the United States, at least in my experience, to describe a single intent for anything we do, is a mission impossible. The reality is that if there are 14 officials involved in a decision, they are coming from 14 different intents. I think it is a rather futile effort to discuss the intent of an international act. Reference was made to oil tankers. The hint that I drew from that was perhaps that oil tankers should be declared a prohibitive target. Again, perhaps that was not intended, but I would like to make the point that this would be a dangerous approach. Indeed, any strict
list of prohibitions is a dangerous approach, because it presumes that we can predict the future. It presumes that we can predict the circumstances under which we may want to target an oil tanker and that reasonable men would agree that the consequences, including environmental consequences, are outweighed by the human and national security needs that may pertain to the situation. I think it is a mistake to attempt to prejudge the future and deviate from the basic principles of proportionality and necessity.

I would like to recognize Commander Mike McGregor who co-authored our paper and, indeed, wrote a significant portion of it. We both hope that you will have a chance to read the paper and we would very much appreciate any comments you might have. Now, as Admiral Robertson pointed out, the topic before us is environmental considerations during military operations other than war. One difficulty I have, personally, with that is that I have never met a U.S. attorney that can intelligently define what war is in this context.

I define it for this purpose as armed conflict. So for the purpose of our paper and for my discussion this morning, I am talking in terms of military operations which are limited to those actions that are not premised on the extraordinary right of self-defense. Therefore, the military operations that I am talking about do not involve the use or threat of force except perhaps in a law enforcement mode but not in a warfighting mode. In this context, I believe it is reasonable to conclude that military forces must generally comply with accepted principles of customary and treaty law applicable to the State in which they are operating.

This rule of law, in my judgment, can be summarized as follows: States, to the extent practicable under the circumstances, must not cause significant injury to the environment of other States or to international areas. *Ipso facto* this obligation carries with it a duty to assess environmental implications before the fact. As mentioned yesterday, as far as the United States is concerned, an Executive Order of the President and Joint Chiefs of Staff guidance require such an assessment where military forces are involved. Under international law, States are free to somewhat degrade their own environment assuming the impact does not extend beyond their borders. I would suppose, therefore, as a matter of international law, that armed forces involved in operations other than war (read armed conflict) are only obligated to comply with the standards of the State in which they are operating, even if the domestic standards of the host State which is supplying the armed forces are stricter—sort of the "lowest common denominator" rule.

It should be emphasized that once forces are involved in armed conflict, the laws of war—the principles of proportionality and necessity—would pertain, and, indeed, would, under certain circumstances, displace and/or mold normal peacetime principles. What I envision in this middle world of non-violent use of armed forces, whether it be for constructing a refugee camp or humanitarian assistance, we should follow the normal peacetime rules as is generally the practice.
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with regard to ICAO rules for the air navigation of military aircraft throughout the world. Although the United States military makes it perfectly clear that military aircraft are not bound under all circumstances to comply with ICAO safety and navigational rules, generally speaking in the peacetime environment milieu, military aircraft do comply with those rules. I think the military flight patterns throughout the world in the last 40 years have proven to be non-threatening and have been basically neighborly with commercial air navigation throughout the world.

I have to reemphasize the point that when we are talking about the exercise of the extraordinary right of self-defense or extraordinary circumstances, military aircraft should, and must be allowed the freedom to exercise the rights that would be premised upon these extraordinary requirements. So it might be true, with regard to environmental rules, that under normal peacetime circumstances, armed forces would comply with the international standards and norms expected of all other State officials. It would be the exception that would apply only when we are exercising the extraordinary right of self-defense.

It is also true that although States, under existing international law in our view, are free to degrade the environment, more and more States are enacting domestic legislation to establish minimum standards. As this number grows—there are now around 40 States that have environmental standards that apply domestically—as the thought grows that domestic environmental practices do have at least an indirect effect on the world community, I think emerging international law will follow the principle that a minimum environmental standard is required of each nation-State as an element of human rights. If that be true, then eventually one can envision international standards that would be applicable even to domestic practices even though the impact of such domestic practices might not be felt beyond the borders of the State or in an international area.

Finally, let me make this contextual point. It must be recognized that effective measures to protect and conserve the global environment will involve significant costs and policy tradeoffs. International legal norms designed to protect the environment, unless they are to be observed in the breach, must take into consideration economic, political and national security realities. A well-considered, balanced, cost-effective international and economically oriented environmental regime, could, however, serve important interests of the world community, well into the convoluted and complex multi-polar world of the Twenty-First Century. Thank you.

Colonel James A. Burger, JAGC, U.S. Army, Staff Judge Advocate, Allied Forces Europe/HQ AFSOUTH: As has already been mentioned, I am going to address the material covered in my paper on the ongoing conflict in the former Republic of Yugoslavia. I think it certainly is a conflict which has been in the
forefront of most peoples' minds when they think of what is going on in conflicts today. Maybe it is also a sign of the type of conflicts that we have in today's world, and we might continue to have in the future.

I also think that it is important because this conflict has had a profound affect on the environment. I think it is appropriate for this Conference to look at how we have dealt with environmental problems in this conflict. I did have some problem when I began preparing to write my paper trying to identify what type of conflict this was. Within the circles of the military people dealing with the problem, there is a lot of debate about this. It is probably the most extensive peacekeeping operation that we have had in the world's history. Certainly, we have sent thousands of peacekeepers in and created an extensive "peacekeeping" mission. We have also gotten into the debate of whether this is becoming a "peacemaking" mission, whatever that is.

