

Chapter II

Opening Address

The Honorable Conrad Harper

Professor Grunawalt's Introduction of the Honorable Mr. Conrad Harper

Professor Grunawalt: We are very fortunate indeed to have with us this morning as our keynote speaker, Mr. Conrad Harper, the Legal Adviser of the Department of State. If there is a testament to the importance of the work we are doing, it is that Mr. Harper has found the time to break away from the State Department to join us this morning. Mr. Harper, we are just absolutely delighted that you are, in fact, here and able to join us.

Mr. Harper did his undergraduate work at Howard University and earned his law degree from Harvard. He was engaged in the private practice of law from 1971 to 1993, with the New York City law firm of Simpson, Thatcher and Bartlett. His specialization was in commercial litigation, but he did many other things along the way, for example, visiting lecturer at Yale Law School, consultant at the Department of Health, Education and Welfare, and working many years in various capacities with the NAACP and its Legal Defense and Education Fund. He is a member of various Councils, including the council of the American Law Institute, a Fellow at the American Academy of Arts and Sciences, a member of the Council of Foreign Relations, and a Trustee of the Nelson Cromwell Foundation. Mr. Harper assumed his duties in the Clinton Administration on the 24th of May, 1993.

I had occasion to meet Mr. Harper a little more than a year ago. I had been given the unenviable task of briefing Mr. Harper and his staff with respect to the *Vincennes* incident and the destruction of Iran AirBus Flight #655. At that time, Mr. Harper and his staff were preparing for the Iran AirBus case before the International Court of Justice. Now I had occasion any number of times to talk about the *Vincennes*, in the context of rules of engagement, to a variety of audiences, national and international. But, this was the first time I was subjected to cross examination and let me tell you, it was a very interesting evolution. But, I learned something from Mr. Harper at that time and I can attest certainly this morning that our speaker is indeed a quick study and an insightful, precise, and consummate lawyer and a great gentleman. Ladies and Gentlemen, I give you our keynote speaker, Mr. Conrad Harper.

The Honorable Mr. Conrad Harper, Legal Adviser, U.S. State Department

Mr. Harper: Thank you very much Professor Grunawalt for that more than pleasant introduction. It is always delightful to hear oneself described in such a way that applause would emanate at least from one's mother if not from anyone else. I am particularly pleased to be in this room because before we came in this morning for this session I went around the entire room and looked at the titles of the many volumes on the shelves that line these walls. Although it is an extraordinary collection in its own right, I know it is just the leavings, if you will, of a major library here at the War College. But nonetheless, it's an extraordinary group of volumes gathered over the last hundred years dealing with history and political science and warfare. And, many of them are in dust jackets of the 1890's and early 1900's. So to some of us who have a little touch of bibliomania, it was just extraordinary to see what has been placed here to grace this historic conference facility. I am grateful for this particular environment.

I am particularly glad to be with our distinguished colleagues in the armed forces, government, the academy, and the sciences for what promises to be a most stimulating conference on the protection of the environment during armed conflict and other military operations. The knowledge and scholarship and experience that the group assembled here brings to the subject is impressive. And, I am grateful to Rear Admiral Stark and Dean Wood for the gracious invitation to take part in these proceedings.

The U.S. Government has long taken a very serious interest in this subject. The Departments of State and Defense have, for some time now, participated actively in international discussions regarding protection of the environment during military operations. Consensus, as we all know, is not easy to forge, but I believe that our efforts in recent years have been productive, and have beneficially raised the profile of this issue in the international community.

Since Rear Admiral LeGrand will soon follow me to frame the issues to be discussed in the coming days, I thought I might address in more selective fashion the events of the Gulf War, which in recent years, have tended to dominate discussions in this field. Specifically, I would like to share with you what lessons I am and am not inclined to draw from Iraq's wanton damage of the environment during the Gulf War, and the international community's response to Iraq's conduct.