But when I analyzed what has happened and looked at the rules that we are applying, I had to conclude that no matter what else, this was a limited operation. It was not a full-blown international conflict, at least as far as we who were sent there are concerned. The U.N. forces were sent there as "peacekeepers." The NATO forces that were sent there, although to help the U.N., have, perhaps, become "peacemakers."

There are limits; everything that we are doing had to be authorized by a U.N. resolution and a NATO mandate. We are going to follow those mandates and not go beyond them. Also, this has been an extremely complex operation involving U.N. peacekeeping. The U.N. was first sent in to separate the Serbians and the Croatians in the Krajina area. It was the humanitarian relief operation in Bosnia proper, which was a separate operation from the peacekeeping operation. We had the embargo operation at sea, Sharp Guard, which is a NATO operation and Deny Flight, the air operation which maintained a "no-fly zone" over Bosnia and also which came to the aid of the U.N. forces. More recently, it has tried to protect the so-called "safe areas." And, most recently, to protect Sarajevo. That was what this recent bombing campaign was all about. So, extremely complex operations involving land forces, air forces, and sea forces present all sorts of problems in the environmental area which I think will be interesting for us to look at.

The fact that the environment has been affected by the conflict is undeniable. First, because of the intense fighting which has been going on in the area. Second, due to the movements of populations which you see on television. There are thousands of people being forced to move from one area of the country to another. Some of this is deliberately forced, with the burning of houses and farms and that sort of thing.

You also have the scale of the peacekeeping operation itself. There are thousands of peacekeepers, and supply convoys, and all of this being put into a relatively small area can not help but have an effect on the environment—the
My paper asks how have we dealt with these problems. I tried to examine the type of rules that we have set up for ourselves and how we have tried to exercise restraint and control for the protection of the environment. While environmental problems may not have been the foremost thing on peoples' minds in regard to this conflict, it certainly was considered. There were many things that were done to protect the environment.

Our operational plans have several very important annexes. They include the Rules of Engagement Annex, which sets out the rules which apply to actual military operations; and the Legal Annex, which sets out those legal rules which apply to all of the other things not covered in the Rules of Engagement Annex. Both of these Annexes start out with a statement regarding the preservation of the environment, that we will apply applicable rules of law—including the law of armed conflict, the law of the sea and national rules that may apply to the environment within the countries concerned. All of these rules of law set limits upon what our armed forces could do and how they are to conduct their operations.

Looking first at the rules of engagement. Even though not all of the participating nations were parties to the Additional Protocols, we looked to the Protocols as a good statement of many of the customary rules of armed conflict but we did not want to say that the full panoply would apply. We took the position, and it was clearly stated in the rules of engagement, that we would require the forces to follow the rules of armed conflict. I think these would include those customary law rules that are set out in the Additional Protocols, and the Additional Protocols do, of course, mention environmental protection, Article 35 and Article 55, which have already been cited.

More importantly though, all of the rules of the law of armed conflict were very germane and had to be considered in attempting to limit collateral damage which was important in protecting the environment.

I mentioned the Legal Annexes which cite that the legal rules are generally applicable either in the air, on the sea, or on the land. The Law of the Sea Convention has articles regarding environmental protection, Article 192 and Article 194. These rules are being applied to Operation Sharp Guard. In regard to air operations, I mentioned in my paper the Basel Convention on Transboundary Movement of Hazardous Wastes. Certainly, we carry a lot of hazardous cargo in our air operations. Accidents have to be prevented and the places where these cargoes are stored have to be well maintained so that the materials are kept safely and do not pollute the surrounding environment.
Another area covered in the Legal Annexes is the responsibility for damages. This was mainly in the context of the payment of claims. The United Nations has a very extensive claims payment program. The policy of the U.N. is not to pay claims for regular operations where there is no fault or where things are done in the line of duty. However, the U.N. does pay claims where there is some sort of fault or negligence involved. We have had a number of instances where environmental type claims have been paid by the U.N. Of course, since we have had NATO forces and other national forces operating there as well, we have received claims at NATO. Individual nations have also received claims coming out of the Yugoslavia conflict. I think it is important to address the issue of claims because if there is a responsibility for the payment of claims then the nations participating will hopefully take measures to try to prevent the occurrence of claims by taking precautions against environmental damage.

Another area covered by my paper involves the agreements that we have between or among nations. There is the U.N. Model SOFA; the U.N. has executed or contracted a model SOFA agreement with the Bosnians and, more recently, with the Croatians. One of the provisions in this SOFA is that there will be respect for the law of the receiving State. NATO is also negotiating SOFA agreements that would go into effect if this becomes a NATO operation. If NATO went in to help U.N. forces withdraw or as part of a peacekeeping operation, there would be NATO SOFA agreements stating that there would be respect for the law of the receiving State. I say "respect" because there is something you have to be very careful of here. A country may have a very sophisticated environmental program that cannot be complied with during conflict. But there certainly would be respect for the rules and that respect would include environmental protections.

Another type of agreement might be those between the participating parties, between the U.N. and NATO, or between the NATO participants. These agreements might set out who is responsible for claims, how they are going to be investigated, how you are going to assess responsibility, and which party is going to have to pay damages.

I made some generalizations at the end of my paper. The most important and primary is that environmental rules have to be applied to all conflicts, even those that are non-international or are true humanitarian operations. The environmental rules and the rules which apply to armed conflict have to be recognized. Our forces must be advised that there are a set of rules which they are expected to obey. Our rules of engagement make clear that we will comply with the law of armed conflict no matter what type of conflict it is. In fact, we deliberately avoid characterizing the conflict. We just enjoin our forces to comply with the law of armed conflict. A second generalization of my paper is that you must recognize the responsibility of our forces to respect the laws of the receiving State. We utilize Status of Forces Agreements to do so. Our operations in the
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former-Yugoslavia has given us a great deal of practical experience in how to address environmental problems. If you take the position that, yes, we do have a problem here, an environmental problem, and then try as best you can to work that problem, we will have accomplished a great deal. Our experience in Yugoslavia has, at least, been a beginning, a beginning we can look back upon in later years and draw some value from it.

Thank you.

Dr. Raul E. Vinuesa, University of Buenos Aires: Thank you. I have assumed the role as commentator so I will not deliver my own approach about non-international armed conflicts but instead will make a few remarks on the subject.

This is a very difficult task because the main topic is: “The Existing Legal Framework.” After reading both of the very accurate and appropriate papers of our presenters, I tried to squeeze out of them what the law was, and I have had some difficulties because I found out, for instance, that United Nations peacekeeping operations are being considered as part of “military operations other than war.” Let me, as my first comment, try to make a distinction within the topic that we are now dealing with, which is protection of the environment during non-international armed conflicts. In my view, there are military operations other than war that could be related to non-international armed conflict but also could be related to just the simple use of force in compliance with international law. If, for example, we are thinking of new rules for the conservation of highly migratory fisheries, which will come to the U.N. General Assembly for consideration in December, you will see that Articles 21 and 22 of the draft convention talk about the “use of force” but do not define what that “use of force” is. If it means force which will involve military operations other than war, the law applicable in time of peace should continue to apply.

So having said that, I will just take one second to deal with what is going on in non-international armed conflict operations in which there is no external intervention. When I refer to external intervention I mean any third party intervention as in recent experiences within former-Yugoslavia “peacekeeping operations.”

If, during an internal armed conflict, there is no peacekeeping operation and there is no third State intervention, what is the applicable law here? Additional Protocol II, but most probably the State in which the insurgency or internal armed conflict is taking place is not a party to it. That will be one of the main problems. Even if that State is a party to Additional Protocol II, it is very difficult to think that Articles 14 and 15 of that Protocol will cover the protection of the whole environment as such. Protocol II only concerns the protection and the survival of the civilian population which will, in a collateral way, protect the environment.
So basically what remains to be applied to the foregoing situations is just internal law.

In that sense, a problem of legal lacunae will arise because any number of States have not developed domestic law regarding environmental protection in general, and certainly not in terms of armed conflicts, even internal armed conflicts. In one of the papers just presented to us there is a very accurate comment about new trends or new developments within domestic law in which reference is made to several examples where constitutions and other internal statutes have introduced regulations concerning the protection of the environment. I could add another example to that list with the Argentine Constitution, as reformed in 1994. It includes an impressive new section dealing with very basic general principles on environmental protection. But no one knows what it really means in practical terms because it is a pure programmatic declaration without immediate direct possibility to be implemented. But at least it is good for it to be there. We will see how that is developed.

So what is finally the applicable law for those situations in which there is no domestic law to be observed? I think there is a possibility to consider the applicability of general and basic principles recognized world-wide which are linked to an historical development approach within international environmental law. Through analogy, and by implication, we can depart from the general principle that expresses the duty not to damage other States and areas beyond national jurisdiction. But that seems rather dangerous because its direct consequence would be that as long as a State produces environmental damage within its own territory, the nonexistence of internal legal obligations would permit virtually unlimited damage to the environment. On the contrary, States must observe, even when involved in an internal armed conflict, their duty not to affect the environmental interests of other States or of the international community as a whole. State responsibility would only emerge when the effects of internal activities expands national frontiers.

Let me conclude on that issue that international standards pertaining to environment protection, per se, are very poorly developed. But most of our expectations to reverse that situation would not necessarily be concentrated on the international level but on future domestic legislation where basic uniform standards could influence what is going on within the territory of individual countries.

The prior panel addressed international armed conflict and I will not address that. What I will address is what I will call a “mixed situation” involving peacekeeping forces not directly involved in combat. In most instances those forces have much stricter obligations than domestic belligerents. They are governed by conventional arrangements among the participating nations comprising the peacekeeping forces. They also have their own national rules of engagement that
they use when they come across a common problem. Still, they have very basic principles that they have to adhere to during the intervention.

But as they are not involved in combat, there will be few situations in which damage to the environment could be justified by military necessity by peacekeeping forces.

Let me explain what that means. It is arguably an internationalization of the conflict when peacekeeping operations are introduced into a specific internal conflict. This is something that really complicates the whole subject. Even in the former-Yugoslavia situation, the question will be whether the peacekeeping operations/intervention would impart international armed conflict obligations on the internal belligerents, but not, of course, on peacekeepers who have their own obligations, rules of engagement and conventional agreements.