The facts are not in dispute. Iraqi forces deliberately exploded more than 700 oil wells in occupied Kuwait, and released more than one million tons of crude oil into the Persian Gulf. We have yet to completely fathom the consequences of this massive, reckless poisoning of the environment. The Gulf's ecosystem has been disrupted for years to come, for as long as twenty years according to some experts.

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The oil fires lighted by Iraqi forces produced a torrent of pollutants which cast a toxic pall over Kuwait and soiled the skies of other Gulf States as well.

This tragedy fueled an already existing debate among lawyers, scientists, policy makers and military officials over the adequacy of the international legal regime which is intended to protect the environment from unjustified damage during times of armed conflict.

On one side of the debate are those who believe that the legal regime requires substantive modification. Some suggest the need for the wholesale creation of new international instruments. Others advocate a range of smaller-scale changes which would ostensibly clarify and expand the reach and effect of existing laws. Among the changes suggested are expansion of the scope of Additional Protocol I to the 1949 Geneva Conventions and the 1977 Environmental Modification Convention (ENMOD). Additional Protocol I, to which the United States is not a party, prohibits the use of methods of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. Parties to the ENMOD Convention undertake not to use environmental modification techniques having widespread, long-lasting or severe effects as a means of destruction or injury to another party.

In addition to expanding the scope of Additional Protocol I and the ENMOD Convention, it has also been suggested that their terms be clarified and harmonized. It has been said that the terms “widespread, long-term and severe” on the one hand, and “widespread, long-lasting, or severe” on the other are vague and imprecise.

Others have proposed modifying the proscription against destruction of property not justified by military necessity and the related principle of proportionality to include explicit references to environmental damage among the categories of damage to be weighed in the law of war calculus. It has been suggested that these legal principles are currently formulated in a way that tips the scales in the favor of military action at the expense of damage to the environment.

The other side of this debate takes the view that the existing legal regime is substantively adequate and sufficiently protective. From this perspective, existing laws properly balance the need to protect the environment against the legitimate prerogative to engage in armed conflict under certain circumstances. It is the view of individuals in this camp that further development of the legal regime to protect the environment in times of armed conflict should focus on collective efforts to appreciate the not-insignificant scope and reach of existing laws, to disseminate and internalize these norms and to enforce them vigorously and remedy their violation.

Interestingly, the events of environmental consequence that occurred during the Gulf War have been cited as instructive examples both by those who believe that substantive changes in the legal order are necessary and by those who do not.

I must say that I belong to the latter camp. In my view, the crying need to enforce current norms far outweighs the need to modify or expand the existing legal regime. We should distinguish between two distinct legal imperatives which inform this discussion: The imperative to establish and articulate rights where appropriate, and the imperative to enforce those rights and to remedy, when necessary, their violation.

History suggests that lawmakers, whether judges or legislators, are understandably more inclined to embrace discussions of rights than to confront sticky, practical, and often times seemingly intractable questions embedded in issues of compliance and remedies.

One of our challenges, I think, is to resist this inclination, for rights divorced from a commitment to enforce them and to remedy their violation are of limited value.

The question of rights and liabilities is, in fact, not even always at issue. That Iraq violated international law by setting fire to oil platforms and dumping oil into the Gulf appears, in my view, beyond dispute. International law prohibits the destruction of property not justified by military necessity, prohibits military operations not directed against legitimate military targets, and prohibits military operations that cause incidental damage clearly excessive in relation to their direct military advantage. By any reasonable measure, Iraq's actions violated these proscriptions. Many observers have noted that the oil platform fires were ignited at a point when the conflict was essentially concluded, and therefore, not even a pretense of military justification existed for these Iraqi actions.

Consequently, the environmental events of the Gulf War are principally a case study in the difficulties of fashioning remedies and giving meaning to those international legal norms that are intended to protect the environment. Let us then take a closer look at the reaction of the world community to Iraq's destruction of the environment and ask whether it is serious, whether it is sufficient, and what lessons it suggests for the future.

U.N. Security Council Resolution 687 asserted Iraq's liability under international law for all direct loss or damage stemming from its unlawful invasion and occupation of Kuwait. The Resolution makes particular reference to "environmental damage and the depletion of natural resources" as if to emphasize that these elements of damage are not to be overlooked, and are to be treated together with more traditional indicia of damage and injury to persons, their livelihood and their property.

The precedential value of this Resolution should not be overlooked. It is, arguably, the first time that the international community has formally recognized wartime environmental damage to be compensable. On the other hand, Resolution 687 does not work any change in the law of war on environmental damage. And, it bears noting that under *jus ad bellum*, under international law relating to the use

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of force, Iraq is liable for environmental and all other damage directly caused by its invasion whether or not it violated the law of war.

In accordance with Resolution 687, the U.N. Compensation Commission was established to administer the claims process and to make payments to claimants from a fund that was to be capitalized through a 30% levy on Iraqi oil exports. Unfortunately, these oil exports have not resumed because of Iraq's failure to comply with applicable U.N. Security Council resolutions; as a result, the Compensation Fund's balance is currently only about ten million dollars, which has been contributed by the United States and other countries (mostly from frozen Iraqi assets) to begin the claims process. I should note, for the sake of comparison, that we are estimating that approximately 200 billion dollars in claims will be filed with the Compensation Commission before the process is concluded.

The claims have been divided into subgroups and given priority on the basis of urgency. In December 1993, the first panel of the Compensation Commission began working on cases involving claims of death and serious personal injury. Other panels are giving priority attention to the claims of hundreds of thousands of foreign workers who were compelled to leave Iraq and Kuwait at great personal loss. Individual claims of less serious personal injury and property damage have followed, as have commercial claims. To date, the Commission has approved some 355,000 individual awards, totaling approximately 1.4 billion dollars. Environmental claims will be considered at a later point in the process, and the Commission has set a February 1997 deadline for their submission.

The reason for the long horizon for environmental claims is that it will take some time to assess accurately the long-term environmental consequences of Iraq's actions, and that until such assessments are concluded, effective, comprehensive consideration of environmental claims cannot occur. Of course, so long as the Compensation Commission's financial resources are not sufficient to cover the awards it issues, decisions will have to be made regarding the allocation of available funds, and the first priority will probably be to compensate individuals for direct personal loss rather than governments, which would likely be the principal claimants for environmental damage.

Let me hasten to add that there are limitations in the Gulf War example which affect the extent to which it may be considered a paradigm.

The Gulf War presents none of the shades of gray one would expect to find in a typical scenario implicating international legal protection for the environment during armed conflict. Iraq's actions reflect complete vindictiveness; unlike the typical case where there may be debate over the question of military necessity and justification, Iraq's conduct was, essentially, without any pretense of justification.

The Gulf War example is also atypical in that the perpetrator of the environmental damage was militarily defeated and, save for the operation of

multilateral sanctions, has substantial resources that can be used to satisfy claims arising from its conduct.

In short, the Gulf War example does not speak to the more difficult, more subtle cases where the intent of the party doing damage to the environment is less clear than it was in the case of Iraq. It is these cases that peculiarly challenge the international legal order: cases where the environment is not deliberately targeted for destruction; cases where environmental damage is incidental to achieving a military objective.

Changes to the law, to the existing legal order, will not, in my view, make such hard cases any easier, because their difficulty ultimately inheres in the nature of their circumstances. To the extent that widespread agreement on new laws and standards could be reached, and I have my doubts, the resulting agreement might likely resemble a lowest common denominator, decidedly unhelpful in dealing with hard cases.

Or, in order to garner consensus, a new agreement might well be a model of ambiguity, the value of which could also fairly be questioned. In this regard, I note the debate that has occurred in the wake of the Gulf War over whether Iraq's damage of the environment constituted "widespread, long-term and severe" damage in violation of Article 35(3) of Additional Protocol I. Although Additional Protocol I has received considerable support in the international community, what exactly constitutes "widespread, long-term and severe damage" is a question that continues to perplex commentators and to defy shared understanding. One might therefore be wary of a process that could very well generate new rules, new standards whose meaning would remain fundamentally in doubt.