Considering military operations other than war, and I want to make a distinction between peacekeeping operations and other military operations, which implies the use of force performed in compliance of international law. Once again, the example I gave before on the law of the sea regarding unilateral actions in which some use of force is legally justified. The fisheries conservation policies prescribed by the Law of the Sea Convention and the new draft agreement on highly migratory fish stocks, allow the use of force outside the 200 mile exclusive economic zone under international standards. Why? Because most of those operations will take place in areas under international jurisdiction.

With regard to military operations in general, if you perform them in your own territory it is your own environmental problem. If you cross a border, or you get into a complicated jurisdiction that is beyond your national jurisdiction, I think we enter a different scheme which is basically international environmental law applicable in peacetime.

As a final reflection, I think that we are dealing here with the very basics of the Fourth Hague Convention, a Convention that limits the use of force in war. These same principles have been applied to protect the environment in the course of military operations during time of peace as well.

Finally, I would like to mention that the papers submitted by our panelists have examined the relationship between environmental protection and human rights. We have come to appreciate that the environment is not just the habitat in which human beings develop their lives. In the past, however, protection of the environment during armed conflict has been dealt with as a sort of collateral effect derived from the protection of individuals.

We are in a transitional phase in which new trends, not law but trends, related to the generation of a universal consciousness towards the protection of the environment are reflected in rules of engagement, especially those rules applied by certain developed countries not only concerning peacekeeping operations, but mainly concerning any military operations. I believe that those attitudes provide
a strong input of how to internally tackle the environment during internal armed conflicts.

Rules of engagement on an international level will be the aggregate means to implement and enforce these developing standards. I stress this idea of developing standards because I am not quite sure what the law is respecting non-international armed conflicts. On the other hand, it could be perceived that as of today, there are developing standards concerning environmental protection during all sorts of military operations other than war, not just restricted to operations in which peacekeeping forces are involved. Thank you.

Professor Theodor Meron, New York University: I am grateful to Captain Jack Grunawalt for having invited me to this very timely, interesting and stimulating conference. I think that you, sir, deserve special thanks for bringing together a group of academic civilian and military experts on law and environment for a discussion of this extremely important subject. I would think that meetings and dialogues of this kind are something that we need even more in the future. If I may make a personal comment, it is that people are not aware of the extremely important work in international law that is being done in the military community.

In assessing protection of the environment in non-international armed conflicts, one must keep in mind certain basic considerations. First, to be effective, protection of the environment must be continuous. It cannot depend on differences between peace, war and civil war. It is encouraging to note that there is an emerging consensus that what is prohibited for international wars cannot be tolerated in civil wars. Second, as we all know, instruments protecting the environment in non-international armed conflict are considered to be weaker than those applicable to international wars. The reason for this weakness, and this is the heart of the problem, is not merely technical. It reflects the traditional reluctance of States to recognize international constraints on the conduct of civil war within national territories. The critical stakes involved in this conflict, namely, survival of authorities and power, partition of territory, movements of population, the challenge of identifying the actors responsible for especially grievous violations of the environment, imputabilities and responsibility issues, all act to create formidable difficulties confronting the international community in trying to improve the protection of the environment in non-international armed conflicts. How to bind insurgents through rules of international law continues, of course, to be a very major problem. Of course, quite a few successes have been pointed out by some of our colleagues and quite a few of our present difficulties could be at least attenuated through good faith and respect for already existing principles. But the undeniable normative weakness plays, I suggest, into the hands of those who tend to pay little respect to existing rules.
There has nevertheless emerged an encouraging though tentative trend towards the extension of some law of war treaties and some arms control treaties of major environmental significance to non-international armed conflict, and I would like to mention briefly some of these treaties. This is already positive international law, not something futuristic. Consider, for instance, the applicability of some parts of the 1954 Hague Convention on the protection of cultural property to non-international armed conflict. Consider the applicability of the 1972 Biological Weapons Convention in all circumstances, including non-international armed conflicts. Or consider the applicability of the 1993 Chemical Weapons Convention to all conflicts, international or internal, and so on.

And most recently, I would like to draw your attention to the proposals before the Review Conference of States party to the United Nations Conventional Weapons Convention of 1980 to extend the prohibitions contained in Additional Protocol II on land mines, et cetera, to non-international armed conflicts. Although I share Dr. McNeill’s skepticism expressed in his excellent article in the 1993 Hague Yearbook of International Law about prospects for a drastic expansion by treaty of environmental protections applicable in time of war, I would not rule out the possibility of a fairer, modestly focused expansion by treaty of environmental protection to non-international armed conflicts. We have seen this in the treaties which I have briefly mentioned to you and have seen that this sort of expansion can also be focused on particularly important objects or essential environmental assets.

Moreover, as is noted in my paper, we had hoped the ENMOD Convention was applicable in other circumstances. Some other environmental treaties, such as those protecting endangered species, their habitats and other particularly vulnerable environmental assets would, I suggest, not make much sense unless they were construed as applicable in all conflict situations. In the ICRC Experts Committee in which I participated together with several other people present here such as Professor Bothe, a suggestion was made that all major environmental treaties should be studied with a view towards ascertaining whether they would be applicable in a time of war including non-international armed conflict. I strongly support the comments made in this regard by my colleague and friend Paul Szasz this morning. A point here of relevance is whether it would not be possible to try and see whether in future treaties dealing with the environment we could not, whenever possible, incorporate explicit language dealing with this problem.