In sum, I am unconvinced that new laws would help us answer difficult questions; the more likely outcome is that they would merely inspire continued debate on somewhat different terms.

To this point I have made reference only to civil remedies. Criminal sanctions are, of course, another tool, a potentially powerful tool, to enforce international norms. Whether the international community will one day elect to bring to bear the force of criminal sanctions against those who perpetrate gross and unjustified environmental damage in warfare remains to be seen. In my view, we have not yet arrived at the point where the international community is willing to put its credibility, commitment, and the full force of its conscience behind prosecutions for environmental crimes in much the same way that it has demanded accountability in the context of Rwanda and Bosnia. The absence of the necessary consensus is to some extent reflected in the continuing international discussions, and disagreements, about the appropriate subject matter jurisdiction of a possible International Criminal Court.

These are only a few of the issues to be addressed during our discussions which will no doubt enrich our understanding of this important subject. More than that,

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these discussions constitute an integral part of our commitment to enforce the norms governing the protection of the environment during military operations. Through the process of dissemination, by teaching what international law requires, the Naval War College is shaping the understanding of the men and women of the armed forces in whose hands the integrity of the environment rests during military operations as so graphically brought home by Rear Admiral Stark's comments this morning.

Precautionary, *ex ante* efforts of this sort are crucial if we intend, as a practical matter, to protect the environment, and not simply debate liabilities, enforcement, and remedies after the fact. By engaging in discussions that may well help shape the legal regime, this institution ensures that the perspective of the armed forces and the realities of armed conflict are not lost or neglected in the process. Only through a commitment to dialogue, education, and consultation shall we succeed in building a reasoned measure of respect for the environment in the international community.

And I thank you for this opportunity to share some of my thoughts.

Professor Grunawalt: Mr. Harper has consented to respond to questions and I open up the floor to anybody who would like to begin.

Colonel Charles Dunlap, U.S. Air Force, U.S. Strategic Command: I would like to challenge your assumption that the way the Iraqi's waged war was clearly a violation of international law. How is a third world nation supposed to oppose a high-tech power that is a high-tech power because it has an industrial base that is dumping unbelievable amounts of pollutants into the air? In other words, isn't the use of smoke to defeat satellite systems and precision weaponry a legitimate way for a third world less-developed nation to resist a high-tech power?

Mr. Harper: I am glad you asked the question. First of all, I do not agree with your premise. More to the point, if Iraq's actions are not condemnable, there is nothing worth talking about during this conference. I took Iraq as the clearest possible case. I appreciate that by fouling the air and fouling the water it could be argued that Iraq was simply engaged in opposing the Coalition arrayed against it. But, this was a means so horrific, so disproportionate, so outrageous, that no one has come forward, and I understand you not to be doing this, to justify what Iraq did. This was an act or series of acts of desperation virtually at the last moment; at a time when it could not reasonably be argued that they would in fact slow the Coalition's victory over Iraq in the field.

Colonel Dunlap: Just a quick follow-up. Doesn't an armed force have the right to continue to resist as long as it has the means to resist? Or must it make an assessment as to whether or not it can be victorious? Isn't it legitimate to try to withdraw their forces from the area of combat? In other words, save what they could by obscuring the ability of the Coalition forces to identify their movements? In fact, during that period they launched an attack against the Marines. They were able to marshal their forces to launch an attack against the Marines advancing towards Kuwait City under the obscurant occasioned by the fires of the wells. As Admiral Stark said, the fouling of the waters posed a very real operational problem for Coalition naval forces. Looking at it from the third world's perspective, how can we condemn Iraq when we, as an industrialized nation, have these precision capabilities only because we have this infrastructure which is dumping pollutants into the atmosphere?