Now, the difficulty noted by, among others, Colonel Burger a few minutes ago of classifying conflicts as either international or internal, provides a powerful argument, I submit, for the application of the more protective rules which are applicable normally in international armed conflicts. Colonel Burger, for example, appears to treat the conflict in Yugoslavia as primarily non-international armed
conflict. Yet, the United States Government, in its omnibus brief submitted to the Hague Criminal Tribunal, has asserted very strongly and categorically that the entire set of conflicts in Yugoslavia constitute international, not internal armed conflicts.

In attempting to enhance in the future, protection of the environment in non-international armed conflict, I would like to point to several approaches which are not mutually exclusive. I already mentioned that the treaty making or law making approach, while useful in specific areas, does not hold much promise, as we have seen from the discussion of the earlier panelists, for the future in the present circumstances. Professor Oxman's suggestion, voiced in his 1991 article, that additional treaty protection could be created for objects of special environmental importance deserves, however, careful consideration.

The second approach is to try to strengthen national peacetime environmental policies. Strengthening national environmental policy, law and education during periods of peace may, in practice, contribute to de-legitimatizing those acts which are really disastrous for the environment in time of internal war, whether carried out by the government or by rebels as those two groups battle for the hearts and minds of men.

There is also the interpretive approach. Wherever possible, we should try to construe environmental treaties which are silent on their applicability in time of war as continuing in effect during non-international armed conflicts. The 1993 ICRC report to the United Nations General Assembly makes this point very strongly. Of course, absent international wars, there is no justification for suspending international treaties on grounds of war within sovereign States. There remains, however, a rather troublesome possibility of a State trying to suspend such treaties on grounds of national emergency, necessity, or force majeure. Other States should be skeptical of such justifications for treaty suspension. Ideally, of course, environmental treaties should provide for non-derogability, or at least for as narrow a derogability as possible.

Fourth is the human rights connection. As we all know, there is an important school of thought linking protection of the environment in time of war, including of course civil war, with protection of human rights. The recent decision of the European Court of Human Rights in the case of Lopez, Ostra v. Spain has given new vitality to the human rights connection of environmental protections. Of course, respect of human rights has always suffered from claims of derogability on grounds of national emergency.

Fifth is the customary laws strategy. I refer to the Martens Clause which encapsulates the reservoir of general principles in customary law which limits the discretion of the military commander and suggests that military commanders select those tactical solutions that are most beneficial to the protection of the environment. This would include also such general law of war principles as that
of proportionality, the prohibition of causing unnecessary damage or wanton destruction, and perhaps also some principles of State responsibility. Perhaps the single most important challenge at the present date is to recognize that these principles rooted in the Hague law and confirmed to a certain extent by the Geneva Conventions of 1949, especially the Fourth Geneva Convention, have an undeniable place in non-international armed conflict.

Sixth, other rules and other agreements. I refer to development of another set of essential standards for the protection of the environment in non-international armed conflicts to be followed by the parties to those conflicts. Compliance will benefit from strong international pressure on the parties and from the need of the rebels for international recognition of some kind. In other circumstances, such other rules might be transformed into agreements between the parties and in drafting those other rules and other agreements an attempt should be made towards greater integration of environmental and law of war standards. This could lead to a more significant emphasis in the law of war on such fundamental environmental concerns as the precautionary principle and respect for future generations. This should also be relevant to the drafting of rules of engagement, military manuals and training models.

Seventh, mechanisms for inducing respect for existing principles. We have spoken about that this morning, and I would like to develop that a little bit. I would suggest that imaginative consideration should be given to the possibility of developing more efficient scrutiny and monitoring of violations. Such mechanisms could include, as already suggested by Jack McNeill, (1), requiring violators of existing principles to pay compensation and (2), prosecuting aggressive violators as war criminals. I would accent that such prosecutions should be contemplated only where the existing customary law is sufficiently established to overcome possible challenges of ex post facto. One would have to be cautious about the applicability of simple compensatory models in the present state of the international environment. Problems about the role of international institutions in non-international armed conflicts are legend. But environmental protection, I suggest, raises additional questions. Special expertise is needed in relation to environmental issues. If international institutions are to contribute to monitoring, to assessment and to the calibrating of process and the development of protective measures, some environmental capacity building is desirable in the ICRC, OSCE, the United Nations, and NATO, especially where some institutions which I have mentioned deploy fact-finders, observers or military units. We need, perhaps, to think of technical assistance to States involved in internal conflict in this context. We need to raise environmental consciousness and expertise of military trainers and foreign military advisors.

Eighth, and most important, is the problematic expansive approach. Here I address the readiness to apply to non-international armed conflicts the broader
and the more protective rules applicable to international armed conflicts. This approach, as exemplified by the paper written by Admiral Harlow and even more explicitly by Colonel Burger, pleads with regard to the conflict in the former-Yugoslavia for respect by United Nations peacekeeping forces and NATO forces of the more extensive environmental protection stated in Additional Protocol I. Colonel Burger notes that the rules of engagement used by the peacekeeping forces in Yugoslavia, and the rules of engagement proposed for the NATO forces acting in support of the United Nations, and I quote: "... do not make a distinction between international and non-international conflicts," and that any peacekeeping force will follow the environmental provisions of Additional Protocol I, and I again quote: "... no matter how we classify the conflict." The application of such higher standards, Colonel Burger suggests, would apply not only to non-international armed conflicts, but also more broadly to military operations that fall short of war.