Mr. Harper: As an abstract matter, of course, one could say that a losing force has the right to defend itself as long as possible; to conserve its resources as long as it may. But it is not simply the United States that has condemned what Iraq did. The world community has condemned it. The U.N. has condemned it. I think it is fair to say, and I also think of this when trying lawsuits, it may not be important what the truth is; truth is what the jury has decided what is true. And, the world jury has decided this issue in a way that is absolutely clear.

Rear Admiral William H. Wright, IV, U.S. Navy: To my way of thinking, if Saddam Hussein had done exactly what he had done and the tide had changed and he had become the victor, there would be no jury. There would be no follow-up punishment. Isn't this essentially an example of "to the victor goes the spoils?" And when you, as the winner, want to find an excuse to continue to extract pain from the loser, you can do it.

Mr. Harper: Again, I appreciate the challenge of your comment, but I don't accept either the premise or the conclusion that you advance. I think it's important when evaluating a conflict that we try to undertake a measure of justice. The same arguments that you put forth, of course, had been raised to challenge the war crimes trials in Nuremberg and in Tokyo. If we are not prepared to say, as of 1945-46-47, that customary international law already condemned aggression; and if we are not prepared to say today that customary international law and convention already condemns the wanton destruction of the environment; and if we are not prepared to apply the first set of principles to the Nazi's and to Tojo, or the second set of principles to Iraq today, then we may abandon any hope that any effort we make toward advancing the rule of law is worth a candle.

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Professor Leslie C. Green, University of Alberta: I want to follow-up on the suggestions that have just been made. If I remember rightly, two things are relevant. First, you said, sir, that the world community condemned the Iraqi actions as a breach of the law of war. If I remember correctly, the Environmental Law and Warfare Conference, held in Ottawa about three years ago, didn't condemn it. That was a conference of lawyers, not of politicians. As much as I respect the Security Council, it is not a body of lawyers. Second, Additional Protocol I, which produced the restrictions on damage to the environment, was not relevant. It was not in force during the Iraqi operation, and even if it were, I think it provides that an offense only occurs if the intention is to affect the environment. But, in a general way, can it not be argued that creating a smoke screen, setting fire to oil intentionally released into the water to prevent landings and that sort of thing, are all justifiable even though you may be losing and your purpose is to just cover your retreat? I suggest that it goes a little far to maintain automatically that this was clearly a breach of the law of war as it existed at that time.

Mr. Harper: I like the fact that the first three speakers seem to be reading from, let us say, conjoined texts. Let me see if I can give yet a third answer. First, the fact that lawyers gathered in Ottawa did not see the matter as the Security Council and other components of the world community did, is to me, an interesting, but not dispositive fact. I do believe the Security Council is a body of law though not a court and not a group of lawyers as such. But, it is operating within the confines of a legal system under the Charter, and therefore, its statements with respect to this subject are entitled to a good deal of deference from us, at least to the extent of a clear recognition that what Iraq did was beyond the pale. Indeed, none of us can cite an example prior to 1991, that would at all be clearly relevant to what Iraq had done under the circumstances.

Second, it seems to me that any person who is fighting any kind of war will want to argue that any action taken in regard to defense is justifiable. And to some extent, the discussion is rhetorical rather than substantive. There will always be somebody around who will make an argument of justification for an action deemed to be necessary under the circumstances. But, it is the function of reason under the circumstances that I think is decisive here. If we are not prepared to endorse the proposition that at some point the befoulment of those waters and the befoulment of that air was not legally beyond the pale, then we may as well decide that the enterprise in which we're all engaged, which is to bring a system of international law to bear on questions of armed conflict, is simply an irrelevant exercise only fit for discussion and not for implementation.