I believe that rules of engagement offer a very attractive strategy as does the inclusion in military manuals of environmental rules which follow, for all armed conflicts, the most protective rules. In addition, the anthropocentric provisions of Additional Protocol II could be broadly interpreted to provide more direct protection to environmental assets. Most important is the emerging readiness, which we have seen especially from General Linhard yesterday, to factor environmental concerns into the calculus of the military commander.

None of the above approaches offers a definite or a comprehensive strategy. Taken together, however, they suggest useful strategies for more effective protection of the environment in a non-international armed conflict, and they serve to facilitate the development of conventional and customary international law in this area of growing concern.

Thank you, sir.

Admiral Robertson: Thank you Professor Meron and all our panelists. I will now open the session to questions and comments from the floor.

Captain Stephen A. Rose, JAGC, U.S. Navy, U.S. Atlantic Command: My question is for Colonel Burger, perhaps the panel at large. Jim, your paper has a very optimistic assessment of the ability to weave environmental concerns into the rules of engagement—it was done seamlessly; it was done without much sweat, and apparently without any real dilemma for the commander. Harking back to earlier speakers who made the same basic point about the Iraqi situation, we have the luxury of factoring in environmental concerns without much difficulty for the commander. Professor Roberts, however, makes a telling and useful point in his paper. He suggests that at the higher levels there were other urgent concerns—the use of weapons of mass destruction, the potential mistreatment of prisoners, and
Perhaps extra-territorial terrorists acts—that trumped, or at least subordinated any environmental concerns.

The question I have for you is, in your actual discussions with the commander, what dilemma did you face? What actual considerations or scenarios that you discussed caused the commander to say “Wait a minute, time out, I’m not sure what the balance here is.” Because the thrust of your paper is there really wasn’t a problem, and yet I have a sense that what we are talking about is not melodrama here, good versus bad, but good versus right, competing rights. Yet in the actual application of all the scenarios we have talked about, I have not really seen the ethical dilemma put forward in the context that would make the military commander really feel awkward or feel that he has a hard choice to make.

My final point in posing this question is that in observing our panel of senior officers yesterday, although they genuflected in the arena in the direction of environmental concerns, I got a lot of body language that they were uncomfortable about really being taken to task concerning a primacy of environmental concerns when it came down to making hard choices. So, when you talked to your commanders, what was it you discussed behind closed doors that made them feel uncomfortable?

Colonel Burger: I am not sure I can tell you everything I discussed behind closed doors. I am little surprised that you drew from my paper that it was not a problem, because I think it really is a very big problem, and a difficult problem.

What I meant to convey is that the recognition of the environmental rules, and that we will follow the rules, is not in question. Our commanders did agree that they wanted to follow the rules, and they were looking to the lawyers to point out to them what the rules were and this included environmental rules. I should point out that I am not the only lawyer over there. It is interesting that there were U.N. lawyers, NATO lawyers, and national lawyers of a number of different nations all working on these problems. Now, as to particular questions, it is difficult, especially from the NATO point of view, because we really are not involved on the ground yet. But as far as the maritime operation was concerned, it was the regular business of trying to prevent pollution in the oceans or discharges from the ships. These are preventative things that our navies normally do. The air forces, generally, also take precautions in regard to their carrying of hazardous cargoes and that type of thing. But really where we get involved in a lot of difficult problems in a peacekeeping operation is on the ground. At that time, I think we are going to have a lot of difficult questions, but we have not gotten to that stage yet.

Captain Rose: A quick follow up. I would argue, $Q.E.D.$, where is the conundrum? I mean what actually is happening in the military operations other than war area
that puts the ethical dilemma or the juridical dilemma to the commander? I do not know of any scenarios. Can you cite any?

Admiral Harlow: Perhaps, to put it in perspective from the orientation of the panel yesterday, I think it is fair to say that in the history of warfare there has been a greater impact on human beings by direct killing than there has been by adverse actions taken against the environment. I think we have to remind ourselves that if the need is so great that we all agree it warrants the killing of human beings, it is not unreasonable to conclude that collateral environmental damage, although important, is collateral to that primary issue of justifiable homicide. The dilemma of U.S. commanders frequently is: are the restrictions of the ROE going to result in a greater loss of our forces? That is, will more of our young men be killed by virtue of these restrictions? That is the way I think it was emphasized yesterday.

Dr. Myron H. Nordquist, Naval War College: My question is probably also for Colonel Burger. I do not understand the legal theory of why NATO is in Bosnia in the first place. We keep talking about the “rule of law,” and I wonder if we should not be following constituted documents like the North Atlantic Treaty. As I understand it, Article 5 states that there has to be an armed attack against one of the parties for NATO to become involved. I wonder, is anybody thinking fundamentally like “Gee, do we have the authority to be here in the first place?”

Colonel Burger: The NATO Council discussed that very thoroughly and passed a resolution in which they said NATO was authorized to participate in peacekeeping, humanitarian, and other types of operations other than normal defense. So these operations, which are outside the historical role of NATO, have been approved by the NATO Council. Of course, the theory in approving the Bosnia operations was that this is also connected to the basic defense of the NATO countries themselves, by preserving the peace. But these non-traditional type of operations have been approved by the NATO Council.

Professor George K. Walker, Wake Forest University: I have a comment for Colonel Burger. First of all, when we drafted the San Remo Manual, we used the term “due regard” rather than “respect” because of the use of the word “respect” in the humanitarian law conventions. That is more of a comment. The other is a question. If we assume that you are going in with “respect” or “due regard” for the law of the host State, and if we assume that the State would either apply some sort of international norms to which there is a derogation in time of emergency, or perhaps they have a national derogation policy, where do you go for your law from
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there? You are going into the host State in an emergency, which by definition exempts out the environmental norms, what law are you going to apply then?

Colonel Burger: I am not sure that it exempts out all of the environmental norms, but it certainly is true that you are going in in an emergency. You can not be expected to follow all of the rules. That is why we use terms like “due regard” or “respect.” There has to be a certain amount of give and take there. The standards that we would apply in our operations, for example in Italy where we have support bases, are different than the standards that we would apply if we went into Bosnia and had forces on the ground in Bosnia.

Mr. William M. Arkin: Colonel Burger, I think you are familiar with the MOU between your commander and NATO dated 25 July 1995 that was released last week by the Secretary General’s office. It is the confidential MOU that lays out the rules of engagement regarding the use of force. Under “Targeting Arrangements,” it says in Paragraph 14, “A joint air plan designed to achieve a graduated response will be developed by COMAIRSOUTH in coordination with the commander of the U.N. force. The plan will include attacks on targets selected to achieve the desired response. Examples of targeting categories, including fixed and mobile are . . .”—and they give three categories or options—“fielded forces including troop concentrations,” “command and control, and supporting lines of communication,” and “direct and essential military support.” Then there is a note, and it says Option I and II targets are within a ZOA (Zone of Action) approved previously. Option III targets are subject to political approval. But nowhere in this MOU does it specify what political approval means, who the political authority is that we are referring to, and what exactly is the reason for Option III targets being subject to political approval nor what is defined as “direct and essential military support.” So when I read this document, I am sure it is backed up by the NATO OPLAN 4201 and others, I do not get from it a clear statement of what the restrictions are, or what types of targets can be attacked under the current conflict. One might argue that this is not an issue yet, but there might be targets which are controversial, let us say, defined as “direct and essential military support” that might challenge questions of interpretations of the law. And I am wondering if you could go into a little bit about how these ambiguous formulations are put into practice.

Colonel Burger: I think it is improper to call those the rules of engagement. It was not meant to be so. The rules of engagement are separate and this particular agreement was to assure proper coordination between the United Nations Command and the NATO Command so that the decision to target and to choose
targets would be done in coordination and would not be done at the risk of the U.N. forces. This came after a lot of difficult discussion between the U.N. and NATO and how we are going to arm one force or the other, or one mission or the other. So it is really very incomplete when it refers to how you target or choose targets.

Colonel David E. Graham, JAGC, U.S. Army: In an effort to give Jim a break here, so that he no longer has to defend either U.S. or U.N. policy in Bosnia, I would like to take contentiousness perhaps to a new height and object to the title of the panel overall. That is, if we use the terminology used in the panel title, we are going down a slippery slope, and perhaps beginning to mix apples and oranges with respect to non-international conflict and MOOTW.

I think because we are significantly involved in both areas, we have to be very precise about what we call non-international conflict, on the one hand, and MOOTW on the other. For most of us who have worked this area for a number of years, non-international conflict means common Article 3 conflicts or conflicts under Additional Protocol II to the 1949 Geneva Conventions. If you take a look at Service or Joint literature or doctrine right now, we have trouble identifying what we mean by MOOTW, but we have identified specifically 13 different subsets of military activities or operations that we consider to be MOOTW. None of those are non-international conflicts. They run the full gamut from arms control to counter-drug operations in support of civilian authorities to—very importantly—peace operations. Under peace operations there are three subsets: support to diplomacy peacekeeping, traditional peacekeeping, and peace operations. But in future conferences and discussions, I think it would behoove us to keep non-international conflict and the law that applies there on the one hand and MOOTW on the other. I can already see that Jack Grunawalt has his hand raised so I suppose I accomplished my purpose.

Admiral Robertson: I just want to make one comment before that. I think that you need to excuse the panel on that because their subject was given to them and it has a parenthesis, i.e., “military operations other than war—MOOTW.”

Professor Jack Grunawalt, Naval War College: Let me carry that one step further. Dave, I am in full agreement. I would like to point out that we owe this conference to the benevolence of the Under Secretary of Defense for Policy who gave us the funding for it. That benevolence came with a few little things which “thou shalt include.” As a matter of fact, Admiral Harlow and I were discussing this last night and we recognized at the very outset that we were pounding a round peg into a square hole. I could not agree more with you.
**Colonel Burger:** I have just one thought on that. In a situation like we have in the former-Yugoslavia today, we can really have several layers of conflict going on at the same time. If you get fighting between Croatia and Serbia, which are two States, I think that would be an international conflict. If you have fighting within Bosnia between the Bosnian Government and non-recognized bodies or entities like the Bosnian Serbs or the Bosnian Croatians, that could be a non-international conflict. Then, on another layer, you have the U.N. forces in there which are doing peacekeeping and they are not involved, and maybe they should not be involved, in a conflict at all. Then you have the difficult situation of NATO getting involved in support of the peacekeepers. You have to ask, what is their situation? I really don’t have the answers to all of those things but it is a very complex situation and it presents problems in all of these different areas.