Vice Admiral James H. Doyle, Jr., U.S. Navy (Ret.): I never had the opportunity before to cross-examine the Legal Adviser of the State Department, so I better take it. I want to approach it from a little different perspective and get your views. I think what you are hearing from Admiral Wright and Colonel Dunlop is the dilemma which an operator is faced with when he has to make a decision in those shades of gray cases. Since, in this particular case, the standard of widespread, severe and long-term is not knowable and you mention that claims cannot even be approached or settled at this point, maybe we are asking the wrong question. Maybe the question should be more oriented toward military justification. You have got to have some standard there and the operator at sea is probably not going to get instructions other than “use your own best judgement.” It is going to be up to him to make a decision, so what are your views on that?

Mr. Harper: If I understand you correctly, you are inquiring whether military justification is the only screen through which we put this question, as opposed to considering a competing environmental objective.

Vice Admiral Doyle: How can we consider the unknown competing environmental effects at this point?

Mr. Harper: I think the situation is that we can consider what is unknowable in the sense that we may not know precisely its contours, but we know enough to know that it is a catastrophe. It is a little bit like having been hit both by a train and by a car and trying to sort out how much damage is attributable to one and how much by the other. The fact is that you were damaged and to some degree the damage was inextricable. But, you are able to say, in a rough way, that what happened was wrong. Well, clearly I think that was the situation here. It is not, to a precise extent, known to us to what degree the environment was harmed. But, there is no doubt that the harm was substantial. And, if that is the case, foreseeable environmental harm is a fair counter to put into the balance test as against military justification to see whether or not justification carries the day.

Professor Michael Bothe, Johann Wolfgang Goethe University, Frankfurt, Germany: Just to assure you, I am not reading from the same paper as the previous speakers. Three comments. I was present at the meeting in Ottawa, mentioned by Leslie Green. I thought it was not the purpose of that meeting of experts to come to any conclusion condemning anything or anybody. If that were the purpose of the meeting, it was probably happening at the wrong meeting. But there are certain elements in the discussion of the Ottawa meeting which I strongly disliked. This was an attitude of benign neglect to what had happened in the field of

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environmental law during the last twenty years or so. In this respect I certainly disagree with my good friend Leslie Green.

The second point pertains to the Security Council. What is the effect of Resolution 687? I think it is quite clear that the damage which has to be compensated by Iraq under that Resolution is not damage caused by a violation of the laws of war, it is damage caused by the fact that Iraq committed an aggression. Of course, there is a standard of unlawfulness that is quite different. So the question of whether this was widespread, long-lasting and severe, is for that purpose, irrelevant. I hope this is clear. I am trying to sell this idea to the U.N. working group which is dealing with that matter of which I happen to be a member. My question to you, sir, is, were you not pleading with your last remark in a little bit of the opposite direction of what you said to begin with. The issue of what are the values competing with military advantage which would have to be taken into account when a particular decision is made to attack or not to attack, or to attack in a particular way. I was most impressed to hear earlier this morning that this was a matter considered prior to measures being taken to enforce the U.N. embargo in the Adriatic Sea. Now, if we have a rule, which is as general as the principle of proportionality, you leave the balancing to the commander. It is the commander who is required to balance competing values in the particular case. Could we assist the commander by trying to further develop the law in order to make some of those issues a little clearer? I agree the principle is there, that the principle is good, but there should be a little bit more detail added to that principle in order to make it more workable. What you said in your last comment, I think, seems to meditate for that approach. Thank you sir.

Mr. Harper: Well, I hope I have not contradicted myself. I had intended to say two things. One, that as part of our discussions over the next several days, we are going to be factoring in the question of environmental damage as part of the law of war calculus. I think I said that earlier and I thought I was repeating it in somewhat different words a few minutes ago.

But, the second point, which is also important and stimulated by your remarks, is that our search for details is carried on in a worrisome way. We shall find ourselves spinning more wheels without necessarily learning more in the process. In that event, I submit it will always be the commander who is going to have to make decisions. And, he will not have before him a blueprint that will make it easy in very tough cases. There will be principles; there will be laws, if you will, but they won't dictate a result in a certain given circumstance. Human judgment will have to be brought to bear. My own sense is that over time, cases will illustrate the principles that will have already been established. But, I am not persuaded that undertaking a further conference to see whether we can elaborate those details now would be the best use of our collective energies.