**Professor Adam Roberts, Oxford University:** I would like to agree with what Ted Meron said about the way in which principles applicable to international armed conflict may become extended in one way or another to a non-international armed conflict. I think that there are ways in which that can happen, additional to those specifically identified. One has to do with the former-Yugoslavia. We have seen the very interesting case of one officer with UNPROFOR, whether properly or legally or otherwise I do not know, surreptitiously emptying a large dam in territory held by Serbs, but retreating Serbs at the time, so that when they blew up the dam as it was known that they were threatening to do, it would not in fact either destroy the dam or flood people lower down the valley. This was an entirely successful operation, a remarkable piece of environmental protection extended by international forces to an internal conflict.

Then, of course, one has the case of the application of law to and by U.N. peacekeeping forces, and their acceptance historically, that the international rules governing the conduct of armed conflict do apply to U.N. peacekeeping forces. They also, of course, apply because the individual countries providing contingents are bound by international conventions, and their internal military disciplinary systems reflect those conventions.

So there, too, one has an example of the way in which rules developed for international armed conflicts may become applied through the presence of U.N. forces, at least in some degree, in non-international armed conflicts. Added to this—and one forgets this at the time of the terrible conflict in the former-Yugoslavia—there have been many cases of non-international armed conflicts in which one party or another or both have agreed to a greater or lesser degree to apply the body of international rules governing international armed conflicts.
Professor Paul C. Szasz: Let me comment a bit on the applicability of international humanitarian rules to U.N. forces. The question has been raised about whether or not the U.N. should become a party to the Geneva Conventions and Protocols. This has been resisted by the Legal Office of the U.N., of which I was a part at the time, on two basically formal grounds. One is that the Conventions do not foresee participation by international organizations, and therefore, their final clauses would have to be changed. The other is that the U.N. is not in a position to fulfill all the responsibilities of a Protecting Power, therefore, it should not become party to the Conventions.

The other reason given, that has just been mentioned, is that the U.N. does not have its own armed forces. It always uses the forces of member States, which are bound by the customary and treaty rules. This could change. In theory there could be U.N. forces per se, but as yet there are no plans thereof.

This having been said, the U.N. also considers that it is institutionally bound by international customary law. So to the extent that rules have been embodied in customary law, as is generally asserted about the Hague Conventions and the 1949 Geneva Conventions, they also bind the U.N. Secondly, the U.N. would be bound by resolutions or rules that are promulgated by competent U.N. organs.

Like the Universal Declaration of Human Rights, which was promulgated by the General Assembly and is addressed to “all organs of society,” therefore including the United Nations, other conventions developed under the auspices of the United Nations, and endorsed by the General Assembly, will normally be considered as binding on the United Nations. I thank you very much.

Professor Meron: In the case of Nicaragua, the International Court of Justice suggested a sort of a piecemeal type of approach. Those aspects of the conflict which related to the relations between the Contras and the Sandinista Government would be governed by those rules of international humanitarian law which apply in internal conflicts. Those parts of the conflict, if established factually, which pertain to the intervention by the United States and the Sandinista Government, would be governed by those rules of international humanitarian law that apply in international armed conflicts.

Now the problem with this sort of approach is that it would create a structure of truly Byzantine complexity. People who are law of war experts, and military officers and international lawyers, would find it extremely difficult to dissect the various aspects of the problem in which they are concerned in order to be certain whether it is one set of rules or the other set of rules which is applicable. As regards the conflict in Yugoslavia, starting with the Bosnia War Crimes Commission Report, and continuing with what I consider to be the views of the Security Council, the United States Government and others, the approach was that we have to look at the entirety of the conflict. When we look at the ensemble of the conflicts
in Yugoslavia, at least after a certain point in time, and as practical people, people who have to apply common sense to the solution of problems, we regard that conflict as international.

I would suggest that although the NATO forces, or the peacekeepers involved in military operations in this conflict are, of course, not technically parties to the conflict, to the extent that they resort to military force, the approach exemplified by Colonel Burger makes a lot of sense. In this situation it does make sense, at least pragmatically, for them to apply the laws governing international armed conflict, including protection of the environment. So the context dictates, up to a point, the selection or choice of the applicable norms that should be applied by entities that are not technically parties to the conflict yet participating in armed hostilities. I am saying so in defense of perhaps Professor Grunawalt. Perhaps this connection and the title of this panel, although not logical, I grant you that, of non-international armed conflicts and operations other than war, does make, on practical grounds, a certain amount of sense.

**Admiral Robertson:** I might add one point to that. I think that many of you are familiar with the on-going work of Professor Grunawalt’s organization here at the Naval War College. Not only is he preparing a manual for use by the armed forces, but also he is lecturing throughout the world on the subject of the rules that are found in that manual, on ROE and that sort of thing. That brings to mind what was mentioned a couple of times yesterday—that we have built into our armed forces an ethic and a culture of respect for those rules. If we can spread that broader, throughout the world, we will have accomplished many of those things that are in the nine objectives that were referred to by Professor Meron.

I am afraid that we have run out of time, but I will give our panelists one last opportunity for a summation. No? Then thank you very much. We are adjourned.