Professor Paul C. Szasz: Two comments. One, again, back to the Ottawa conference three years ago, I too was a participant. Let me read just one paragraph from the chairman's conclusions: *"The conference noted that grave damage resulted from Iraqi actions during the Gulf War, for example, in setting oil fires and releasing oil in the Gulf. There was a shared view that important provisions of custom and conventional law had been seriously violated."* I think for a basic academic conference, that was a strong statement. In effect, the conference condemned the actions the Iraqis had committed as unlawful.

The other comment, I think, is a slight quibble with what you said before. You said that the reason the compensation fund has not yet started operating is because of Iraqi non-compliance with Security Council resolutions. I think, actually, the reason is that there is a resolution under which Iraq could sell about 1.5 billion dollars worth of oil, regardless of compliance with other resolutions, but they simply refuse to do so because they do not want money to flow into the compensation fund.

Mr. Harper: I accept your modification and it's quite correct. There is a very special resolution for that purpose.

Professor Szasz: That means that even if they start complying as they hope to comply and these actions are lifted, they still may be reluctant to release that 30% to the compensation fund. So that is almost a separate problem from the other question of compliance.

Mr. Harper: That is true. Of course, the compensation fund is, in fact, operating. But, it cannot make substantial awards because the funds available are so small. Let me backup a moment and say that I am beginning to think I was the only person in the room who did not attend the Ottawa conference. Second, I waited until this time to call on you so you could read the paragraph that, in fact, nailed the coffin shut on this subject. But third, I do think that it is very, very important to recognize that the final statement did accord with the general thrust of my remarks; that the world community did condemn what Iraq had done.

Professor Adam Roberts, Oxford University: As a non-lawyer, I hesitate to put words into the mouth of the Legal Adviser and I am sure he will be able to take them out again. But it seems that some of those present, especially as reflected in the initial questions, may have been making slightly heavy weather, as many lawyers have, of the legal issues raised by environmental destruction in the Gulf War, by putting so much emphasis on those provisions of Additional Protocol I and the ENMOD Convention which you mentioned, that specifically address the

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environment. And, I took your initial presentation to state something I am going to put much more crudely than you did, but thereby to invite your comment on it. That is, in order to assess the legality of what Iraq did in the Gulf War, in the incidents you have mentioned, you do not need to get to Additional Protocol I or the ENMOD Convention at all. The key provisions that were often not mentioned in many discussions about the legality of environmental destruction in the Gulf War, were those you alluded to in a general way. For example, Article 147 in 1949 Geneva Convention IV, the grave breaches clause, which mentions wanton destruction not justified by military necessity, and various other provisions of conventional law going back to the Hague Rules. It seems to me that many people, especially at the time when there were such apocalyptic predictions about environmental consequences, were lured into discussing the wrong conventions because their titles mention the environment. Maybe it is better that they stick to old rules and to interpret them because they cover the case better, and because they deal with the point that was raised in the question of whether in fact this is wanton destruction and despoliation of resources as much of as on the question of its actual subsequence, and in some cases, later incalculable impact upon the environment.

Mr. Harper: I embrace what you have said with one modification, I would have called your remarks elegant rather than crude. Certainly, it is the case that going back to Hague 1907 and coming forward, one could find that there was violation of long established principles of international law in what Iraq did.

Professor Bernard H. Oxman, University of Miami: As you know, sir, considerable public attention has been paid in the last decade to your job description. There was a panel of the American Society of International Law that I served on that endeavored to address that issue. I think that, in part, the line of argument that you developed depends in large measure on who - and under what circumstances - is performing the risk-benefit analyses that are required. Many of us have learned from experience that micro-management of military operations conducted thousands of miles away can produce undesirable results. The question is, it seems to me, who should be involved and at what point, in making decisions regarding targeting involving potentially catastrophic environmental damage.

I guess the question is whether you are satisfied, at least in terms of the organization of the United States Government, that an appropriate balance has been achieved on this issue. It is, of course, laudable that commanders in the field making these decisions, will weigh the factors prudently. But, I think some people at least would feel more reassured if they felt, not only in the case of the United States, but in the case of other governments as well, that balancing is being done at an appropriate policy level, with appropriate input by lawyers who are professionally trained to be detached as you had averred to.

Mr. Harper: I think the point is an excellent and important one. Certainly, it is fair to say, and I can say this in the presence of Jack McNeill, who on many occasions not only illustrated for me but instructed me in various matters, that we do try hard, at least in this Administration, to involve lawyers at an early stage in the matters that we believe have significant legal implications and major policy concerns. There is a fairly orderly methodology followed by the Legal Adviser for the National Security Council, the Assistant Attorney General for the Office of Legal Counsel, the General Counsel for the Department of Defense, the General Counsel for the CIA, and the State Department's Legal Adviser, for assembling from time to time, or through surrogates, to discuss issues that are of that quality. I cannot represent to you that we have reached Nirvana on this process. But, I think it has worked better and better as we have learned to play together, to use the favorite term of an elementary school teacher I very much liked. As we play together better, I think the process becomes a better one.

Professor Christopher Greenwood, Cambridge University: I would like to assure the Legal Adviser that I was not at the Ottawa conference either, which may go a long way to explaining the clarity of its conclusions. I would like to be controversial and say that I agree with the Legal Adviser's view that what Iraq did in the Gulf was a violation of the 1907 Hague Regulations. I do not think there is any need or any right to look at Additional Protocol I in this context because it clearly was not in force. And, I do not regard those provisions as declaratory of customary law. What I do think is important is that the reason why Iraq was clearly in violation is that the motive and the purpose that Iraq had was largely vindictive. Particularly in relation to the firing of the oil wells, it was an act of destruction designed to shock the world. Any military advantage that might have arisen was largely incidental. I am quite sure it was incidental in the minds of the Iraqi high command when they took the decision to do what they did. But, if we look at this as a precedent for the future, I think it would be a great mistake to be locked into the mind-set of thinking that the act of releasing a million tons of oil is necessarily a violation of the laws of war. I do not think that is necessarily the case at all. If Kuwait had released that oil into the Gulf as part of a desperate defensive measure to stop Iraqi amphibious operations in the original invasion, then I think we would come to a very different conclusion, applying the law that was in force at the time.

Mr. Harper: I can only add, it is great to hear that someone agrees with me. More to the point, I accept the counter-example, which is one of the reasons why the issue of getting into details as suggested by another speaker is extremely hazardous. We do not know what the future will present. We can be confident that it will not present easy cases and, therefore, we cannot escape that most tragic and yet, in a

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real sense, that most important aspect of human life; that is to say, the application of our judgments to the facts at the time.

Professor George K. Walker, Wake Forest University: One quick question and comment. That is, we have to keep in mind the mirror image principle in all this. And that is, we cannot just simply look back and say the law of armed conflict is of a prior era; that we have to consider the possibility that there is law developing and developing even now. Is that your position?

Mr. Harper: Absolutely, the law is not only alive; it now and then kicks. We have to know that it is not a dead science. It is a lively art and we must bring to it a sense that it will increase in our lifetime and for generations to come.

Professor Grunawalt: We have run out of time. I want to thank the Honorable Mr. Harper. It's obvious, from the discussion we have just had, that his was a superb keynote address. And, I think it is now clear that we have many things to do this week and I thank each one of you who have raised issues and discussions. We have just begun to see the tip of the iceberg, a quick glimpse of the issues that we will be hearing from our panelists. And, I know that we will get into considerable debate and discussion on these topics. Mr. Harper, one more time, thank you so much for providing the tone, the necessity of this debate, and the intellectual content of your address. Thank you very much.